



REPUBLIC OF KENYA

High Court of Kisii

Criminal Appeal 60 of 2012

NELPHAT O. GUTO.....APEPLLLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence in Migori SPM's court by

Kibet Sambu dated 29th February 2012 in criminal case No.124 of 2012)

JUDGMENT

1. The appellant herein Nelphat Omwange Guto was charged with stealing contrary to **section 275** of the **Penal Code**. He faced an additional charge of handling stolen property contrary to **section 322 (2)** of the **Penal Code**.
2. The particulars of the 1st count were that on the 28th February 2012 at Telkom (K) Limited offices in Migori county within the Republic of Kenya the appellant stole one battery make Chloride Exide 2.4 AH valued at Kshs.17,000/= the property of Telkom Kenya. The particulars of the 2nd count were that on 29th February 2012 at police line estate Migori county within the Republic of Kenya, otherwise than in the course of stealing dishonestly received and retained one battery Chloride Exide 24 AH having reason to believe it to be stolen property.
3. The appellant pleaded guilty to the charges and the prosecution summarized its case as follows:-
4. That on the 28th February 2012 at around 8 a.m. the complainant John Langat (a technician with Telkom (K) Ltd. – Migori) had received a verbal report from one of the security guards on night shift that one battery Chloride Exide 24 AH attached to the company's generator was missing.
5. He personally summoned the guards who were on night shift one of whom was the appellant and proceeded to the scene where it was indeed confirmed that the company's battery had been stolen. The appellant upon interrogation led police officers to his residential house in Migori where a search was carried out and the subject battery recovered hidden in a box which was taken as exhibit in the matter.
6. The appellant was then escorted to Migori police station and charged with the offence stated above. He produced the battery in evidence as **P. Exhibit 1**.
7. The prosecution proceeded to inform the court that the appellant was a first offender. The appellant in mitigation told the court that he had been employed by the complainant company for the last 5 months, had not been paid any dues and as a result was tempted to steal the said battery so as to sell it to support

his wife and child who were sick. He prayed for leniency.

8. The trial magistrate convicted and sentenced the appellant to serve three (3) years imprisonment.

9. The appellant was dissatisfied with the conviction and sentence hence the present appeal.

10. In his petition of appeal filed on 5th June 2012 the appellant has appealed against both conviction and sentence on the grounds inter alia that the trial magistrate erred in convicting the appellant unlawfully when a plea was taken in a language appellant could not understand, that there was no sufficient evidence on record in convicting the appellant, that the trial magistrate did not consider the appellant's mitigation; that the complainant company was to blame for appellant's action and that the 3 years imprisonment was excessive and harsh considering that the property stolen was recovered intact.

11. When the appeal came before me for hearing on 11th October 2012, the appellant's counsel Mr. Anyona abandoned ground 1 of the petition of appeal and submitted that appellant was a casual employee of the complainant company, he was never paid for 3 months and as a result he was tempted and took the battery alleged to be stolen. That he never ran away with the battery but instead kept it as a lien in his place of residence and eventually the battery was recovered.

12. He further submitted that the appellant's sentence of 3 years imprisonment was excessive in the circumstances considering the fact that he took away the battery in an attempt to pay himself 3 months' salary, he had asked the trial court for leniency and trial court should have considered this evidence and given a lenient sentence and that there is no evidence that appellant had been paid his dues. He asked the court to consider a non-custodial sentence such as probation.

13. The appeal was opposed by the state. Mr. Mutuku learned counsel for the state submitted that the appellant was convicted on his own plea of guilty. The plea was unequivocal as no ground in the petition of appeal faults the manner in which the plea was taken.

14. He further submitted that the allegation of appellant taking the battery as a lien was a non-issue and that it was for that very reason that the trial magistrate found it necessary to impose maximum sentence as the appellant was a security guard entrusted with the security of the property of Telkom Kenya Limited Migori but the appellant abused this trust.

15. On sentence Mr. Mutuku submitted that the battery was recovered before it was sold and considering the circumstances under which the offence was committed, it called for the maximum sentence of 3 years.

16. Finally he urged the court to dismiss the appeal so that this case serves as a deterrent to other would be thieves.

17. Mr. Anyona in response to the above submission stated that though the appellant may have breached the trust bestowed upon him by his employer, the complainant company also breached its trust by not paying the appellant for services rendered and was also guilty of lack of good faith on its part.

18. As a first appellate court, I am under duty to subject the evidence tendered before the trial court to fresh and exhaustive evaluation so as to reach an independent verdict.

19. From the evidence on record the conviction of the appellant was based on his own plea of guilty. The evidence adduced by the prosecution revealed the fact that the stolen battery was recovered, that the appellant was a first offender. In mitigation the appellant told the court that he had not been paid by the complainant company for a period of 3 months a fact that the complainant company did not rebut. He also stated that he had a sickly wife and child.

20. I have reviewed all the evidence. In **Edwin Otieno Odhiambo –vs- Republic – Criminal Appeal No.359 of 2006** the Court of Appeal held that on matters of sentencing, if a court failed to take into account mitigating circumstances, the chances of not coming up with an appropriate sentence were

enhanced. It appears to me that the trial court did not consider the mitigating circumstances put forward by the appellant.

21. In the result, I find the trial magistrate's sentence of 3 years imprisonment to be excessive considering all the factors I have stated above. The said sentence is hereby set aside and in lieu thereof I sentence the appellant to 12 months imprisonment with effect from 29th February 2012. The appeal on conviction fails and is accordingly dismissed.

Dated and delivered at Kisii this 31st day of January, 2013

RUTH NEKOYE SITATI
JUDGE.

In the presence of:

Mr. Shabola (present) for the State

Mr. S.M. Sagwe h/b for Anyona Mbunde for the Accused

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI
JUDGE