



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
(CORAM: OJWANG, J.)

CRIMINAL APPEAL NO. 97 OF 2006

BETWEEN

DAUDI WACHIRO ABDUL.....APPELLANT

-AND-

REPUBLIC.....RESPONDENT

(An appeal from the sentence awarded by Principal Magistrate Mrs. G.L. Nzioka on 2nd March, 2006 in Criminal Case No. 1405 of 2006 at the Makadara Law Courts)

JUDGEMENT

The appellant was charged with the offence of stealing a motor vehicle contrary to s.278(a) of the Penal Code (Cap.63). The particulars were that the appellant, on 10th February, 2006, at Burma Market in the Nairobi Area, jointly with others not before the Court, stole a motor vehicle reg. No. KAU 170K, a Nissan Pick-up, grey in colour, valued at Kshs.1,000,000/= the property of **James Mumo Musyoka**.

The record shows that after the substance of the charge and every element thereof was stated to the appellant, he pleaded: "It is true I stole that motor vehicle." A plea of guilty was then entered, after which the prosecution stated the facts relating to the commission of the offence.

On 10th February, 2006 at about 8.00 a.m., the complainant took his motor vehicle, reg. No. KAU 170K, Nissan Pick-up to the appellant to wash for him. After the appellant had washed the said motor vehicle, he asked one **Jackson** to drive it to Kamukunji, allegedly for the purpose of meeting the owner of the motor vehicle. As the two of them drove towards Kamukunji, they met somebody else, who the appellant said, knew where the owner of the said motor vehicle was. So the appellant told the said **Jackson** to disembark, and return to his place. When the complainant later sought to retrieve his motor vehicle, he did not find it, and he could not trace the appellant. He reported the matter to Shauri Moyo Police Station, and on 15th February, 2006 the appellant was arrested and charged. The said motor vehicle had not been recovered when the appellant was brought before the trial Court.

The appellant acknowledged the record of facts to be true, and he was convicted on his own plea of guilty. After hearing the appellant's address in mitigation, the Court awarded a sentence of five years'

imprisonment.

The appellant comes before this Court pleading that he is remorseful and deeply regrets the loss of the complainant's motor vehicle; and that the sentence of imprisonment be set aside and substituted with a non-custodial sentence.

Learned State Counsel **Mr. Makura** opposed the appeal on sentence, as the maximum term of imprisonment provided for is seven years, while the term of imprisonment imposed was five years. In the words of learned counsel, "The Magistrate exercised her discretion properly and did not act on wrong principle or on mistake of law or fact; the sentence was not patently harsh, or manifestly excessive. The trial Court did not overlook any material factor."

Learned counsel urged that, as the trial Court had taken into account the appellant's statement in mitigation, the appeal had no merits and should be dismissed.

The appellant himself urged that the theft of the motor vehicle happened only because he had been deceived; and he had expressed remorse, and deserved a reduction of sentence.

It is clear to me that the appellant recognises he had been part of an alliance of thieves which deprived the complainant of his motor vehicle. He deserves to suffer punishment on that score. The five-year term of imprisonment awarded by the learned Magistrate was imposed in judicious exercise of lawful discretion. Whenever a discretion is thus exercised by the trial Court, its correctness is to be assumed, unless a wrong principle is shown to taint such exercise of discretion. And so it is the obligation of this Court to protect the lawful and principled exercise of discretion by the trial Court, rather than substitute this Court's discretion for that of the trial Court.

I am in agreement with learned State Counsel that the sentence of five years' imprisonment awarded by the trial Court, out of a possible penalty of seven years, was, in the circumstances of this case, fair and most appropriate.

I therefore dismiss this appeal, and affirm the sentence imposed by the trial Court.

Orders accordingly.

DATED and DELIVERED at Nairobi this 23rd day of July, 2007.

J.B. OJWANG

JUDGE

Coram: Ojwang, J

Court Clerk: Nd'ungu

For the Respondent: Mr. Makura

The Appellant in person