REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(CORAM: OJWANG, J.)

CRIMINAL APPEAL NO. 607 OF 2006

BETWEEN

JAMES GACHIRI WANJA…..……..…… APPELLANT

-AND-

REPUBLIC……...RESPONDENT

(An appeal from a three-year-imprisonment sentence imposed by Resident Magistrate, H. Nyakweba at the Kiambu Law Courts in Criminal Case No.1235 of 2006, on 10th August, 2006)

JUDGEMENT

The grounds in support of this appeal are set out in the appellant's petition of appeal which was filed on 13th October, 2006. These grounds are as follows:

(a) that, the appellant had "pleaded not guilty at the trial";

(b) that, the learned Magistrate "failed to consider fully" the facts of the case;

(c) that, the learned Magistrate failed to consider the appellant's plea in mitigation;

(d) that, the learned Magistrate failed to consider the appellant as a first offender when he imposed a sentence of "4 years' imprisonment";

(e) that, the learned Magistrate failed to consider the circumstances that led to the commission of the offence.

The charge, in the trial Court, had been that the appellant, on the night of 25th – 26th May, 2006, at Riambai Village in Kiambu District, stole a pair of slippers valued at Kshs.100/=, being the property of one ***Charles Muturi Kiarie*** – contrary to s.275 of the Penal Code (Cap.63). An alternative charge had also been brought against the appellant: handling stolen goods contrary to s.322 of the Penal Code (Cap.63). Subsequently the case was consolidated with a similar one, Criminal Case No.1236 of 2006.

While it is clear that the appellant's grounds of appeal are somewhat generalised, and relate to both conviction and sentence, the record made by Resident Magistrate ***H. Nyakweba*** indicates that the

gravamen on appeal can only relate to *sentence*, and not to conviction.

When the consolidated charges were read to the appellant on 13th July, 2006 and at his own request, he pleaded: "it is true"; and thereupon the learned Senior Resident Magistrate entered a plea of "guilty." The matter was then mentioned on 20th July, 2006 when the facts were set out by the prosecution; and to these facts the appellant stated in Court: "The facts are true." The learned Magistrate recorded that the accused was "convicted on his own plea of guilty."

As the prosecutor stated in Court that there was no previous criminal record on the appellant, and that he should be treated as a first offender, the learned Magistrate ordered for a pre-sentence report from a Probation Officer. The Probation Officer's report which was presented in Court on 10th August, 2006 showed that the appellant was already serving sentence in a similar offence in Criminal Case No. 1236 of 2006; and on this basis the learned Magistrate remarked: "It appears he is a habitual offender; a deterrent sentence is therefore necessary"; and he went on to impose a sentence of three years' imprisonment.

The foregoing facts disclose a problem with the trial Court's conviction and sentence which, however, ahs not been brought out in the petition of appeal, or in the submissions made on the occasion of this appeal. There has been no explanation by the respondent of the legal justification for the consolidation of Criminal Case No. 1235 with Criminal Case No. 1236 if already, the appellant had been found guilty in Criminal Case No. 1236 and was in the course of serving sentence. It is not clear to this Court how a decided case could again be consolidated with a new case, and then a fresh plea be taken in respect of the consolidated case. Would the appellant not, in effect, be pleading guilty for a second time, in respect of at least an element in the consolidated case? Certainly. And if so, then this would be contrary to a well-established principle of criminal law: *autrefois convict*. This concept is thus explained in Osborn's Concise Law Dictionary, 6th ed. (London: Sweet & Maxwell, 1976):

> "[Formerly convicted.] A special plea in bar to a criminal prosecution by which the prisoner alleges that he has been already tried and convicted for the same offence before a court of competent jurisdiction."

A consideration of a fully tried criminal case with a new criminal trial would, besides, pose serious difficulties as regards sentencing. As already noted, the trial Court had imposed a three-year term of imprisonment; but for which offence – as sentence had already been awarded for Criminal Case No.1236 of 2006? How could the earlier sentence possibly be unscrambled, and added on to sentence for the new offence?

There can be no doubt that the learned Magistrate, in imposing sentence in respect of the new case, was influenced by the fact that the appellant had been found guilty in the earlier case – because he dispensed the three-year term of imprisonment, which appears to be the true subject of the instant appeal, on the basis that the appellant had shown himself to be "a habitual offender."

Thus, even before getting to the merits of the submissions on appeal, it may be stated here that the setting for the trial itself, in Criminal Case No. 1235 of 2006, was tainted with impropriety and illegality.

It is on the basis of the more structured submission on appeal, by learned State Counsel ***Mrs. Kagiri,*** that the appellant himself was able to state his case. She entered her submission by inviting the appellant to acknowledge that he had pleaded guilty at the trial Court, and so he could now only be contesting sentence – quite contrary to the content and purport of his petition papers. The appellant did, indeed, concede that he was only contesting the sentence which had been meted out against him.

Once the appellant made that concession, learned counsel now, in her turn, made a concession regarding the merits of the appeal on sentence. This concession by the State, however, calls for scrutiny, as a certain remarkable defect is apparent in it. As already noted, the trial Court lacked a foundation for imposing sentence according to law, from the moment it consolidated a fully-heard criminal case with a new one, when sentence on the old case was already being served.

Whereas the record shows that the trial Court imposed a sentence of three-year-imprisonment, the erroneous reference to a four-year-sentence in the appellant's petition of appeal was adopted as a factual statement be ***Mrs. Kagiri.*** She urged that a four-year term of imprisonment would have contravened the terms of s.275 of the Penal Code (Cap.63) which relates to the general offence of theft. That section provides:

> "Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years."

Although learned counsel censored the sentence awarded by the learned Magistrate as illegal, such was not at all apparent on the face of the record of proceedings. Thus there was, with respect, no basis for learned counsel to urge a rectification of an illegal sentence. Rectification, if it be, would have to be on more fundamental considerations, as already indicated earlier on.

Aside from the possibility of illegality tainting the trial Court's sentence, learned counsel justified her concessions by urging that the appellant was a first offender; that he had pleaded guilty and thus helped to save for the Court precious time as well as incidental expenses; that his appeal had merits. And the appellant himself took the cue and asked for pardon, invoking the plight being suffered by his children while he remained in jail.

It is clear to me that there are fundamental legal questions, of a radical impact, which must determine the fate of this appeal even without recourse to the points stated in the petition of appeal or the specific points canvassed during the hearing in this Court.

The consolidation of a concluded criminal case with a new matter coming up for trial, in my opinion, undermined the very basis of the trial which culminated in the sentence now being challenged. The sentence itself, as a result, had no lawful time-frame on the basis of which it could be reckoned. In these circumstances the trial, I would hold, lacked legal validity and could not properly lead to the sentence which was imposed.

It would have been proper to order a new trial, in these circumstances. However, taking into account the fact that the appellant has been in jail for about nine months now, I consider it fair that he be set at liberty.

I hereby acquit the appellant, and order that he shall be realised from prison forthwith, unless he is lawfully held in some other cause.

Orders accordingly.

DATED and DELIVERED at Nairobi this 10th day of May, 2007.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: G. Ndungu

For the Respondent: Mrs. Kagiri

Appellant in person