



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NANYUKI
CRIMINAL APPEAL NO. 127 OF 2015

HEZEKIAH BULIMO BUTSINO APPELLANT

Versus

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Nanyuki Chief Magistrate's Court Criminal Case No. 1148 of 2015 by Hon. E. Bett Senior Resident Magistrate on 15th October 2015).

JUDGMENT

1. **Hezekiah Bulimo Butsino (Hezekiah)** was charged before the Nanyuki Chief Magistrate's court with the offence of *stealing by servant contrary to section 281 of the Penal Code*. When the plea was read out to him, on 14th October 2015 Hezekiah stated, **"its is true"**. The trial court in error recorded "plea of guilty entered". That entry of guilty was before the prosecution stated the facts and before Hezekiah stated that those facts were true. The steps to be followed when plea is being taken were set out in the case of **ADAN vs REPUBLIC (1973)EA LR 445** as follows:-

"2. The manner in which a plea of guilty should be recorded is:

- a. The trial magistrate or judge should read and explain to the accused the charge and all the ingredients in the accused's language or in a language he understands;***
- b. He should then record the accused's own words and if they are an admission, a plea of guilty should be recorded;***
- c. The prosecution may then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts of to add any relevant facts;***
- d. If the accused does not agree to the facts or raises any question of his guilt his reply must be recorded and a charge of plea entered but if there is no change of plea, a conviction should be recorded together with a statement of the facts relevant to sentence and the accused's reply."***

2. On 15th of October 2015 the prosecution read out the fact of the case to which Hezekiah respondent "It is true". The trial court again recorded the plea of guilt. Hezekiah has filed his appeal against his sentence of 5 years by the trial court. The law that guides the court when considering an appeal against sentence has often been the subject of discussion in previous cases. The following cases gave an indication of that discussion. In **Shadrack Kipchoge Kogo vs Republic Criminal Appeal No. 253 of 2003 Eldoret** where the Court of Appeal stated:-

“Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred”.

In **Nelson vs Republic (1970) EA 599**, as follows:-

“The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless as was said in James vs Rex (1950), 18 EACA 147, it is evident that the judge had acted upon some wrong principle or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. Republic v Shershewity (1912) C.CA 28 T.LR 364.”

3. Hezekiah very eloquently represented himself before this court in English language. He submitted that before his conviction he was a university student. During his holiday from his studies he obtained employment from Timothy Nderi the complainant in this case. Hezekiah was teaching at the establishment of Nderi. He did not name the establishment nor did he indicate what he was teaching. He submitted that when he began to work for Nderi, Nderi paid him his June 2015 salary in time. That however subsequently Nderi failed to pay him his salary. He submitted that it was because of that failure to pay him his salary that he decided to take his employer’s property as the criminal charge shows. The items that he took were listed by the prosecution and they totaled 29 items. Those items to name a few were: **hot point cooker, hot point fridge, Samsung microwave, 13 kg gas cylinder, laptops mattresses and a black suitcase.**

4. Hezekiah in his submission before this court stated:

“..... I pleaded guilty but I committed the offence because I was demanding my salary from Timothy Nderi. I hoped he would be a gentleman that he would pay me and I would return his goods”.

The submissions made by Hezekiah were contrary to facts that were narrated by the prosecution after he pleaded guilty and which facts he confirmed were true. The essence of the prosecution’s facts were that Nderi had left Hezekiah in his house when he, Nderi had gone to Nairobi for a business trip. On his return he found Hezekiah had taken his household goods as stated above. Hezekiah was traced through his mobile telephone at Mlango Kubwa are in Nairobi. Nderi’s household goods were all recovered from that area and Hezekiah was arrested and charged with the offence of stealing by servant. **Section 281 of Cap 63** which sets out that offence is in the following terms.

“Stealing by clerks and servants

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.”

5. There is no doubt and there is no dispute by Hezekiah that the items he stole belonged to Nderi who was his employer. It follows that the facts as narrated by the prosecution disclosed the offence contemplated in section 281 of cap 63. Hezekiah in my view was correctly convicted of the offence of stealing by servant. That being so it would only be correct for this court to only consider his appeal against sentence.

6. Hezekiah was a first time offender. The trial court in sentencing him did indeed consider that fact. It however noted that he had stolen a large quantity of Nderi’s household goods. The maximum sentence in respect to section 281 of cap 63 is 7 years. Hezekiah was sentenced to serve 5 years imprisonment. In

my view considering that Hezekiah was a first time offender and that he was a young man of 25 years old the sentence of 5 years which is almost 3 quarters of the maximum jail term was excessive. It is because of that I find that there is a basis for this court to interfere with the lower courts sentence.

7. Accordingly, the judgment of this court is that the appeal against sentence does succeed. The sentence of the lower court is set aside and is substituted with a sentence of 1 year.

DATED THIS 31ST DAY OF MAY 2016

MARY KASANGO

JUDGE

CORAM:

Before Justice Mary Kasango

Court Assistant – Njue

Accused: Hezekiah Bulimo Butsino

For the State:

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE