

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL NO. 116 OF 2014

(FORMERLY KISII HCCRA NO. 122 OF 2012)

BETWEEN

DOLLY ANYANGO OGUTUAPPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 236 of 2012 at the Principal Magistrate's Court at Rongo, Hon. Z. J. Nyakundi, PM dated on 2nd May 2012)

JUDGMENT

1. The appellant, **DOLLY ANYANGO OGUTU**, was charged with offence of stealing by agent contrary to **section 283(b)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the charge were that on 19th April, 2012 at Nyarach village, Central Kamagambo Location within Migori County, stole **Kshs250,114/=**, the property of William Ong'wenya Mira which had been entrusted to her.
2. The appellant pleaded guilty, was convicted and sentenced to 3 years imprisonment. She now appeals against conviction and sentence. In the supplementary grounds of appeal filed by her advocate, she contends that the language used in the proceedings was not definite, that the appellant was not addressed by the learned magistrate on the gravity of the offence and that she pleaded guilty without understanding the nature of the offence she was facing and that the sentence was manifestly harsh and excessive.
3. Mr Ongoso, learned counsel for the appellant, argued that the guilty plea was not unequivocal and as such it should be set aside. Counsel cited the well-known case of *Adan v Republic [1973] EA 445* to support his arguments.
4. The appeal was opposed by Mr Oluoch, learned counsel for the State. He urged that the plea was unequivocal and that the facts read to the appellant disclosed an offence and that there was no error on the face of the record. As regards the sentence he contended that in view of the maximum sentence of 7 years imprisonment and in light of the amount stolen, the sentence was neither harsh nor excessive.
5. I have considered the record and it is clear that the learned magistrate followed the procedure set out in *Adan v Republic (Supra)*. The accused responded and accepted the facts as true. I therefore find that the plea was unequivocal.
6. Mr Ongoso submitted that the charge as drawn was defective in that it did not specify how the appellant was an agent. The charge as drawn is consistent with the form set out in the second schedule to the *Criminal Procedure Act (Chapter 75 of the Laws of Kenya)*. The charge sets out the name of the principal and the amount stolen which is sufficient information to enable the appellant know the case she is facing. I therefore dismiss this ground.
7. As regards the sentence, this court can only interfere with the sentence if it is manifestly harsh or

excessive or that the magistrate took into account irrelevant factors or failed to take into account relevant factors. In this case, the appellant was a first offender and as the facts disclose, she was a victim of some trickster. She also pleaded guilty. In considering the sentence the court must take into account the moral blameworthiness of the accused. Had this fact been taken into account, the learned Magistrate would have at least considered the possibility of a non-custodial or lesser sentence.

8. Upon reconsideration of the sentence, I reduce the term of imprisonment to 1 year but the appellant shall serve the balance of the sentence under community service. She is set free forthwith unless otherwise lawfully held.

DATED and DELIVERED at HOMA BAY this 20th day of March 2015.

D.S. MAJANJA

JUDGE

Mr Ongoso instructed by Ayoma Ongoso and Company Advocates for the appellant.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.