



REPUBLIC OF KENYA

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

Criminal Appeal 76 of 2007

ELUIS OMONDI OGUNA.....APPELLANT

-AND-

REPUBLIC .....RESPONDENT

*(An appeal from sentence imposed by Resident Magistrate*

*A.O. Ademba on 5<sup>th</sup> June, 2006 in Criminal Case No.3781 of 2006*

*at Makadara Law Courts)*

**JUDGEMENT**

The appellant was charged with the offence of theft from a person contrary to s.279(a) of the Penal Code (Cap.63, Laws of Kenya). The particulars were that, on 5<sup>th</sup> July, 2006 at Huruma Estate in Nairobi, within the Nairobi Area, the appellant stole a dress and cash, Kshs.1,800/=, the property of **Edward Kyulu Nzioka**, from the person of the said **Edward Kyulu Nzioka**.

It is recorded that when the substance of the charge and every element thereof was stated to the appellant herein by the Court, in a language that he understands, and then the Court asked him whether he admitted or denied the truth thereof, he replied: "It's true." The Court thereupon entered a plea of guilty, after which the prosecutor read out the facts.

The facts as stated, are that on 5<sup>th</sup> July, 2006 at Huruma Estate in Nairobi, the complainant who is a clothes-hawker, was approached by the accused who claimed he wanted to buy a dress for his wife. He selected a dress which he said fitted his wife, and then asked the complainant to come outside with him; and while the two were in the darkness, he grabbed the complainant and took his money, in the sum of Kshs.1,800/=. The complainant reported the matter to the Police station, and investigations were initiated. Subsequently, much later, the accused was arrested and charged with the offence of stealing from a person.

The accused acknowledged the stated facts as true, whereupon he was convicted on his own plea of guilty. He proceeded to make a mitigation statement: he craved forgiveness, and said he was a married man with children to care for.

After considering the mitigation statement, the learned Resident Magistrate sentenced the accused to a two-year term of imprisonment.

Learned counsel **Mr. Kanyangi** stated in Court that the appellant has already served the term of imprisonment imposed by the trial Court, and has been released; but this appeal had been brought all the same, because the conviction had been arrived at erroneously. It was urged that the facts did not support the charge under s.279(a) of the Penal Code: that, the fact that the accused stole one dress and cash, being the property of the complainant, were not consistent with the facts as read out in Court. In the circumstances, it was urged, there had been no unequivocal plea of guilty – and so, on the facts as given, the appellant should not have been convicted.

Learned counsel also urged that since the appellant was a first offender, the sentence imposed had been manifestly excessive.

**Mr. Kanyangi** urged that the conviction be quashed, and the sentence set aside.

Learned counsel **Ms. Gateru**, for the respondent, opposed the appeal, and supported conviction and sentence. She urged that the plea had been properly taken, in a language understood by the appellant; the appellant pleaded guilty; and the facts disclosed an offence known to the law – theft from a person contrary to s.279 of the Penal Code. The appellant had taken a dress which he had not paid for, and he had stolen Kshs.1,800/=.

Counsel urged that there was nothing on record to show that the trial Magistrate had not acted judiciously.

Counsel recalled the provision of s.348 of the Criminal Procedure Code (Cap.75, Laws of Kenya), regarding appeals in situations where pleas of guilty had been recorded. The said s.348 of the Criminal Procedure Code provides:

***“No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.”***

Now as regards sentence, counsel urged that a “very lenient sentence” had been imposed, for the maximum sentence provided for was fourteen years in jail; the learned Magistrate had taken into account the mitigation, when he imposed a two-year-term of imprisonment. Counsel urged that the appeal had no merit and should be dismissed, and sentence confirmed.

In his response, **Mr. Kanyangi** urged a new point: that the languages used in Court when the conviction was entered were English and Kiswahili; but the appellant primarily spoke *Dho-Luo*, and hence it was impossible to say he did understand the languages used in Court: and on this account, the plea had not been unequivocal.

The exact gravamen in the appeal, in my opinion, does not exactly beckon out to all and sundry. From the facts on record money was stolen from the complainant. The facts also make it reasonably clear that a dress was taken away from the complainant. Since the appellant did plead guilty, this would be an acknowledgement that, indeed, he stole the said items from the complainant.

The next point raised in the appeal is whether the appellant understood the languages used in the Court – English and Kiswahili. Does the fact that this appellant came from the Luo community, mean he could not follow Kiswahili, the language which is the most widely used in Nairobi, and which in Kenya is the *lingua franca*? Logically, that would not be so. On *fact*, this Court will take judicial notice, based on the recorded fact that the incident took place in Nairobi’s Huruma Estate, and the fact that the complainant, with whom the appellant *had been communicating*, in all probability was not from the Luo community – that the appellant would not have been linguistically handicapped when the plea was taken in Court. On fact, therefore, I hold that the appellant *did* understand the charge, at the time it was read out to him, along with the facts, and he pleaded guilty.

It follows, therefore, that the Court acted judiciously in finding the appellant guilty, and in sentencing him accordingly. I cannot say that, out of a possible sentence of 14 years in jail, a sentence of two years’

imprisonment would rightly be perceived as harsh and excessive. This point as a ground of appeal, indeed, has, to my mind, a complexion of frivolity, and it is for dismissal.

The appeal is dismissed. Conviction is upheld. Sentence is affirmed.

***Orders accordingly.***

**DATED** and **DELIVERED** at Nairobi this 29<sup>th</sup> day of October, 2008.

**J.B. OJWANG**

**JUDGE**

**Coram: Ojwang, J.**

**Court Clerk: Huka**

**For the Appellant: Mr. Kanyangi**

**For the Respondent: Ms. Gateru**