



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 535 OF 2010

IBRAHIM HASSAN HAROW.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 13 of 2012 in the Principal Magistrate's Court at Mandera – R. Odeny (PM) on 19/02/2010)

JUDGMENT

1. **Ibrahim Hassan Harow**, the appellant herein lodged an appeal against conviction and sentence for the offence of stealing contrary to **Section 279(a)** of the **Penal Code**, in **Cm cr. Case No. 13 of 2006 at Mandera.**
2. The brief facts were that, on 31st December 2009 at about 14.00 hrs, at Township location of Mandera East District within North Eastern Province, jointly with others not before the court, they stole a mobile phone make Samsung 3053 valued at Kshs,7,000/= the property of Nima Ali Noor.
3. Upon conviction the appellant was sentenced to serve 7 years imprisonment.
4. Pursuant to the appeal the appellant filed written submissions through learned counsel Mr. Omboga, in which he stated that the prosecution did not call material witnesses whose evidence would have been in favour of the appellant. That the prosecution failed to take into account the friendship between the appellant and the complainant, and that the complainant did not make any formal complaint against the appellant as required by law.
5. Learned state counsel Mr. Mulati responding for the state, urged that the complainant knew the appellant well, that the appellant did sell the complainant's phone, and that the court was right in convicting him. The learned state counsel also submitted that whether or not the complainant's mother made the first report to the police, the complainant did record her statement with the police.

6. I have analysed and reassessed the evidence on record to make my own findings and draw my own conclusions. It is not in dispute that the appellant snatched a phone from the complainant's hand and dashed off with it, when the motor vehicle in which they were travelling came to a halt. It is not also in dispute that he passed the phone onto a 2nd person who subsequently sold it to a third person.
7. The appellant's contention was that he took the phone to pay himself back for a phone that the complainant took from him. He was hazy on the details as to when, where and under what circumstances the complainant took his phone, necessitating the action that he took, on the fateful day.
8. It does not matter who made the first report to the police in the circumstances of this case because the evidence shows that the police did record the complainant's statement and she testified in court.
9. There appears to have been a lapse on the part of the trial court in stating whether the complainant was a minor of tender years who required to be subjected to **voire dire** examination before her testimony was received or not. The fact that she was in class six on its own is not conclusive evidence of such a fact.
10. The upshot is that the actions of the appellant on 31st December 2009 however, amounted to theft under **Section 279(a)** of the **Penal Code**, because he had no permission to take the phone belonging to **PW1** in the manner that he did, whether or not she was indebted to him. The appellant did snatch the phone which is the subject matter of this case from the person of the complainant.
11. On the sentence, **Section 279(a)** of the **Penal Code** provides for a sentence of up to 14 years imprisonment upon conviction. The sentence of 7 years imprisonment imposed by the trial court was therefore lawful. I am of the opinion however, that it was harsh and excessive in the circumstances of this case, where the phone stolen was worth Kshs.7000/=. I am satisfied that the ends of justice would still have been served by a much less severe sentence.
12. For the foregoing reasons this appeal succeeds on sentence, and appropriate orders will issue, once it is established whether the appellant has been in custody since the date of sentence or he was out on bail pending appeal.

SIGNED DATED and **DELIVERED** in open court this 13th *day* of **December 2013**.

L. A. ACHODE

JUDGE