REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 96 of 2005

MOSES NGUGI NJOROGE …… APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

(Appeal from original Conviction and Sentence of the Senior Resident magistrate's court at Kigumo in Criminal Case No. 1452 of 2003 dated 10th February 2005 by L. Nyambura – S.R.M.)

J U D G M E N T

The appellant before me, Moses Ngugi Njoroge was charged before the Senior Resident Magistrate's Court at Kigumo with the offence of school laboratory breaking and stealing contrary to section 306(1) of the Penal Code. Alternatively the appellant was charged with handling stolen goods contrary to section 322(2) of the Penal Code. In the fullness of time, the appellant was duly tried but convicted on the alternative count. Upon conviction, the appellant was sentenced to 2 years imprisonment. He was aggrieved by the conviction and sentence. He therefore preferred this appeal.

When the appeal came up for hearing before me, **Mr. Mugo**, learned counsel appearing for the appellant opted to abandon the appeal on conviction. Instead he opted to pursue the appeal on sentence only. In support thereof counsel submitted that the trial court failed to consider the appellant's mitigation. That the appellant had worked at the school for over 10 years and because of the conviction he had lost all the benefits. That the appellant was deeply remorseful and had totally reformed. Finally counsel submitted that the appellant was the sole provider of his family.

Mr. Orinda, learned principal state counsel did not oppose or support the appeal. Rather he elected to leave the matter to court.

It has been constantly stated that sentencing is an exercise in discretion by the trial court. That discretion cannot be taken away by the appellate court unless it is demonstrated that in imposing the sentence, the trial court acted capriciously or failed to take into account matters it ought to have or took in to account matters it shouldn't have and finally if the sentence imposed is illegal or manifestly harsh and or excessive as to amount to a miscarriage of justice.

The alternative offence on which the appellant was convicted carries a maximum sentence of 14 years. The appellant was however sentenced to 2 years. This may not appear to be manifestly harsh and excessive sentence. However considering the value of the item that he was alleged to have been found in possession of i.e. a mere microscope body tube, I think that the sentence imposed in those circumstances was harsh and excessive. I think that this was one of those cases which should have attracted a non custodial sentence. After all, the appellant was a first offender, a fact which should have worked in his favour. Further and I note as correctly pointed out by counsel for the appellant, the trial magistrate totally ignored the appellant's mitigation. Had the learned magistrate for a moment considered the mitigation put forth by the appellant I have no doubt at all that she would have arrived at a entirely different and perhaps right sentence.

I note that the appellant had served about 23 days imprisonment before he was released on bail pending appeal. Much as I would have preferred to impose a non-custodial sentence, my 6th sense tells me that

the appellant has already been sufficiently punished. Accordingly I do not think that it would be right again to impose another penalty. Accordingly and for the foregoing reasons I would reduce the appellant's sentence to the 23 days served before he got a reprieve through bail pending appeal. Orders accordingly.

Dated and delivered at Nyeri this 31st day of October 2007

M. S. A. MAKHANDIA

JUDGE