



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CRIMINAL APPEAL NO 40 OF 2015

ANGAUS KUBO..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(From original conviction and sentence in Criminal Case Number 281 of 2015 in the Senior Resident Magistrate's Court at Wundanyi delivered by Hon K. I. Orange (SRM) on 15th July 2015)

JUDGMENT

INTRODUCTION

1. The Appellant, Angaus Kubo, was tried and convicted by Hon K.I. Orange Senior Resident Magistrate for the offence of stealing by servant contrary to Section 281 of the Penal Code. He pleaded guilty to the charge and was sentenced to serve three (3) years' imprisonment.
2. The particulars of the charge were as follows :-

“On the 3rd day of July 2015 at around 3.00 pm at Makuti Bar which is at Bura Station Location within Taita Taveta County you were found to have stole (sic) Kshs 83,378/=, the property of Ziporah Mwang'ombe.”

3. Being dissatisfied with the said judgment, on 5th August 2012, the Appellant filed Mitigation Grounds of Appeal with his Notice of Motion seeking to be allowed to file an Appeal out of time. The said application was allowed on 1st October 2015 and the said Mitigation Grounds of Appeal deemed as duly filed. The Grounds of Appeal were generally as follows:-
 1. **THAT the Learned Trial Magistrate convicted him without considering his mitigation to his plea of guilty.**
 2. **THAT the Learned Trial Magistrate erred both in law and fact and convicted him without considering his mitigation that he was an orphan and the sole bread winner with a seven (7) months' pregnant wife.**
 3. **THAT he was a self-sponsored student at Mount Kenya University third (3rd) year pursuing a Bachelors of Education.**
4. When the matter came up in court on 2nd March 2016, the court directed both the State and the

- Appellant to file their respective Written Submissions. However, the Appellant did not file any Written Submissions but instead filed Mitigation Grounds of Appeal on 9th March 2016.
5. In addition to the Mitigation Grounds of Appeal shown hereinabove, the Appellant added the following Mitigation Grounds of Appeal that could be summarised as shown hereunder:-
 1. **THAT he was remorseful for the offence he had committed and highly regretted the pain it had caused the Complainant.**
 2. **THAT he had been actively engaged in church programmes and was participating in enlightening his fellow inmates on alternative ways with a view to shunning from criminal activities.**
 3. **THAT he had been fully reformed and could now live harmoniously with his community.**
 4. **THAT the sentence that he was given be quashed and that either he be set free or be given a non-custodial sentence.**
 6. The State's Written Submissions were dated and filed on 16th March 2016.
 7. When the matter came up for the hearing of the appeal on the same date, both the Appellant and the State asked this court to deliver its Judgment based on their respective Written Submissions.

LEGAL ANALYSIS

8. As can be seen from the Appellant's Grounds of Appeal, the Appellant did not challenge the fact that the Prosecution had proved its case to the required standard. In fact, he admitted to the charge. No value then would be added in setting out the facts of the case as was adduced during trial.
9. The question that this court was being asked to consider and determine was whether or not the Appellant had advanced good reasons to persuade it to set aside the aforesaid sentence which he argued was harsh in the circumstances of the case.
10. Section 278 of the Penal Code Cap 63(Laws of Kenya) provides as follows:-

“If the offender is a clerk or servant, and the thing stolen is the property of his employer, or came into the possession of the offender on account of his employer, he is liable to imprisonment for seven years.”

11. The import of the penalty is that a Trial Court cannot sentence a person convicted to the offence of stealing by servant to imprisonment to more than seven (7) years. The sentence of three (3) years was therefore proper and in accordance with the law.
12. In its Written Submissions, the State submitted that the Trial Court considered the Appellant's mitigation before it sentenced him and that he had not been remorseful. It pointed out that the Appellant had stolen from the Complainant on three (3) different occasions and that when he was arrested he was found with the sum of Kshs 31,050/=. It contended that despite all these transgressions, the Trial Court sentenced the Appellant to three (3) years imprisonment yet the law prescribed that a person found guilty of such an offence was liable to seven (7) years imprisonment.
13. Before the Learned Trial Magistrate read out the sentence herein, the Appellant said the following in mitigation:-

“I pray for leniency. I was fending for my family.”

14. The Learned Trial Magistrate then recorded the following:-

“The offence is serious and he had not shown any remorse for the offence. To be sent to prison of (sic) three (3) years. 14 days right of appeal explained.”

15. Section 275 of the Penal Code prescribes the general penalty for the offence of theft. The same provides as follows:-

“Any person who steals anything capable of being stolen is guilty of the felony termed theft

and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years.”

16. Accordingly, having considered the submissions by the Appellant and the State, this court noted that as the evidence that was adduced by the Prosecution was overwhelming, consistent and proven beyond reasonable doubt, a non-custodial sentence as had been sought by the Appellant herein was thus untenable for the reason that the Learned Trial Magistrate exercised his discretion judiciously.
17. Notably, the Mitigation Grounds of Appeal that the Appellant lodged before this court were not raised in the Trial Court. As was rightly pointed out by the State, the Appellant wronged the Complainant on three (3) occasions and continued to wrong him despite being forgiven and being given chances to repay the monies. He never repaid the monies and Kshs 31, 050/= did not appear to have been given to the Complainant by the Appellant. It was recovered.
18. However, as the said sum of Kshs 31,050/= was recovered, purely on the principle of proportionality and the fact that the Appellant pleaded guilty to the offence in the first instant, this court was persuaded to reduce the sentence he was to serve from three (3) years to two and a half (2 ½) years' imprisonment.

DISPOSITION

19. For the foregoing reasons, this court hereby sets aside the sentence that was meted upon the Appellant by the Trial Court and substitutes the same with two and a half (2½) years' imprisonment that is to run from the date he was imprisoned.
20. The upshot of this court's judgment, therefore, is that the Appellant's Mitigation Grounds of Appeal filed on 5th November 2012 is hereby allowed only on the ground that he pleaded guilty at the first instance and saved both the court and prosecution from going through a full trial.
21. It is so ordered.

DATED and DELIVERED at VOI this 31st day of March 2016

J. KAMAU

JUDGE

In the presence of:-

Angaus Kubo..... Appellant

Miss Mukangu..... State

Simon Tsehlo– Court Clerk