



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)**  
**CRIMINAL APPEAL NO 730 OF 2003**

**SIMON KIOI KANYI .....**  
**.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, in this Appeal **SIMON KIOI KANYI** (to whom I shall hereinafter refer to as the “***Appellant***”) was convicted on his own plea of guilty on a charge of stealing from a person contrary to Section 279 (a) of the Penal Code and sentenced to five (5) years imprisonment. The particulars of the offence were that on 25<sup>th</sup> July, 2003 along River road Nairobi the Appellant jointly with others not before Court stole cash 100/= and Travelling bag worth 900/= the property of **LOISE NYAMBURA MWAURA** from the person of the said **LOISE NYAMBURA MWAURA**.

This Appeal is against sentence only and the Appellant is urging me to interfere and reduce the sentence of five (5) years imposed on him by the subordinate Court. The Appeal is premised on five grounds which are as verbatim:-

1. **THAT** I pleaded guilty to the charge of stealing from the person.
2. **THAT** I am most remorseful and deeply regret the act.
3. **THAT** I beg this Court to take a favourable view of the fact that i have no previous conviction.
4. **THAT** I have a family that wholly depend on me for subsistence who stand to suffer as a result of my long incarceration.
5. **THAT** the sentence imposed on me was inordinately harsh and severe.

In his address to me, the Appellant who was unrepresented only reiterated the fact that the sentence imposed was harsh and excessive considering that he was a first offender. In my view the grounds that the Appellant has put down in his petition of Appeal ought ideally to have been urged before the trial Magistrate in mitigation. Having perused the record I note that when the Appellant was called upon to mitigate he is recorded as saying:-

***“.....I have a problem.....”***

Nothing else is recorded in mitigation in favour of the Appellant apart from the above. This in my view

was unfortunate. The Magistrate ought to have inquired from the Appellant what he meant by:-

**“.....*I have a problem.....*”**

The answer may well have had an impact perhaps on the sentence. As it is, it is difficult to say whether the Appellant had anything to say in mitigation. For purposes of sentence, mitigation is very important, for it goes a long way in determining the appropriate sentence to be imposed. In the absence of any consideration by the Learned Magistrate of any mitigating factors, an Appellant may feel and rightly so in my view that the sentence imposed was manifestly harsh and excessive.

Mrs. Obuo, Learned State Counsel agreed that the sentence imposed was harsh and excessive considering that he Appellant was a first offender and the value of the items stolen.

I agree that the sentence imposed would appear to be excessive. Section 279 (a) of the Penal Code under which the Appellant was charged states that:-

**“.....*If the theft committed under any of the circumstances following, that is to say:-***

***(a). If the thing is stolen from the person of another;***

***(b). .....***

***(c). .....***

**“.....*The offender is liable to imprisonment for fourteen years.....*”**

The Appellant was a first offender. He had readily pleaded guilty to the charge and thereby saved Court’s precious time. This should have worked in his favour. This is a matter which should have attracted probation perhaps.

On my own evaluation of the facts and circumstances of the case, I think that five years imprisonment in the circumstances of this case was excessive, harsh and was uncalled for. It was not deserved and I am therefore minded to disturb the subordinate Court’s decision to the extent that I commute the Appellant’s sentence to the term so far served with the consequence that the Appellant shall forthwith be released from prison custody unless he is otherwise being held for lawful purposes.

Dated at Nairobi this 13<sup>th</sup> day of March, 2006.

.....

**MAKHANDIA**

**JUDGE**