

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 83 OF 2015

(From original conviction and sentence in Criminal Case No. 906 of 2015 of the Chief Magistrate's court at Garissa – Ole Tanchu S.R.M).

KELVIN MACHARIA NJERU APPELLANT

V E R S U S

REPUBLIC RESPONDENT

JUDGMENT

The appellant was charged in the Chief Magistrate's Court at Garissa with stealing by servant contrary to Section 281 of the Penal Code. The particulars of the offence were that on diverse dates between 3rd and 8th April 2015 at Garissa Township within Garissa County stole cash Kshs 104,950/=, Mpesa float of Kshs 147,131/-, Dell Vostrol Laptop Computer, a Nokia mobile phone all valued at Kshs 304,000/= property of Jeremaih Kariuki which came to his possession by virtue of his employment.

He was recorded as having pleaded guilty to the charge. He was convicted and sentenced to serve 3 years imprisonment.

Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal. He filed his initial memorandum of appeal on 15th September 2015. Before the appeal was heard however he filed fresh petition of appeal and written submissions.

The appellant relied on his written submissions and elected not to make oral submissions. I have perused and considered his written submissions.

The learned Prosecuting Counsel Mr. Okemwa submitted that the appellant pleaded guilty and agreed to the facts. He stated that the appellant actually bought a motor cycle from the money which was an aggravating factor. Counsel submitted that the grounds of appeal were mainly on sentence and stated that the sentence of 3 years imprisonment was justified as there were aggravating factors and mitigating factors on record.

I have considered the appeal and submissions on both sides.

The main grounds of appeal are on sentence. However the appellant said that the Magistrate erred in convicting him. It is thus correct to say that his appeal is on both conviction and sentence.

With regard to conviction, in my view, the plea of guilty of the appellant was unequivocal. The charge was read to the appellant in Kiswahili language and he said it was true. The prosecutor then gave a summary of the facts and the appellant stated that the facts were correct, and he was convicted. In my view the learned Magistrate correctly followed the required steps for recording a plea of guilty as explained in the case of *Adan -vs- Republic (1973) EA 445*. I will thus uphold the conviction.

With regard to the sentence, the maximum sentence for an offence of stealing by servant under Section 281 of the Penal Code is 7 years imprisonment. The appellant was treated by the prosecution as a first offender as no previous convictions were disclosed by the prosecution to the trial court. The appellant asked for leniency in his mitigation and for time to return the money.

The laptop was recovered. The motor bike worth Kshs 90,000/= bought with the stolen money was ordered to be released to the complainant after the lapse of 14 days if no appeal was filed. In effect therefore some of the stolen money was either recovered or recoverable by the complainant. I will put the value of what was recovered at about Kshs 140,000/= out of the total amount of Kshs 304,000/=. Basically therefore almost half of the value of the money stolen from the complainant was recovered.

In my view therefore, the sentence of 3 years imprisonment was a bit on the higher side. I appreciate that sentencing is an exercise of discretion by a trial court, but in the circumstances of this case where the appellant pleaded guilty and about half of the value of stolen money was recovered my view is that a sentence of 2 years imprisonment would suffice.

I thus dismiss the appeal against conviction and uphold the conviction of the trial court. With regard to sentence I set aside the sentence of 3 years imprisonment and order that the appellant will instead serve imprisonment for a period of 2 years from the date on which he was sentenced by the trial court.

Dated and delivered at Garissa this 13th day of October 2016.

GEORGE DULU

JUDGE