



NO. 172
REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NO. 28 OF 2010
DANIEL MOSIORI.....
APPELLANT
-VERSUS-
REPUBLIC.....
RESPONDENT

JUDGMENT

(Being an appeal from the judgment in the Kisii Chief Magistrate's Court Criminal Case No. 626 of 2009 by C.A Okore - R.M)

The appellant, **Daniel Mosiori** was charged before the Chief magistrate's court at Kisii with obtaining money by false pretences contrary to section 313 of the **Penal Code**. The particulars of the offence given were that on diverse dates between 24th February, and 21st March, 2009 at Mwembe village in Kisii Central District within Nyanza province, the appellant with intent to defraud obtained from **Jackline Nyakundi** the sum of Kshs. 7000/= by falsely pretending that he will help her recover her stolen property. The appellant also faced a second count of stealing contrary to section 275 of the **Penal Code**. Particulars were that on 26th February, 2009 at Mwembe village, in Kisii Central District within Nyanza province, he stole one mobile phone make Nokia 1209 valued at Kshs. 2800/= the property of **Jackline Nyakundi**. Finally the appellant faced an alternative charge of handling stolen property contrary to section 322(2) of the

Penal Code. The particulars of the offence given were that on 26th February, 2009 at Mwembe village, in Kisii Central district within Nyanza province, he otherwise than in the course of stealing, dishonestly retained one mobile phone make Nokia 1209 valued at Kshs. 2800/= having reasons to believe it to be stolen goods. He denied both charges he had his day in court. In abid to prove its case against the appellant, the prosecution called 5 witnesses.

The prosecution case in brief was as follows:-

PW1, one **Jackline Nyakundi**, the complainant, on 20th February, 2009 came back to her house and found it having been broken into and several of her items missing. The items included utensils, pressure lamp, wall clock, harmer, panga, axe, 4 sacks of maize and 1 sack of beans. She reported the matter to Mosochi AP's camp where she was advised to go and record a statement with the police at Nyakoe police station, which she did. On 24th February, 2009, the appellant out of the blues came to her residence and started beating her husband (PW2) and thereafter ordered them to go and see him in his office at Kisii Bus Park the following day. They met him the following day as ordered where upon he demanded Kshs. 6000/= so as to assist them recover their stolen property as a member of the local community policing. They gave him the cash demanded and the complaint took him to scene at Mosochi. The appellant who had presented himself as a member of the dreaded "**sungusungu**" gang as well came back to the complainant's residence on 26th February, 2009 at 11.00 p.m, and demanded a further Kshs. 600/- so as to fuel the police vehicle which was to be used to ferry the allegedly recovered goods form Mosochi. They gave him Kshs. 600/= and he went away. He re-appeared again on 27th February, 2009 demanding that a red cock be slaughtered for him to appease the spirits, so as to give him good luck in arresting the thieves. The complainant duly bought a cock worth Kshs. 300/= and cooked it for him the following day. He came with his friend **Nickson Nyangau** (PW3) to partake the same meal. On the night of 28th February, 2009 he showed up again and asked for more cash. This time they parted with Kshs. 100/- and he left. He came back again on 7th March, 2009 and demanded for more cash. When he

realized that it was not forthcoming, the appellant snatched the Nokia phone (make 1209) and Kshs. 100/= from the complainant and left. The complainant got tired of the appellant's harassment and decided to contact other members of the community policing at their offices in the bus park. She explained to them what she had gone through at the hands of their colleague. They denied that the appellant was one of them. So they laid an ambush and arrested the appellant. He was taken to Kisii police station, and the phone which he had already sold to someone else was recovered. He was later arraigned in court. On his part, PW3, **Nickson Nyangau** confirmed that on a date he could not recall, the appellant invited him for lunch at the house of the complainant where they ate chicken and ugali. On one occasion the appellant sent him to fetch some cash from PW2. He did not know what it was for. He was later arrested by community policing agents and ordered to show them where the appellant was. He took them and the appellant was arrested. He too was arrested. He was however later released. PW4, **Richard Nyariki** was approached by the appellant sometimes in March, 2009 who pleaded with him to advance him some money as his children were ailing. He gave him a phone Nokia 1209 as collateral for Kshs. 1500/= that he advanced him. Later the appellant told him to keep the phone for good since he was unable to repay the loan. On 21st march, 2009 he was arrested on an allegation that he was in possession of a stolen phone. He was released after recording a statement and following the arrest of the appellant. PW5, PC (W) **Cecilia Muthoni**, the investigations officer, stated that on 21st march, 2009 whilst at Kisii police station, the appellant was brought by members of local community policing on allegations that he had obtained cash. Kshs. 7000/= falsely and that he had also stolen a phone Nokia 1209. She booked the report, locked up the appellant and commenced investigations. She established course of her investigations that the appellant had obtained a total of Kshs. 7,000/= from the complainant on the pretext that he would assist her recover her stolen goods and bring to book the perpetrators of the crime. He had also in the process snatched a mobile phone from the complainant's husband after the couple had failed to raise more cash to satisfy his demands. Upon concluding investigations she preferred the charges against the appellant as contained in the charge sheet.

