

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO.144 OF 2014

JOSEPH KHAMITSA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence at Butali Senior Resident Magistrate's Court by T.K. Kwambai - RM on 24th September, 2014)

JUDGEMENT

The appellant has appealed against a sentence of a fine of eighty thousand shillings (Ksh 80,000/-) imposed upon him by the court of the Senior Resident Magistrate's Court at Butali on 24th September, 2014, following his conviction by that court on a charge of stealing Kenya shillings two hundred thousand (Kshs 200,000/-). He has listed three grounds of appeal in his petition of appeal to this court.

In that petition, he has stated that the sentence imposed was harsh in the circumstances in ground 1. In ground 2, he has stated that he is very remorseful for having committed that offence. And in ground 3, he has sought the lenience of this court by asking the court to allow his appeal in respect of the sentence imposed. It is clear from his grounds of appeal that he is not appealing against his conviction.

I have perused the judgement of the trial court and the evidence of the prosecution and that of the appellant in the trial court. The evidence adduced at trial by the complainant (PW 1) and that of her husband (PW 3) clearly indicated that the appellant went to their house and snatched a bag containing Kshs 200,000/- which was in a cupboard. After doing so, he run away. The wife of PW 3 screamed by shouting that the appellant was killing her.

According to the evidence of her husband (PW 3), there was enough electricity light at their home which enabled this couple to identify the appellant. It is also their evidence that the appellant was their former employee who had worked for them for a period of about 1 year. Furthermore, PW 3 stated that he saw the appellant running away with the handbag in which they had kept their money.

The defence of the appellant was that on an alibi. According to the appellant, he was at Eldoret at Moi Teaching and Referral Hospital when this offence was committed.

The trial court properly directed itself on the issues for determination in the instance case. It cited the case of *Karanja v. R (1983) KLR 501* in which the Court of Appeal stated that when an accused has raised a n alibi defence, the burden is on the prosecution to disapprove it. That court went further to state that the burden never shifts to the accused. Furthermore, the trial court considered the evidence of the prosecution and that of the defence and correctly came to the conclusion that there was ample evidence to prove the offence charged against the accused. It found that the offence was proved beyond reasonable doubt.

I have reassessed that evidence independently and have come to the same conclusion. There is ample evidence to support the conviction which in my view is sound.

This appeal is against the sentence that was imposed by the trial court in the sum of Kshs 80,000/- in default to serve four (4) years imprisonment. This sentence is unlawful. According to **section 28 of the Penal Code Cap 63 Laws of Kenya**, a default sentence of twelve (12) months should be imposed where the monetary fine exceeds Kshs 50,000/-.

In terms of that section, the court is not authorized to impose a greater sentence that is in excess of twelve months. In the circumstance, I hereby set aside the sentence imposed and I substitute the sentence of a fine in the sum of Kshs 55,000/- and in default to serve eleven (11) months imprisonment.

JUDGEMENT DATED, SIGNED and DELIVERED at KAKAMEGA this 22nd day of JULY, 2015

J.M. BWONWONGA

JUDGE

22.07.15