



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

Criminal Appeal 324 of 2006

STEPHEN WAITITU KINYANJUI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in Criminal case No.62 of 2006 of the Chief Magistrates Court at Nairobi – Mrs. J. E. Ragot SRM)

JUDGMENT

STEPHEN WAITITU KINYANJUI, the appellant, was charged before the subordinate court with stealing from the person contrary to section 279(a) of the Penal Code. The particulars of offence were that on 8th January 2006 along Kimathi Street Nairobi within Nairobi area jointly with another not before court stole cash Kshs.100/=, handbag, wallet and cosmetics valued at Kshs. 5000/= the property of Elizabeth Camilla Jelagat Rono, from the person of the said Elizabeth Camilla Jelagat Rono. After a full trial, he was convicted and sentenced to serve 3 years imprisonment. Being dissatisfied with the decision of the subordinate court, he has appealed to this court. His filed grounds of appeal appear to be against sentence only. However, at the hearing of the appeal he verbally corrected ground 1 and ground 6 to the effect that the appeal was against both conviction and sentence. Ground 1 was corrected to read that he did not plead guilty. Ground 6 to read that he was pursuing education and that he did not have a family. In his submissions he relied on his grounds of appeal and further stated that he wanted this court to impose a non-custodial sentence so that he could proceed with his studies.

Learned State Counsel Mrs. Kagiri opposed the appeal. Counsel submitted that three witnesses gave direct evidence relating to the commission of the offence. PW1 was the complainant from whom the handbag was snatched by the appellant. Counsel further submitted that PW1 was in the company of PW2 and PW3 during the incident, and the said two witnesses gave evidence that was similar to that of PW1. Counsel submitted that, indeed it was PW3 who chased and arrested the appellant merely 5 meters away from the scene of crime when the appellant threw the handbag to his companion who ran away with it. The appellant was arrested at the locus in quo as there was no opportunity of him escaping. The offence occurred in broad day light and circumstances for identification were favourable. Conviction was therefore safe and secure.

On sentence, counsel submitted that the maximum sentence for the offence was 14 years imprisonment. The learned magistrate considered that the appellant was a first offender and also considered the mitigation of the appellant, and that the offence was prevent in Nairobi. Counsel contended that the sentence was neither harsh nor excessive.

In a short response, the appellant submitted that he was asking for a non-custodial sentence to enable him continue with his studies.

This brief facts are that PW1 ELIZABETH CAMILA CHELAGA was with her sister PW2 CONSTANCE JEPKORIR and PW3 EZEKIEL DAVID MUNGAT RONO at about 4 a.m. They were walking near a joint called TACOS in Nairobi. They were from having a good time that night. They were window shopping for shoes. Someone emerged and grabbed the handbag of PW1. However PW3 caught that person about 5 meters away, after a chase. However, the person who snatched the handbag threw it to someone else who ran away with it.

That person who was caught was taken to the Central Police Station. It was the prosecution case that it was the appellant who took the hand bag of PW1. It was also the prosecution case that the said hand bag contained a wallet, Kshs. 1000/= and cosmetics valued Kshs. 5000/=. The appellant was then charged with the offence.

When put on his defence, the appellant gave an unsworn statement. It was his defence that he knew PW1, the complainant in a party and they became friends. He sated that they disagreed (with PW1) at the party and that was why the witnesses framed him with the offence. He stated further that the matter happened in the morning and they were both drunk.

Faced with this evidence the learned trial magistrate found that the prosecution had proved its case beyond reasonable doubt and that the defence of the appellant was an afterthought.

The conviction of the appellant was predicated on evidence of visual identification and the circumstances of arrest. In *KARANJA AND ANOTHER –vs- REPUBLIC* [2004] 2 KLR 140, the court of Appeal held, inter alia, that –

“1. Evidence of visual identification in criminal cases can bring about a miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger”

In my view, though the intensity of light was not given by the prosecution witnesses, in the circumstances of this case, there could be no possibility of mistaken identity. PW1, PW2 and PW3 did not lose sight of the appellant. PW3 restrained the appellant only 5 meters from the scene. In addition, the appellant in his defence does not deny being with the prosecution witnesses at the time. He however stated in his defence that he was framed due to a disagreement with PW1, whom according to him, was his girlfriend. In his cross-examination however, he did not ask any question to the eyewitnesses regarding raising the issue of a frame up. I find that the appellant was at the scene. I find that the prosecution witnesses did not mistake him for somebody else, and that he was arrested a few meters from the scene. I agree with the learned trial magistrate that the defence of the appellant, alleging a grudge was an afterthought. I find that he was the one who snatched PW1’s handbag. The conviction is safe and I will uphold the same.

On the sentence, the appellant was a first-offender. The maximum sentence for the offence is 14 years. The learned magistrate imposed a sentence of 3 years imprisonment. In my view, the sentence is reasonable, as the stolen items were not recovered, and the learned magistrate took into account the mitigating factors. I will also uphold the sentence.

Consequently, I dismiss the appeal and uphold both the conviction and sentence of the subordinate court.

Dated and delivered at Nairobi this 23rd day of November 2007.

George Dulu

Judge

In the presence of –

Appellant in person

Ms. Gateru for State

Eric - Court clerk