



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA**

**Criminal Appeal 38 of 2008**

**JOHN SASI SIMANGWI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant, John Sasi Simangwi, was charged in the Senior Resident Magistrate's Court at Kaloleni with the offence of hotel-room breaking contrary to Section 304 (1) and stealing contrary to Section 279 (b) of the Penal Code. The particulars of the offence were that on the 25<sup>th</sup> day of September 2007 at Porini Guest House, Mariakani Location in Kaloleni District within the Coast Province, the appellant broke and entered a hotel- room at the said Guest House with intent to steal therein and did steal one mobile phone, make Nokia 1110 valued at Kshs. 2,500.00 and a wallet containing Equity cards and a cash sum of Kshs. 1,550.00 the property of Nzomo Mulwa Nzomo.

When the appellant first appeared before F. W. Andayi, then an Ag. Senior Resident Magistrate on 28<sup>th</sup> September 2007, he pleaded not guilty to the offence. On 29<sup>th</sup> November 2007, the appellant informed the court that he wished to plead guilty to the charge. The charge was then read and explained to the appellant in Kiswahili to which the appellant responded "its true". The Learned Ag, Senior Resident Magistrate then entered a plea of guilty for the appellant.

The prosecution sought time to assemble its facts from the police file and was allowed to present them on 5<sup>th</sup> December 2007. The facts were stated and the appellant responded that the facts were correct. The Learned Ag. Senior Resident Magistrate then convicted the appellant on his own plea of guilty.

In mitigation the appellant prayed for leniency, since he had committed the offence out of drunkenness. The Learned trial Magistrate considered the appellant's mitigation and took into account the fact that he had pleaded guilty to the charge and further that all the stolen items had been recovered. He therefore referred the case to the Community Service Officer for a report on the appellant. An oral report was given by one Nyong'a on 13<sup>th</sup> December 2007. He informed the court that the appellant hails from Kuria District and was not remorseful and asked the court to deal with the appellant otherwise than by Community Service Order.

The Learned Ag. Senior Resident Magistrate then sentenced the appellant to 4 years imprisonment on the 1<sup>st</sup> limb of hotel-room breaking and 2 years imprisonment for stealing. The sentences were to run concurrently.

The appellant was not satisfied with the sentences and has moved to this court on appeal substantially on the ground that the said sentences are too harsh and excessive in the circumstances. During the

hearing of the appeal, the appellant appeared in person and Mr. Onserio appeared for the Republic. The appellant maintained that he pleaded guilty and that the Community Service Officer did not recommend community service for him because he had no relatives in Mombasa. The appellant, therefore prayed that the said sentences be reduced.

Mr. Onserio was in agreement with the appellant. He argued that it was improper for the Community Service Officer to deny the appellant a chance to do community service merely because he is from Kuria District. The Learned State Counsel further submitted that taking into account all circumstances of the case, the sentence imposed upon the appellant is excessive.

I have re-evaluated the proceedings which took place before the Learned Ag. Senior Resident Magistrate. Whereas technical objections could have been raised on the manner in which the appellant's plea was recorded, the appellant himself has reiterated before this court that he pleaded guilty to the charge. So the fact that his own words in response to the charge do not appear to have been recorded by the Learned Ag. Senior Resident Magistrate is not now relevant. On his plea that the sentences imposed upon him are manifestly harsh in the circumstances, I am persuaded that that is the case. The appellant had initially persuaded the Learned Ag. Senior Resident Magistrate to exercise leniency. It was not sufficient to alter that position merely because the appellant had no relatives in Mombasa or that he hails from Kuria District. The appellant has liberty to decide where to live and or earn a living in the whole of Kenya.

In the premises, I have come to the conclusion that the sentences imposed upon the appellant were excessive in the circumstances. I will in the premises interfere with the same. The same are reduced to the period already served with respect to both sentences. The effect is that the appeal against the sentences is allowed. The sentences of four (4) years imprisonment for hotel-room breaking contrary to Section 304 (1) of the Penal Code and that of two (2) years imprisonment for stealing contrary to Section 279 (b) of the Penal Code are hereby set aside and substituted with the period already serviced. The appellant should be released from prison forthwith unless he is held for some other lawful cause.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 7<sup>TH</sup> DAY OF OCTOBER 2008.

**F. AZANGALALA**

**JUDGE**

Read in the presence of:

The Appellant in person and Onserio for the Republic.

**F. AZANGALALA**

**JUDGE**

**7<sup>TH</sup> OCTOBER 2008**