



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL APPEAL 42 OF 2007

(From Original conviction and sentence in criminal case No. 5283 of 2005 of the Chief Magistrate's court at Thika)

JAMES KAMAU MBUTHIAAPPELLANT

V E R S U S

REPUBLICRESPONDENT

J U D G M E N T

James Kamau Mbuthia, (the appellant) was jointly charged with Jane Wanjira Gituru for the offence of stealing contrary to Section 275 of the Penal Code that on 6th day of November, 2005 at Kahuruko Trading Centre in Thika District within Central Province, jointly stole one bicycle make Neelam, one mattress, two blankets, one portable radio make Sonitex, one hurricane lamp, two glasses, seven packets of maize flour, four complete cases of sodas, twenty bottles of fruit juice, nine bundles of tobacco, two packets of cigarettes, four packets of sweets, four breads, twenty one mandazis, thirty one samosas, ten chapattis, nineteen eggs, eighteen packets of wheat flour, four packets of tea leaves, nine packets of milk, six packets of match boxes, one padlock, one 500 gm Blue Bank and cash Kshs.1596/- all to the total value of Kshs.15,732, the property of Daniel Chege Mwangi.

The appellant had faced an alternative charge of handling stolen goods contrary to section 322 of the Penal Code that on 19th November, 2005 at Kahuruko village, otherwise than in the course of stealing, he dishonestly received or retained one bicycle make Neelam, one mattress and one blanket for the benefit of another person, knowing or having reasons to believe them to be stolen or unlawfully obtained. Upon hearing the evidence of the prosecution witnesses and the defence case, the learned trial magistrate convicted the appellant on a charge of stealing contrary to Section 268 (b) of the Penal Code as read with Section 275 of the Penal Code. The appellant was sentenced to three years imprisonment. The prosecutor informed the learned trial magistrate that appellant was a first offender with no previous records and in mitigation, appellant stated he had children and a family.

Having listened to the pre-sentence information, the learned trial magistrate said this-

“Mitigation considered. The nature of offence considered. Circumstances of offence considered and the consequence to the society” and appellant was given the maximum sentence.

Appellant is only appealing against the sentence. In passing out sentence, several principles will guide the court – the nature of the offence, the circumstances under which the offence was committed, the value of the property involved, the criminal record of the offender. The theft occurred in a hotel which belonged to Daniel Chege Mwangi who also worked as a watchman on shift basis. The appellant used to do casual jobs at that hotel. The items stolen had all been within the hotel, and a mattress, blanket and vandalized bicycle were recovered from appellant's home. Upon being apprehended, appellant led the arresting team to his co-accused's home where more items belonging to the complainant were recovered. How did appellant get to steal the items from the hotel? He purported to dismiss the hotel's employee Hannah Njeri by taking the hotel keys from her, saying the complainant had ordered her to quit and hand over the keys to him.

The appellants grounds of appeal were that he is a first offender and the sole breadwinner for his family. He also laments that his long stay in fact will affect him psychologically since his wife has recurring health problems that gets her admitted in hospital now and then and that he is asthmatic thus requested for non-custodial sentence.

The learned State Counsel, Mrs Kagiri opposed the appeal against sentence saying the sentence was not harsh and excessive and was within the law. She submitted that the complainant lost many items which were eventually found in possession of appellant and some, like the bicycle had been vandalized. Mrs Kagiri further pointed out that the learned trial magistrate took into consideration, the appellant's plea in mitigation. As for his health problems, learned State Counsel says the prisons have facilities to take care of the health of prisoners in their custody.

It is apparent from the record, that apart from doing casual work at the complainant's hotel, the appellant and complainant were in-laws. It would then appear that the appellant abused that cordial relationship, and as the learned trial magistrate noted, ***“he did not just steal the solid items, but he dismantled the stolen bicycle's accessories and had them and other items hidden at the home of 2nd accused.”***

The total value of the property was Kshs,15,732/-.

Of course the appellant was not a habitual offender – at least he had no criminal records – yet his whole conduct in committing the offence was shrouded in deceit and malice – thus the destruction of what he could not quickly consume. The value of the property was not of such an astronomical figure – would the circumstances then justify a maximum sentence?

I think given that appellant was a first offender and the value of the property involved, a maximum sentence was rather harsh and under the circumstances I would reduce it to a shorter jail term. Consequently

(1) The three year imprisonment imposed by the trial court is set aside and substituted with a two year term of imprisonment as from the date of the original sentence.

(2) In the event that the appellant will have served the term now imposed then he shall be set at liberty forthwith unless otherwise lawfully held.

Delivered, dated and signed at Nairobi this 18th day of April, 2008.

H. A. OMONDI

JUDGE