



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 724 of 2006

FRANCIS OTIENO EGESAAPPELLANT

- AND -

REPUBLICRESPONDENT

(An appeal from sentence imposed by Senior Resident Magistrate Mr. Maundu on 28th November, 2006 in Criminal Case No. 724 of 2006 at Kibera Law Courts)

JUDGEMENT

The appellant was charged with theft by servant contrary to s. 281 of the Penal Code (Cap. 63, Laws of Kenya). The particulars were that the appellant, on 3rd September, 2006 at Sixth Parklands Avenue within Nairobi, jointly with others not before the Court being servants to *Makwana Davendra Hitesh*, stole from the said *Makwana Davendra Hitesh* cash in the sum of Kshs.1,500,000/=, three cellphones being a Nokia 3310, a Nokia 6610 and a Nokia 7610 all valued at Kshs.60,000/=, a gold chain, two gold rings, two sets of necklaces, assorted clothes, one pair of leather shoes and keys for motor vehicle registration number KAD 666G – all valued at Kshs.1,900,000/= – which came into his possession by virtue of his employment.

It is recorded that the substance of the charge and every element thereof was stated by the Court to the appellant herein, in the language that the understands, and when he was asked whether he admitted or denied the truth of the charge, he stated that the theft was not committed by himself, but by his cousin; and thereupon a plea of not guilty was entered, on 12th October, 2006.

During a mention on 19th October, 2006, the appellant stated before the Court that he intended to make a change of plea; and on 27th October, 2006 he pleaded guilty, and the prosecution then read out the facts of the case, which he then said were not true.

The facts as read out were that the complainant and his family went away on 3rd September, 2006 leaving the appellant and another employee in the house. When the complainant returned two hours later, one employee opened the gate, but the appellant and another employee could not be found. The complainant and his family found the wardrobe open, and clothes strewn over the floor. The complainant checked the receptacle in the wardrobe where he had kept Ksh.1.5million, but found it missing. He also found that mobile phones worth Kshs.60,000/= were missing; and also missing were: assorted jewellery, a pair of leather shoes, and keys to motor vehicle registration No. KAD 666G. After the complainant made a report to Parklands Police Station, a search was made for the appellant and the other suspect, but they were not found in Nairobi; Police officers from Nairobi travelled to Busia, and arrested the appellant

there. Nothing was recovered from the appellant. The property and money stolen was worth Kshs.1,900,000/=, belonging to the complainant.

When the appellant stated that the above facts were not true, the Court again entered a plea of not guilty. But at a mention on 23rd November, 2006 he again stated that he wanted to change his plea. Originally the appellant had been accorded English/Kiswahili interpretation of the proceedings. But on 23rd November, 2006 the charge was read and explained to the appellant in the Luhya language; he understood that language, and responded in that language; he said: “It is true”; and a plea of guilty was then entered. The statement was again read out to the appellant on 28th November, 2006, and he admitted the same, whereupon he was convicted on his own plea of guilty.

The Court treated the appellant as a first offender, and recorded his statement in mitigation. The Court then imposed what it considered to be a deterrent sentence, a five-year term of imprisonment.

In his grounds of appeal the appellant thus states: he is most remorseful and deeply regrets the loss suffered by his employer; this Court in its appellate capacity should take into account the fact that the appellant has no previous conviction; his dependant family will suffer while he is away in prison; the sentence imposed was “inordinately harsh and severe”; a non-custodial sentence would be in order.

Although the appellant had thus stated his grounds of appeal, he chose to let them speak for themselves; and only learned State Counsel **Mr. Murithi** made oral submissions.

Mr. Murithi contested the appeal, and gave the history of the appellant’s changes of plea, up to the final stage when he pleaded guilty and admitted the facts of the offence as read to him.

Learned counsel submitted that the statement made by the appellant in mitigation should have carried little weight; for he said he had not been paid by his employer for four months – which could not extenuate the admitted theft of the employer’s Kshs.1.5 million, three mobile phones, a gold chain and other items all bearing a value of Kshs.1.9million.

Learned counsel urged that since the maximum sentence for the offence committed was seven years in jail, the punishment imposed of five years’ imprisonment was “very lenient, and should indeed be enhanced”. But he asked the Court to affirm sentence and to dismiss the appeal.

After considering the facts of this case, I have come to the conclusion that the appellant, who admits having committed the offence charged, unjustifiably seeks compassion and the substitution of a non-custodial sentence. As an employee upon whom the complainant relied for home-care, the appellant showed disturbing infidelity by encroaching on confidential domestic sanctums which would not have been intended to be within his reach. This Court must set its face firmly against such breach of confidence. Furthermore, the complainant suffered substantial loss in cash and valuables, through the unlawful act of the appellant, and such conduct ought to be subjected to the sanctions of the criminal law.

I hold that the punishment meted out by the trial Court in its lawful exercise of discretion, is to be upheld. Consequently, the appeal is dismissed, and the sentence imposed by the trial Court affirmed.

Orders accordingly.

DATED and DELIVERED at Nairobi this 29th day of January 2009.

J. B. OJWANG

JUDGE

Coram: Ojwang J.

Court clerk: Huka

For the Respondent: Mr. Murithi

Appellant in person