



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MACHAKOS

CRIMINAL APPEAL 155 OF 2011

TIMOTHY MBOLU KITETE.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the conviction and sentence in Makueni Senior Resident Magistrate's Court Criminal Case No. 360/2011 by Hon. J. Karanja,SRM. on 24/8/2011)

JUDGMENT

On 24th August, 2011 **Timothy Mbolu Kitele** hereinafter "**the appellant**" was arraigned before the Senior Resident Magistrate's Court at Makueni on one count of stealing contrary to section 275 of the Penal Code. It was alleged that on the night of 20th day of August, 2011 at Kambi Mawe Secondary School in Makueni District within the Eastern Province, jointly with others not before court stole 3 water pump rods, one rod centralizer and one plunger all valued at Kshs. 6,000/= the property of Kambi Mawe Secondary School.

However, when the case came up for plea on 24th August, 2011, the appellant elected to enter a plea of guilty to the charge. After the facts were read by the prosecutor and the appellant accepted the same to be true and well put, he was convicted on his own plea of guilty and sentenced to a prison term of 18 months

Dissatisfied with the conviction and sentence aforesaid, the appellant lodged the instant appeal on grounds that-

“1. That I am I am married with 4 children who depend on me for all their needs.

2. That I was a first offender

3. That I really regret for this mistake and promise not to repeat or come into conflict with the law again”.

As it can obviously be seen, the appellant's appeal is really on sentence and no more. He does not question his conviction. When the appeal came before me for hearing on 12th June, 2012, the appellant maintained his call and submitted that the sentence imposed was manifestly harsh and excessive. He was remorseful and prayed for a review of the sentence so that he may be released to take care of his children. On his part, **Mr. Mukofu**, learned State Counsel opted to leave the issue to court.

Under section 354(3) of the Criminal Procedure Code this court has jurisdiction to interfere with a sentence imposed by the trial court. The principles upon which this court will so act were stated in opt

quoted case of **Ogalo s/o Owuor vs Republic [1954] 21 EACA 270**. First, the appellate court does not alter a sentence on the mere ground that if members of that court had been trying the appellant they might have passed a somewhat different sentence, and it will not ordinarily interfere with the discretion exercised by a trial court unless it is evident that the trial court had acted upon some wrong principle or overlooked some material factors. Secondly, if the sentence imposed is manifestly harsh and excessive in view of the circumstances of the case, such sentence will be disturbed. These considerations are however informed by the fact that sentencing is a matter of the discretion of the trial court and that the sentence should fit the crime as well as the offender.

No doubt the offence for which the appellant was convicted was serious and common. He was as a result sentenced to 18th Months imprisonment. Of course the sentence was legal since the offence charged upon conviction one is liable to imprisonment 3 years. Such sentence is however dependant on the circumstances of the theft and the nature of the thing stolen. It is therefore apparent that a convictee must mandatorily be sentenced to imprisonment. Other form of punishment is allowed, depending on the circumstances of the offence and the thing stolen. Here the items were not of much value. I do not think that imprisonment was merited.

In sentencing the accused, the trial court did not appear to take into account the appellant's mitigation. Indeed, the sentencing notes are silent on what the trial court considered in arriving at the sentence. The magistrate does justify why he opted for this particular sentence and not any other, more so when the appellant was a first offender.

Having said all the foregoing, it must be obvious that I consider the sentence imposed given the circumstances, manifestly harsh and excessive as to call for my intervention. The appellant has so far served close to a year of the prison term imposed. I consider that period to be sufficient punishment. Accordingly I would commute the sentence to that so far served with the consequence that the appellant shall be set at liberty at once unless otherwise lawfully held.

JUDGMENT DATED, SIGNED and DELIVERED at MACHAKOS this 30TH day of JULY 2012.

ASIKE-MAKHANDIA
JUDGE