

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 179 of 2008

JOEL MAINA GICHIMU APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from the original Judgment and Conviction of the

Senior Resident Magistrate's court at Mukurweini in Criminal Case No. 28 of 2007

dated 2nd October 2007 by V. W. Ndururu – Ag. SRM)

J U D G M E N T

On 9th January 2007, **Joel Maina Gichimu**, hereinafter referred to as “*the appellant*” was arraigned before the Senior Resident Magistrate’s Court at Mukurweini, on two counts of stealing contrary to section 275 of the Penal Code. He pleaded not guilty to both counts and in the fullness of time he was tried. At the conclusion of the trial, the appellant was found guilty on both counts and sentenced to 18 months probation on 12th June 2007. However 4 months later on 2nd October 2007, the learned magistrate recalled the file and reviewed the above sentence and thereafter imposed a sentence of 3 years imprisonment instead.

The appellant was aggrieved by the turn of events. Accordingly he lodged the instant appeal alleging that the sentence imposed was invalid and oppressive amongst other grounds.

When the appeal came up for hearing, **Mr. Makura**, learned Senior State Counsel conceded to the same on the grounds that the subsequent proceedings leading to the sentence of 3 years imprisonment being imposed were a nullity and irregular as the court had become *funtus officio*.

Having perused the record of the trial court carefully, I am satisfied that **Mr. Makura**, was right in conceding to the appeal on the aforesaid ground. From the record, the appellant had been tried, convicted and sentenced to 18 months probation. However 4 months later the learned magistrate reopened the proceedings and sentenced the appellant to 3 years imprisonment instead. That was irregular; as by passing the initial sentence, the court had washed its hands of the matter and could not therefore substitute that sentence with any other sentence. In other words the court had by passing the probationary sentence become *funtus officio*. It was thus not open to it to recall previous sentence and instead impose 3 years imprisonment. To that extent therefore the proceedings were a nullity. The appeal on sentence is allowed. The sentence of 3 years imprisonment imposed as aforesaid is hereby set aside. I would have been minded to order that the appellant continues to serve the 18 months probation. However considering the time the appellant has served in prison, i.e. from 2nd October, 2007, I do not think that it will be in the interest of justice to make such an order. The appellant shall therefore be released forthwith from prison custody unless he is otherwise lawfully held.

Dated and delivered at Nyeri this 31st day of July 2009

M. S. A. MAKHANDIA

JUDGE