REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

Criminal Appeal 4 of 2010

DAN OTIENO OJWANG..........................1ST APPELLANT

EUGINE OTIENO AIKO..........................2ND APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(**An Appeal from the Judgment and Conviction of the**

Principal Magistrate's Court in Kisumu CMCC No. 605 of 2009)

J U D G M E N T

The appellants Dan Otieno Ojwang (appellant 0ne) and Eugine Otieno Aiko (appellant two) appeared before the Senior Principal Magistrate at Kisumu charged with the offence of stealing contrary to section 275 of the penal code, in that on the 2nd December 2009 at Family Bank Kisumu Branch stole Kshs. 790,000/= the property of Family Bank Ltd. Both pleaded guilty to the charge and were convicted accordingly. They were then sentenced to serve twelve (12) months imprisonment. Being dissatisfied with the conviction and sentence they filed the present appeal on the basis of the grounds contained in the petition of appeal filed herein on 11th December 2009.

The petition of appeal is dated 11th January 2010 even though the court date stamp reads 11th December 2009.

The date on the court stamp is clearly an error because the petition could not have been filed before it was compiled neither could it have been filed prior to the judgment appealed against which judgment was delivered on 31st December 2009.
Be that as it may, the grounds of appeal are as follows:-

(1) That, the sentence was manifestly harsh and excessive given that the complainant had withdrawn the case against the appellants, a fact which was not brought to the attention of the court at the time the plea was taken.

(2) That, the learned magistrate grossly misdirected himself by failing to consider that the charge sheet disclosed no offence committed by the appellants.

(3) That, the facts of the case did not support the charge against the appellant.

(4) That, the charge and particulars of that charge were not sufficient to secure conviction and sentence against the appellants.

(5) That, the charge and particulars of the charge did not disclose any charge against the appellants.

(6) That, the learned magistrate ignored the fact that the appellants made equivocal plea of guilty.

(7) That, the learned magistrate erred in law by failing to record down as nearly as possible the words used by the appellants in their plea of guilty.

(8) That, there was an error which was apparent on the face of the record on the trial process and in entering the plea of guilty.

(9) That, the appellants were not given an option of a fine in conviction as required by law.

The appellants were represented at the hearing of the appeal by the learned counsel Mr. Nyawiri, while the respondent was represent by the learned Senior Principal state Counsel, Mr. Musau.

In his submissions, the learned state counsel contended that the lower court proceedings clearly show that the appellants admitted the offence and that the facts narrated by the prosecution disclosed the offence.
As to the sentence, the learned state counsel noted that the appellants have already served one month imprisonment which should be considered as sufficient in the light of their mitigation factors.
Otherwise, the learned state counsel urged this court to sustain the conviction.
Mr. Nyawiri, on behalf of the appellants agreed with the learned state counsel but urged this court to alternatively consider a non – custodial sentence.

Having considered the aforementioned submissions alongside the grounds of appeal, this court is of the view that there is nothing tangible enough to dislodge the appellants conviction by the trial court.

The charge was read to them in a language that they understood and they readily admitted the offence by stating that it is “true”.

The learned trial magistrate could not have recorded what was not stated by the appellants.
A plea of guilt was thereafter entered and after the narration of the facts by the prosecution the appellants accepted the truthfulness thereof. Consequently, they were convicted on their own plea of guilty.

The record does not show that the plea was equivocal nor that the procedure in taking plea was not adhered to by the trial magistrate in line with the decision in the case of Adan –VSRepublic [1973] EA 445.
The facts narrated by the prosecution clearly indicated that the appellants fraudulently and unlawfully took away a sum of money which did not belong to them.
The elements of the charge of stealing were adequately disclosed.
All the foregoing facts have the effect of rendering grounds two, three, four, five, six, seven and eight of the appeal unsustainable.
As regards the sentence, section275 of the penal code provides for a sentence of three (3) years imprisonment.

The learned trial magistrate imposed a sentence of twelve (12) months imprisonment. The said sentence was neither unlawful nor excessive. Besides, the learned trial magistrate had the discretion to impose a sentence not exceeding three years imprisonment or even a non – custodial sentence. However, considering that the stolen amount was fully recovered by the complainant such that it no longer wished to pursue the case against the appellants, the sentence imposed by the learned trial magistrate is hereby set aside and reduced to the period already served with the result that the appellants shall forthwith be released unless otherwise lawfully held. To that extent, the appeal succeeds. Ordered accordingly.

Delivered and signed this 28th day of January 2010.

J.R. Karanja
JUDGE

JRK/va