



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

Criminal Appeal 294 of 2006

MOHAMMED MUSA MUNENE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No. 380 of 2006 of the Chief Magistrate's court at Makadara – Mr. Kassan DMII)

JUDGMENT

MOHAMMED MUSA MUNENE, the appellant, was charged before the subordinate court with offence of stealing from the person contrary to section 279(a) of the Penal Code. The particulars of the offence were that on 13th January 2006 at Roysambu Nairobi within Nairobi Area jointly with another not before the court, stole one mobile phone make Nokia 2300, one Safaricom scratch card and cash Kshs.50/= all valued at Kshs.5800/= the property of DANIEL MISANGO from the person of the said DANIEL MISANGO. He was recorded to have pleaded guilty to the charge. He was convicted and sentenced to serve three (3) years. He has now appealed to this court against sentence.

At the hearing of the appeal, the appellant submitted that he was asking for mercy as he had suffered enough in prison and his wife had now abandoned their three children.

Learned State Counsel, Mr. Makura, opposed the appeal on sentence and submitted that the sentence imposed was legal and neither harsh no excessive, as the maximum sentence for the offence was 14 years imprisonment. Counsel submitted that the magistrate had exercised his discretion in sentencing properly.

This is an appeal on sentence. Sentence is essentially a discretion of the sentencing court. An appellate court will be show to interfere with the exercise of that discretion unless it is shown that the sentencing court took into account an irrelevant factor, or that it took into account a relevant factor, or that it applied a wrong principle or short of these the sentence is so harsh and excessive that an error of principle must be inferred – See SHADRACK KIPROTICH KOKO –vs- REPUBLIC – Criminal Appeal No. 253 of 2003 Eldoret (CA).

Indeed, the offence for which the appellant was convicted carried a maximum sentence of 14 years imprisonment. In the notes on sentencing the learned magistrate merely stated –

“Accused is sentenced to three (3) years imprisonment”

In sentencing the learned magistrate did not take into account that the appellant pleaded guilty to the charge and did not waste the courts time. The learned magistrate also did not take into account that the

items stolen were recovered. The learned magistrate further did not take into account that the appellant was a first offender. This court can only be certain that the learned magistrate took into account the above factors if the notes in sentencing stated so. The learned magistrate did not do so. In the absence of that, this court cannot make assumptions. Therefore I find that the learned magistrate did not take into account relevant factors in sentencing.

The sentence is perfectly legal and, on the face of it, lenient. However, I am of the view that had the learned magistrate taken into account the above relevant factors, he would have sentenced the appellant to a more lenient sentence. On that ground, I will interfere with the sentence imposed, and vary the same.

For the above reasons, I allow the appeal on sentence and order as follows –

1. I quash the sentence imposed by the subordinate court.
2. In its place I order that the appellant will serve a sentence of two (2) years imprisonment with effect from the date he was sentenced by the subordinate court.

It is so ordered.

Dated and delivered at Nairobi this 31st day of October 2007.

George Dulu

Judge

In the presence of –

Appellant in person - absent

Mr. Makura for State - absent

Eric - court clerk