



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
Criminal Appeal 107 of 2003

TIMOTY GITONGA MUGAMBI APPELLANT

AND

THE REPUBLIC RESPONDENT

(Being an appeal from original conviction and sentence in criminal case

No. 1228 of 2003 of the Senior Resident Magistrate's Court at Nkubu dated

27.5.2006 (Nduku Njuki, Esq. SRM)

JUDGMENT OF THE COURT

TIMOTHY GITONGA MUGAMBI was the accused in Nkubu Senior Resident Magistrate's criminal case number 1228 of 2003 in which he was charged in count 1 with stealing stock contrary to section 278 of the penal Code. The particulars of the offence being that:-

“On the 25th day of February 2003 at Iruma s/location in Meru South District within the Eastern Province, stole 2 goats valued at Kshs. 4,000/=, the property of CHARLES MURIUNGI MUGAMBI.”

In count 2, he was charged with stealing from a dwelling house contrary to section 279(b) of the Penal Code. The particulars are that:-

“Between the 23rd and 26th day of February 2003 at Iruma s/location in Meru South District within the Eastern Province, stole 100kgms of tobacco, two thermos flask and a frying pan all valued at Kshs. 10,500/=, the property of CHARLES MURIUNGI MUGAMBI from the dwelling house of the said CHARLES MURIUNGI MUGAMBI”.

The appellant who is a brother to the complainant pleaded guilty to the charge and was sentenced to serve two (2) years imprisonment plus one stroke of the cane and corporal punishment.

The appellant filed his Petition of Appeal on 4.6.2003 from which the following grounds of appeal emerge:-

1. That the learned trial magistrate failed to consider that the appellant was aged 17 years when he was sentencing the appellant to serve the two (2) years' imprisonment.
2. That the learned trial magistrate failed to consider that the appellant was arraigned in court after a misunderstanding between him and his brother over the actual cash realized from the sale of the two goats.

The facts of the case were that between 23rd and 26th February 2003 the appellant went to the

complainant's house and told the complainant's family that the complainant had allowed him to take two goats therefrom. The appellant then took the two goats with him on 23.2.2006. The goats were valued at Kshs. 4,000/=. The appellant also apparently took away from the complainant's house 100kg of tobacco, two flasks and one frying pan all valued at Kshs. 10,500/=. These items were the basis of count 2 of the charge as set out herein above.

The appellant was arrested after a complaint was made to the police. He was subsequently charged with the two offences.

When asked to mitigate after he admitted the facts as given by the prosecutor, the appellant told the court that he was married and had a wife and a one-month old child. That his wife had breast cancer while his mother was dead. He also told the court that his brother did not want to see him at home. What the appellant told the court in mitigation is at variance with what he claimed as part of the grounds of appeal (the same are considered by this court as factors in mitigation) when he stated therein that he was aged 17 years and a student at Iruma Primary School in class 8 and already registered for the Kenya Certificate of Primary Examination (K.C.P.E.).

Before sentencing the appellant, the learned trial magistrate called for a probation officer's report dated 27.6.2003. The following facts emerge from that report:- that the appellant was aged 26 years, married to Esther Kathambi and had one child. The appellant alleged that he had been employed by the complainant who was always reluctant to pay him his dues. The probation report also showed that the offender had not shown any remorse for the offences. The probation officer disrecommended probation.

When the appeal came up for hearing, it was long past the two (2) years imprisonment to which the appellant was sentenced. He had thus long served the sentence. It was not possible for the respondent to serve him with the hearing notice of the appeal. The appeal thus proceeded in the appellant's absence. The advocate for the respondent did not also address the court.

The only issue for determination is whether the appellant was properly convicted and whether the sentence imposed upon the appellant was legal in the circumstances? The appellant alleged in the Petition of Appeal that he was aged 17 years and was a student at Iruma primary School. This allegation by the appellant has been rebutted by the information contained in the probation officer's report dated 27.6.2003. The appellant was actually aged 26 years.

In light of those revelations as contained in the probation officer's report, I would not ordinarily find any reason to warrant an interference with the sentence imposed upon the appellant by the learned trial magistrate. However, a close scrutiny of the record reveals that the appellant was convicted on his own plea of guilty without any indication being given by the trial court as to whether the plea was only on one or both counts. The sentence imposed upon the appellant does not also show on what count the appellant was sentenced to serve the two years plus one stroke of the cane. The court can only infer that this was in relation to count 1 of the charge.

This court finds that the learned trial magistrate's failure to enter a plea of guilty separately on each count and to sentence the appellant separately on each of the two counts occasioned a miscarriage of justice to the appellant. The plea cannot therefore be said to have been unequivocal.

In the result, this appeal succeeds. The conviction is quashed and the sentence of two (2) years' imprisonment and one stroke of the cane is set aside. In any event, even if this court had found that the sentence was properly imposed upon the appellant, it would still have set aside part of the sentence dealing with corporal punishment as outlawed by the CRIMINAL LAW (AMENDMENT) ACT, 2003.

Unless otherwise lawfully held, the appellant is to be released from prison custody forthwith.

Orders accordingly.

Dated and delivered at Meru this 29th day of June, 2006.

RUTH N. SITATI

JUDGE