



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

OF KISII

Criminal Appeal 228B of 2008

CHRISTOPHER SAETA NYANGAU APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The Appellant was convicted on his own plea of guilty and sentenced to three years' imprisonment for the offence of stealing contrary to section 275 of the Penal Code. He has appealed against the sentence. Mr. Kemo for the state conceded the appeal.

The admitted facts were that on 16th November, 2008 at Egesieri village in Nyamira Township within Nyanza Province, the appellant returned home and requested for food from his mother who was the complainant in the case. She answered that food was not ready. The Appellant entered the house and at that point she remembered she had left her cell phone in the house. She suspected the Appellant may steal it. She went to check and found the phone was missing and on asking the Appellant he became angry and threatened to cut her. The complainant called her elder son Duke Ongwae Saeta who rang the mother's number and it rang from the Appellant's pocket. He sought to search the Appellant who ran away with the phone. The complainant reported the matter to her husband who tried to talk to Appellant to no avail. The Appellant subsequently disposed off the phone. The matter was reported to the police following the Appellant was arrested and charged. The phone was not recovered.

The court was informed that the Appellant was a first offender. During mitigation he told court that he decided to steal because he was not being fed at home. The court took into consideration the circumstances surrounding the offence and the Appellant's mitigation before sentencing him to three years. The court does not appear to have taken into consideration the fact that the Appellant was a first offender. Even if it did, the general rule that a maximum sentence should not be imposed on a first offender (**Otieno v Republic [1983] KLR 295**) was not obeyed. The maximum penalty for the offence of theft under **section 275** of the **Penal Code** is three years.

Lastly, the court ought to have considered that the complainant and the Appellant were in a permanent relationship and that sentencing the Appellant to a jail term was not going to help the relationship but only worsen it (**Juma vs Republic [1972] EA 437**). In view of these circumstances, I find that the sentence was unreasonable and manifestly excessive as to justify interference by this court. Considering the value of the phone was Kshs.2000/=, I find that the Appellant has suffered enough for the offence. Sentence is hereby reduced to the period already served. The Appellant will consequently be immediately released unless he is otherwise being lawfully held.

Dated, Signed and Delivered at KISII this 15th Day of June, 2009.

A. O. MUCHELULE

JUDGE

15/6/09

A. O. Muchelule, J

c/c. Mongare

Appellant absent.

Mr. Kemo for State

Court: Judgment in open court.

A. O. MUCHELULE

JUDGE

15/6/09