



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA

OF KISII

Criminal Appeal 64 of 2009

(From original conviction and sentence in the Senior Resident

Magistrate's Court at Keroka in Criminal Case No.959 of 2008 by

P. NDEGE ESQ., RM)

JAMES WARO NYAKEGO ..... APPELLANT

VERSUS

STATE ..... RESPONDENT

JUDGMENT

The appellant was convicted by the Resident Magistrate, Keroka of stealing by agent contrary to **section 283 (b)** of the **Penal Code** whose particulars were that on 20/11/07 at Risa village of Nyatiemo sub location in Masaba District within Nyanza Province he stole cash Kshs.3163/= which he had been entrusted to him as treasurer of Risa Primary School to pay for the school's post office rental box. He was sentenced to serve 2½ years imprisonment.

He was aggrieved by the conviction and sentence and preferred this appeal. However, appeal against conviction was abandoned which left appeal against the sentence.

The appeal is based on the ground that the sentence was manifestly excessive. **Mr. Ayuka** represented the appellant whereas **Mr. Kemo** was acting for the Republic. **Mr. Kemo** conceded the appeal.

The trial court exercised its discretion when it sentenced he accused to 2½ years in jail. The appellate court should not interfere with that discretion unless it can be shown the court did not take into account a relevant factor, or that it took into account an irrelevant factor, or that the sentence imposed was manifestly harsh and excessive in the circumstances of the case (**Wanjema v. Republic [1971] EA 493**).

The appellant was a first offender. There was no particular reason why the trial magistrate thought that such an offender should receive custodial treatment (**Sayeko v. R [1989] KLR 306**). The offence was not grave or aggravated for the appellant to be subjected to shock therapy. Secondly, the amount stolen was only Kshs.3163/=. The court did not take that into account. It was not proper exercise of discretion for the court to fail to consider the sum before settling on the sentence. In short, the appellant did not deserve to be sent to jail for 2½ years for the amount (**Ambani v. Republic [1990] KLR 161**). The sentence was therefore manifestly harsh in the circumstances.

The appeal is allowed. The sentence of 2 ½ years is set aside and in its place the appellant shall pay a fine of Kshs.10,000/= failing which he shall serve 3 months in jail.

Dated, signed and delivered at Kisii this 14<sup>th</sup> day of October, 2009

**A. O. MUCHELULE**

**JUDGE**

**14/10/2009**

Before Hon. A.O.Muchelule-Judge

Court clerk-Mongare

Mr. Nyawencha for Mr. Anyonka for Appellant

Appellant-present

**COURT:** Judgment in open court.

**A.O.MUCHELULE**

**JUDGE**

**14/10/2009**