



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL APPEAL NO. 29 OF 2013
DANIEL MUIMI MUTEMI.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

(FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NUMBER 33 OF 2013

*IN THE SENIOR RESIDENT MAGISTRATE'S COURT AT MWINGI - H.M. NYABERI (AG. SPM) ON
19TH FEBRUARY, 2013)*

JUDGEMENT

The Appellant, Daniel Muimi Mutemi was, on his own plea of guilty convicted and sentenced to seven years for the offence of stealing motor vehicle parts contrary to Section 279(c) of the Penal Code. The particulars of the offence are that on 18th January, 2013 at Mwingi Location in Mwingi District within Kitui County he stole 15 leaf springs and 2 batteries valued at Kshs.37,500/= from motor vehicle registration number KAE 468H the property of Sammy Mwanza Mukwekure.

He now appeals against sentence only.

It is the Appellant's case that the learned trial magistrate did not consider the fact that he was a first offender and that he was remorseful. He also avers that he is an orphan and the Court did not consider his mitigation. He seeks the mercy of this Court.

Mr. Mulama for the state indicated that he was leaving the matter of sentencing to this Court.

The offence for which the Appellant was convicted attracts a maximum sentence of fourteen years in prison. After the plea of guilty was entered, the prosecutor told the court that the Appellant "**may be treated as a first offender.**" The trial magistrate then proceeded to ask for a probation report. In the probation report dated 12th May, 2013 prepared by a probation officer by the name Mr. Kinyanjui James, it is indicated that the Appellant who was 21 years old. The report also revealed that he had been convicted and sentenced to one year imprisonment for the offence of preparation to commit a felony in Criminal Case No. 806/2011. The probation officer nevertheless recommended that the Appellant could be committed to community service.

When sentencing the Appellant, the magistrate stated that: "**Following the probation officer's report, accused is not a first offender. He has not learned from his previous mistakes.**" He then proceeded to sentence the Appellant to 7 years imprisonment.

I do not find it necessary to delve into the principles of sentencing in this matter. One of the reasons for enhancing a sentence is where an accused person is not a first offender. Where the prosecution indicates that an accused person is not a first offender, and an accused person disputes this information, the prosecutor is under a duty to produce records of the previous conviction.

Section 142 of the Criminal Procedure Code provides the mode of proving previous conviction as follows:-

“142. (1) In any trial or other proceeding under this Code, a previous conviction may be proved, in addition to any other mode provided by any law for the time being in force -

(a) by an extract certified, under the hand of the officer having the custody of the records of the court in which the conviction was had, to be a copy of the sentence or order; or

(b) by a certificate signed by the officer in charge of the prison in which the punishment or any part thereof was inflicted, or by production of the warrant of commitment under which the punishment was suffered, together with, in either case, evidence as to the identity of the accused person with the person so convicted.

(2) A certificate in the form prescribed by the Minister given under the hand of an officer appointed by the Minister in that behalf, who has compared the finger prints of an accused person with the finger prints of a person previously convicted, shall be prima facie evidence of all facts therein set out if it is produced by the person who took the finger prints of the accused.

(3) A previous conviction in a place outside Kenya may be proved by the production of a certificate purporting to be given under the hand of a police officer in the country where the conviction was had, containing a copy of the sentence or order, and the finger prints, or photographs of the finger prints, of the person so convicted, together with evidence that the finger prints of the person so convicted are those of the accused person.

(4) A certificate under this section shall be prima facie evidence of all facts stated therein without proof that the officer purporting to sign it did in fact sign it and was empowered so to do.”

In the case before me the prosecutor had indicated that the Appellant was a first offender. However, the magistrate went ahead to rely on the probation report to conclude that the Appellant was not a first offender. A probation report is not one of the documents that can be used to prove a previous conviction. Even if a probation report can be used to establish a previous conviction the trial magistrate erred by not giving the Appellant an opportunity to state whether or not he had a previous conviction. In doing so, the learned trial magistrate proceeded on the wrong principle. It is also disturbing to note that the learned trial magistrate went against the recommendation of the probation officer without giving reasons for doing so.

The Appellant before me is a young man and there is no formal evidence that he is a repeat offender. He pleads for leniency and he told the trial magistrate that he would not repeat the offence. He needs to be given a chance to reconstruct his life and turn away from crime. He will have served over eight months at the time of the delivery of this judgement. In my view that is sufficient punishment.

This appeal therefore succeeds so that the sentence of seven years imposed on the Appellant is reduced to the period already served. He is therefore set free unless otherwise lawfully held.

Orders will issue accordingly.

Prepared, Dated and signed this 27th November 2013

W. KORIR,

JUDGE OF THE HIGH COURT

Dated and delivered on 2nd day of December, 2013

S.N.MUTUKU

JUDGE OF THE HIGH COURT