



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 528 of 2007

JOHN MWENDA NYANGUNYE APPELLANT

- AND -

REPUBLICRESPONDENT

(An appeal from sentence imposed by Ag. Senior Resident Magistrate Mrs. Mbugua on 11th September, 2007 in Criminal Case No. 2839 of 2007 at Makadara Law court)

JUDGEMENT

The appellant was charged with theft from the person contrary to s. 279 (a) of the Penal Code (Cap. 63, Laws of Kenya). The particulars were that the appellant jointly with others not before the Court, on 16th June, 2007 at Shauri Moyo in Nairobi, stole a mobile phone, Motorola C118 by make, valued at Kshs.2600/=, the property of **Mourine Oguta Akeyo**, from the person of the said **Mourine Oguta Akeyo**.

When the substance of the charge and every element thereof was stated by the Court to the appellant herein, in a language that he understands, and when he was asked whether he admits or denies the truth of the charge, he replied: "It is true". A plea of guilty was entered, and the statement of facts was read out by the prosecution.

The facts were that on 16th June, 2007 at Shauri Moyo in Nairobi, the complainant was walking about the first floor of the building that was her work-place; and she was then accosted by three young men who ordered her to surrender her cellphone. After she surrendered her Motorola C118 to the intruders, they demanded her immediate departure from the *locus in quo*. Several days later, on 21st June, 2007 at about 5.00 pm, the complainant spotted the appellant herein, and recognized him as one of the three who had stolen her phone. She raised alarm, which brought out members of the public; and they helped to arrest the appellant herein, who was thereafter charged in Court.

The appellant's response to these facts was: "All facts are true. I was part of the gang that attacked and stole [the] complainant's phone".

The trial Court convicted the appellant on his own plea of guilty; treated him as a first offender; heard his

mitigation statement; but in the course of mitigation, the appellant said:

“I ask for leniency, [for] I was drunk. I do not know what happened. I never stole the phone”.

This new statement caused the Court to change the plea to one of *not guilty*, on 18th June, 2007. The matter was thereafter mentioned on several occasions: 12th July, 2007; 26th July, 2007; 9th August, 2007; 23rd August, 2007; and before District Magistrate **Mr. Kassam**, on 6th September, 2007 the accused expressed his wish to make a change of plea.

Before Ag. Senior Resident Magistrate **Mrs. Mbugua**, on 11th September, 2007 the appellant asked to be allowed to make a change of plea. The charge was then read over to the appellant, and he pleaded guilty. The same facts of the first plea-taking occasion were read over to the appellant; and he said they were true. The appellant was then convicted on his own plea of guilty. He had nothing to say in mitigation. He was sent to jail for a term of four years.

In his grounds of appeal, the appellant contends that “the trial Magistrate erred in both law and fact” in not giving him an opportunity to cross-examine witnesses; that there was no testimony implicating him in the crime charged.

In his oral submissions, the appellant said:

“I want a re-trial. I was sent to jail when there was no hearing.”

Learned counsel for the respondent, **Ms. Gateru**, opposed this appeal: for the reason that it was clear from the proceedings, the appellant had *pleaded guilty at first*; he later changed his plea; and subsequently he changed plea again, and *pleaded guilty*. Learned counsel urged:

“Having pleaded guilty, he can only appeal against sentence”.

And as to sentence, **Ms. Gateru** submitted that since the maximum penalty for the offence charged was 14 years in jail, the imposed sentence of four years’ imprisonment could not be said to be harsh or excessive.

After careful consideration of the pertinent facts, I have come to the conclusion that the appeal has no merit; *by law* an appeal could only be entertained on *sentence*; but the magnitude of the sentence imposed by the trial Court is far below the maximum sentence provided for by the law.

In the foregoing circumstances, there is no legal basis for interfering with the sentence imposed by the trial Court.

This appeal is dismissed: the conviction is upheld; the sentence imposed shall stand and be executed as it has been prescribed.

Orders accordingly.

DATED and DELIVERED at Nairobi this 12th day of February, 2009.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Huka

For the Respondent: Ms. Gateru

Appellant in person