



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(CORAM: OJWANG, J.)

CRIMINAL APPEAL NO. 150 OF 2006

BETWEEN

MOHAMMED FACKIRDAD KALUNDU..... APPELLANT

-AND-

REPUBLIC.....RESPONDENT

(An appeal from sentence imposed by Senior Resident Magistrate Ms. Kasera on 30th December, 2005 in Criminal Case No. 4597 of 2005 at the Kibera Law Courts)

JUDGEMENT

The appellant herein, ***Mohammed Fackirdad Kalundu***, was charged with three counts of the offence of stealing, contrary to s.275 of the Penal Code (Cap.75, Laws of Kenya). The particulars were, firstly, that on 27th May, 2005 at Dog Unit Training Police Lines Langata, in Nairobi, the appellant stole Kshs.10,000/=, one briefcase, one lap-top computer, make *Toshiba Pentium*, three diskettes, five Jeans trousers, one T-shirt, one pair of shorts, one long-sleeved jersey, and one long-sleeved shirt all amounting to Kshs.94,000/= the property of ***Shedrack Hiribae Osia***.

Secondly, that on 27th May, 2005 at Dog Unit Training Police Lines Langata, in Nairobi the appellant stole one mobile phone, make *Motorola V150* valued at Kshs.17,000/= the property of ***Ngate Samwel***. Thirdly, that on 27th May, 2005 at Dog Unit Training Police Lines Langata, in Nairobi the appellant stole one robe valued at Kshs.500/=, the property of ***Majungu Juma***.

The appellant who had at first pleaded not guilty to all the counts, on ***23rd December, 2005*** changed his mind and requested the Court for an opportunity to make a change of plea. This opportunity was given on ***29th December, 2005*** when the learned Senior Resident Magistrate, ***Ms. Kasera*** recorded a plea of guilty, on all the three counts.

This led to the facts relating to the offences being read out by ***Inspector Oyoo***, on 30th December, 2005; and those facts were as follows.

On 26th May, 2005 the 1st complainant welcomed the appellant herein in his house, at the Dog Training Centre at Langata. The 1st complainant left the accused resting in his house as he (1st complainant) left

for his regular employment. As he thus departed from his house, the 1st complainant left in the safe custody of his house the items which were the subject of the criminal charge against the appellant: the sum of Kshs.10,000/=; a briefcase; a lap-top computer and other items. When he returned to the house, the appellant was not to be found; and when he carried out a check of the inside of his house, he found the said items of his, missing. After searching in vain for the appellant, the 1st complainant made a complaint at the Langata Police Station. This alert led to the arrest of the appellant on the following day, 27th May, 2005. It was also now discovered that on that same day of arrest, the appellant had entered the house of the 2nd complainant, and had stolen a mobile phone, *Motorola* by make, valued at Kshs.17,000/=; and the appellant had also entered the house of the 3rd complainant, and had stolen one robe, valued at Kshs.500/=. The appellant was in the vicinity of the complainant's houses when he was arrested, held at Langata Police Station, and charged with the several counts of theft.

The appellant acknowledged before the Court, that the facts as rendered by the prosecution, were true. The learned Magistrate then heard his plea in mitigation: that he is a husband and a parent, and also has three brothers for whom he provided sustenance. She proceeded to impose a *three-year* term of imprisonment in respect of the first count; and a *two-year* term of imprisonment in respect of the second count and third count respectively – these penalties to run *consecutively*. It turned out that the appellant was to serve a continuous jail term of *seven years*.

In his petition of appeal the appellant acknowledged that he had pleaded guilty, and so was only contesting *sentence*. In this regard the grounds of appeal are thus stated:

- (1) that, the trial Magistrate erred in law when she imposed a maximum sentence of seven years' imprisonment, despite the plea made in *mitigation*;
- (2) that, the verdict of the trial Court was harsh, severe and unbearable;
- (3) that, the learned Magistrate misdirected herself in law and fact, applied a wrong principle, and imposed sentences carrying grave consequence during their execution;
- (4) that, the appellant was remorseful, and deserved a more lenient sentence.

Learned State Counsel **Ms. Gakobo** conceded that the sentence imposed by the trial Court was harsh, considering that the appellant was a first offender, according to the record. This was the case, in particular, with regard to the three-year term of imprisonment imposed for the first count of the charge; it was the maximum term permitted under s.275 of the Penal Code (Cap.63).

As regards the two-year term of imprisonment imposed in respect of the second and third counts, learned counsel submitted that this was in every respect legal, and ought not to be disturbed; save that, in counsel's view, the two sentences could have been made to run *concurrently*.

There is no record which shows the appellant to have been convicted of theft before the conviction recorded by the trial Court in this matter. He is, therefore to be taken to have been a *first offender*; and that fact dictates that he should not, in principle, be punished with the maximum penalties prescribed by law.

Applying the foregoing principle, I hereby set aside the trial Court's sentence on the first count of the charge, and substitute it with a term of imprisonment of *two years*. Applying the same principle, I hereby retain and affirm the two-year term of imprisonment which the trial Court had imposed in respect of both the second and the third counts of the charge. I, however, consider the three counts of theft to be so *related in character, timing and occasion*, that they ought in normal judicial practice to be penalised as *one single course of infractions*. I, therefore, order that the three separate two-year terms of imprisonment, in respect of the three counts of theft, shall *run concurrently*.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 30th day of July, 2007.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: G. Ndung'u

For the Respondent: Ms. Gakobo

The Appellant in person