



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CRIMINAL APPEAL NO. 41 OF 2013**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**ELIAS ONDARA MARIITA.....ACCUSED**

**JUDGMENT**

1. This is a criminal appeal by **Elias Ondara Mariita**- the appellant herein. On the 27<sup>th</sup> March, 2012, the appellant was charged with stealing by servant contrary to section 281 of the Penal Code. The particulars were that on the 27<sup>th</sup> March, at Nyamataro Trading Centre Kisii Central District within Kisii County being a servant to Pius Mamboleo, stole cash kshs. 7,765 the property of Pius Mamboleo which came into his possession by virtue of his employment. The appellant pleaded guilty to this charge. And accordingly he was sentenced to (5) five years imprisonment. He now appeals. He has (3) three grounds of appeal. They are:-

1. *That I was treated as first offender your lordship the sentence imposed on to me is rather on higher side.*
2. *That I am the only sole breadwinner in the family of seven siblings which took off the parents and left me hard caped your lordship and staying in prison will hamper family progress.*
3. *That I am a student registered with IATA exam body studying online after graduating from Aviation industry having taken flight dispatch and air traffic control course. Then registered the licence of the above course hen staying in person will hinder all the progress in the course.*

2. The gist of which is that the sentence was a severe one, ought to be reduced. In any event the appellant argues that he is an orphan along with his other seven siblings whose progress will be curtailed if he serves his 5 year sentence to the maximum.

The respondent's in the other words opposes the appeal. The respondent through state counsel, Clara, affirms that the appellant's sentence was proper, and even a lenient sentence. The maximum sentence provided by law is (7) years. His appeal against the sentence of (5) is uncalled for, as it was not even the maximum sentence allowable by law. That therefore the appeal lacks merit and should be dismissed. She urged the court to uphold the sentence of the trial court.

3. This court takes cognizance of the fact that the appellant pleaded guilty straight away, thus saving the court of its precious judicial time. Secondly, the appellant he is a first offender and has no previous criminal record. Third, he is a student doing his studies for IATA exams. Forth, he is an orphan along with his other seven(7) siblings therefore continued incarceration will militate against the family progress. Fifth, he is remorseful. The court, in its view, will mix mercy and justice. The appellant has been in custody for now three years. He has pleaded remorse and forgiveness.

4. Accordingly, the appellant be and is hereby released from custody and set at liberty, the period of three years- so served is adequate. He is now released unless lawfully held. His appeal succeeds.

Dated and delivered at KISII this 20<sup>th</sup> day of March, 2015

**C.B. NAGILLAH,**

**JUDGE.**

**In the presence of:**

Appellant in person.

No appearance for the state

Edwin Mongare Court Clerk.