



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 254 of 2006

(From original conviction and sentence in Criminal Case No. 2782 of 2006 of the Magistrate's Court at Makadara – Mr. Kassan DM II)

ISADAT KEYA KISALIAPPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

SADAT KEYA KISALI, the Appellant, was charged before the Subordinate Court with the offence of stealing from the person contrary to section 279(a) of the Penal Code. The particulars of the offence were that on 11th May 2006 along Landhies Road within Nairobi area stole one mobile phone make Nokia 1600 valued at Kshs.5,500/= the property of Christopher Mbita from the person of the said Christopher Mbita.

When plea was taken, the appellant is recorded to have pleaded guilty. He was convicted and sentenced to serve four (4) years imprisonment. Being aggrieved, he has appealed to this court against the sentence imposed. At the hearing of the appeal the appellant submitted that he had pleaded guilty and asked that the sentence be reduced. He submitted that the subject stolen item (mobile phone) had been recovered. Learned State Counsel, Ms. Gateru, submitted that the State was conceding to the appeal as the appellant pleaded guilty and did not waste the court's time. Counsel further submitted that the mobile phone was recovered. Counsel asked me to review the sentence to any appropriate sentence.

Sentence is essentially the discretion of the sentencing court. An appellate court will be slow 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 failed to take 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 KOGO –VS- REPUBLIC – Criminal Appeal No.253 of 2003 Eldoret (CA)**.

In my view, the subordinate court failed to take into account relevant factors in sentencing. It did not take into account that the appellant was a first offender or that the mobile phone was recovered. There is no mention of these factors in the notes on sentencing. I am of the view that had the learned magistrate taken into account these relevant factors, the sentence would have been much less severe. Learned State Counsel was right in conceding to the appeal on sentence. I will therefore interfere with the sentence.

There is a more important reason why I will interfere with the sentence imposed. The magistrate who sentenced the appellant in MR. KASSAN DMII (Prof.). He sentenced the appellant to four (4) years imprisonment. In terms of section 7(3) of the Criminal Procedure Code (Cap 75) the learned magistrate did not have jurisdiction to pass such a sentence. The section provides –

“7(3) A subordinate court of the second class may pass the following sentences in cases where they are authorized by law –

(a) imprisonment for a term not exceeding two years;

(b) a fine not exceeding ten thousand shillings”.

It follows from the above provisions of the law, that the sentencing court being a DM II court, did not have jurisdiction to pass a sentence of four (4) years imprisonment. The sentence is therefore illegal. I will therefore have to review to a sentence that the sentencing court had jurisdiction to pass.

For the above reasons I find merits in the appeal. I allow the appeal, and order as follows –

1. I quash the sentence passed by the subordinate court.
2. I order that the appellant will serve a sentence of two (2) years imprisonment from the date on which he was sentenced by the subordinate court.

It is so ordered.

Dated and delivered at Nairobi this 22nd October, 2007.

GEORGE DULU

JUDGE

In the presence of –

Appellant in person.

Ms. Gateru for State - absent

Eric – court clerk