



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Criminal Appeal 340 of 2007

SILAS MUTUA KIRURIAPPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from original Conviction and Sentence of the Senior Principal Magistrate's Court

at Nanyuki in Criminal Case No.992 of 2007 by NDUNGU H.N. (MISS)

J U D G M E N T

Silas Mutua Kiruri, hereinafter referred to as “*the appellant*” was on 7th June, 2007 arraigned before the Senior Principal Magistrate’s Court, Nanyuki on two counts of stealing contrary to *section 275* of the Penal Code and two alternative counts of handling stolen property contrary to *Section 322* of the Penal Code. The appellant pleaded guilty to the two main counts and was convicted on his own plea of guilty. Upon conviction, he was sentenced to 5 years imprisonment on each count. The sentence was ordered to run concurrently.

Aggrieved by the aforesaid sentence, the appellant lodged the instant appeal, limited as it were on sentence only. He complained in his petition of appeal:

“1. That I had pleaded guilty to the charges.

2. That the imposed sentence of 5 years imprisonment on each count is harsh and excessive if it could be meant for rehabilitation purpose.

3. That the imposed sentence was illegal in regard (sic) I never understood the substance of the charge and the danger thereof in respect to section 207 CPC.

4. That the imposed sentence is illegal and excessive in regard (sic) I was tortured in the police station and also the police officers from Nanyuki police station influenced me to plead guilty to the charge for a lesser severe sentence.

5. That I am a person of good character whilst evidence of good character is admissible in respect to section 56 of the Evidence Act.”

The foregoing grounds of appeal cannot really pass for serious grounds of appeal. They are merely further pleas in mitigation.

When the appeal came up for hearing, the appellant reiterated that the sentence imposed was manifestly harsh and excessive. He was remorseful and had infact trained as a carpenter whilst in prison.

Mr. Makura conceded to the appeal on the ground that the sentence imposed was on the face of it illegal. The maximum sentence for the offence charged was 3 years imprisonment. However the learned Magistrate imposed 5 years imprisonment on the appellant which was illegal.

I agree with Mr. Makura from the onset with regard to the illegality of the sentence imposed. Section 275 of the Penal Code under which the appellant was charged is categorical that:-

“any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years.....”

Nothing was brought to the fore of the learned Magistrate that would have compelled her to impose any other sentence than the one prescribed as aforesaid. If and when a trial court imposes an illegal sentence as herein, that is sufficient ground for this court’s intervention.

The appellant was sentenced on 7th June, 2007. He has so far served 2 years of the illegal term imposed. From the sentencing notes of the learned magistrate, it would appear that the appellant is a repeat offender. Indeed he had only come out of jail on 1st June, when committed the instant offence on 5th June, 2007. The learned magistrate it would appear had again in recent times jailed him for another similar offence. As correctly pointed out by the learned magistrate, the appellant was “a jail bird who does not learn and change. He keeps re-offending. This is the 3rd time I am trying him for related offence in a period of just about 3 months....”

One can understand perhaps why the learned magistrate ended up imposing the illegal sentence. I think she was frustrated and rightly so by the appellant’s antics and exploits who seem to have had little or no regard at all for the law and penal institutions. However that was not a good reason enough to impose an illegal sentence. Indeed there can be no reason to justify an illegality.

Accordingly I would set aside the sentence of 5 years imprisonment imposed on the appellant, and substitute therefor a sentence of 3 years imprisonment from the date of conviction. Because of his past antecedents alluded to as aforesaid by the learned magistrate, I think that the maximum sentence is justified in the circumstances. That is my order.

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

M.S.A. MAKHANDIA

JUDGE