



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

**Criminal Appeal 704 of 2006**

**DORCAS MELI LUTI.....APPELLANT**

**-AND-**

**REPUBLIC.....RESPONDENT**

***(An appeal from sentence imposed by Senior Resident Magistrate Ms. Karani on 22<sup>nd</sup> November, 2006 in Criminal Case No. 5133 of 2006 at Makadara Law Courts)***

**JUDGMENT**

The appellant was charged with stealing by servant contrary to s. 281 of the Penal Code (Cap.63, Laws of Kenya). The particulars were that the appellant, on divers dates between the months of July and September, 2006 at Imara Daima Estate in Embakasi, within the Nairobi Area, being a servant of Sabina Kiilu, stole from Sabina Kiilu two mobile phones, Nokia and Samsung by make respectively, three suits, and one gold ear-ring – all valued at Kshs. 64,500/= – which came into her possession by virtue of her employment.

The record shows that, on 15<sup>th</sup> September, 2006 before Principal Magistrate Mrs. Nzioka, the substance of the charge and every element thereof was stated to the appellant herein, and when she was asked whether she denied the truth of every element of the charge, she replied in Kiswahili, “It is not true”, and a plea of *not guilty* was entered.

Before Senior Resident Magistrate Ms. Karani on 8<sup>th</sup> November, 2006, when the prosecutor, Inspector of police Muriuki informed the Court he was ready with one witness, the next entry on record is: “Accused had admitted the offence”. It is then recorded: “charge read over [and] explained to accused”; and the following words are then attributed to the accused: “true”. Thereafter the facts are read out, and it then recorded: “Accused: it’s true I stole the things named”. The record then proceeds:

“Court: accused convicted on own plea of guilty”.

I have matched the typed proceedings against the hand - written record for the occasion when the appellant had *pleaded guilty*; so the details set out above, from the time Senior Resident Magistrate Karani took over this matter, run directly counter to the fact that there was an already recorded plea of *not guilty*. The learned Magistrate proceeds to take the statement from the prosecutor, that the accused is a first offender, and to take a “mitigation statement” from the appellant herein. The learned Magistrate goes on, on that very footing, to call for a Community Service Report, and then, on 22<sup>nd</sup> November, 2006, proceeds to sentence the appellant to a jail term of three - years - and - a - half.

It is strange that the appellant, in her grounds of appeal, states that: “I pleaded guilty to the charge and [was] convicted on my own plea.”

The content of the appellant’s grounds of appeal would confirm that she had an *arguable defence*, and this is consistent with the recorded plea of not guilty. These detailed (18 in number) grounds of appeal actually assert the appellant’s *innocence* in her own perception.

From the foregoing account, the proceedings which took place before the Senior Resident Magistrate are fundamentally irregular. But at the hearing, learned respondent's counsel, Mr. Makura opposed the appeal; and he urged that the appellant *had* pleaded guilty, when she was brought before the trial Court. He submitted that, whereas the sentence meted out was three-and-a-half years of imprisonment, the law allowed for as much as *seven years* in jail, for stealing by servant (s.281 of the Penal Code) – and counsel urged that the sentence was neither harsh nor excessive. He further contended that “no extraneous circumstances were taken into account”, in the imposition of sentence; he urged that the appeal be dismissed.

For the reasons already stated, I hereby annul the sentence imposed by the Senior Resident Magistrate. I order that the appellant shall forthwith be released, unless otherwise lawfully held.

**Orders accordingly.**

DATED and DELIVERED at Nairobi this 22<sup>nd</sup> day of October, 2008.

**J.B. OJWANG**

**JUDGE**