At the close of the prosecution case, the appellant was placed on his defence and opted to give a sworn statement but called no witnesses. He stated that PW2 was fighting with his wife on the material date. He went to separate them since he was a friend to PW2. He then took their phones; Nokia 1600 and Nokia 1209 respectively, since he thought that the surging crowd would steal them from the couple. He later returned them to PW2. However PW2 gave him Nokia 1209 to sell for him. He sold it to **Richard Nyariki** (PW4), who gave him Kshs. 1,000/= leaving a balance of Kshs. 500/=. In a nutshell the appellant denied having committed the offences charged.

The learned magistrate having carefully evaluated the evidence as presented was persuaded beyond reasonable doubt that the appellant had committed the offences preferred in counts 1 and 2 in the charge sheet. Accordingly, she convicted him and sentenced him to 2 years imprisonment on each count. The sentences aforesaid were ordered to run concurrently.

The appellant was aggrieved by the conviction and sentence. Through **Messrs Koina Onyancha & Co. Advocates** he lodged the instant appeal. He advanced 4 grounds in support of the appeal being:

“1. That the learned Resident Magistrate erred in law and in fact in failing to allow the appellant an opportunity to call his witnesses after the appellant testified considering the fact that the appellant was unrepresented.

2. That the Learned Resident Magistrate erred in law and fact by making a finding that he prosecution had proved its case beyond reasonable doubt.

3. That the learned Resident Magistrate erred in law and fact by failing to properly consider the appellant’s defence which was not shaken even under cross-examination and give the appellant the benefit of doubt and thereby acquit him.

4. That the sentence imposed by the Learned Senior Resident Magistrate is harsh and excessive in the circumstances.”

When the appeal came up for hearing, **Mr. Onyancha**, learned counsel for the appellant chose to abandon the appeal on conviction. However, he opted to pursue the appeal on sentence only. He submitted that the sentence imposed taking into account that the appellant was a first offender was harsh and excessive. The appellant was a young person who ought to have been given a chance to reform.

Mr. Mutai, learned Senior State counsel neither supported nor opposed the appeal on sentence. Instead he opted to leave the matter to court.

I have been asked to interfere with the sentence. Sentencing is discretionary and unless it is shown that the sentence imposed is manifestly harsh and excessive, an appellate court would hardly interfere. See **Wanjema Vs Republic (1971) EA 493**. In the instant case, the appellant was handed a jail term of only 2 years. The sentence is obviously legal. Though the appellant was a first offender, it does not appear to me that the sentence is manifestly harsh nor excessive as submitted by counsel for the appellant. Indeed the appellant offered no mitigation at all that would have assisted the learned magistrate in arriving at the appropriate sentence. He was given an opportunity to mitigate which opportunity he did not seize. Considering what the complainant went through and the conduct of the appellant as he committed the offences, the sentences imposed were more than deserving. In fact they were even lenient.

When all these circumstances are considered, I am of the view that the trial magistrate did not grossly misdirect herself on the sentences she came to nor did she err in principle by failing to take into account the core factors of the case.

The end result of this appeal is for dismissal. It is so ordered.

Judgment dated, signed and delivered at Kisii this 16th September, 2010.

ASIKE-MAKHANDIA

JUDGE