



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

Criminal Appeal 529 of 2004

(From Original Conviction and Sentence in Criminal Case No. 1129 of 2004 of the Chief Magistrate's Court at Makadara Mrs. Gandani. SRM).

SIMON IBRAHIM KIPKEMBOI.....
.....**APPELLANT**

VERSUS

REPUBLIC.....**RESPONDENT**

JUDGMENT

SIMON IBRAHIM KIPKEMBOI, the appellant was jointly charged with **JOSEPHAT OUSA MAURICE** with one count of shop breaking and stealing contrary to Section 306(a) and 279 (b) of the Penal Code. The appellant pleaded guilty to the charge and was accordingly convicted. However, his colleague pleaded not guilty to the charge and his case proceeded to trial in the normal manner. He was however acquitted of the charge at the no case to answer stage.

Upon conviction on his own plea of guilty, the appellant was sentenced to serve seven (7) years imprisonment. He was aggrieved by the sentence and hence lodged this appeal. In his petition of appeal limited to sentence only, the appellant states that he pleaded guilty to the charge and did not waste court's time, that he was a first offender, that he committed the offence whilst drunk, that he was remorseful, that he has no father and his old mother depends on him as the sole breadwinner and finally that the sentence imposed on him was harsh and excessive for a first offender. In his written submissions in support of the appeal, the appellant merely repeated and reiterated the aforesaid grounds.

Mrs. Gakobo learned state counsel appeared for the state and opposed the appeal. Counsel submitted that the appellant was convicted for shop breaking and stealing. The offence carries a maximum sentence of seven (7) years. Though the jail term imposed was the maximum penalty, counsel maintained that the sentence was neither harsh nor excessive. That the trial court exercised its discretion in sentencing properly.

The principles upon which an appellate court acts in dealing with appeals on sentence have long been settled. In the case of **SAYEKA VS. REPUBLIC (1989) KLR 306**, it was held inter alia:

"..... The appellate court will not ordinarily interfere with the discretion exercised by the lower court unless it is evident that the lower court has acted upon some wrong principles or overlooked some material facts or the sentence is manifestly excessive in the circumstances of the case....."

Further Court of Appeal in the case of **STEPHEN ONDIEKI NYAKUNDI VS. REPUBLIC, CA APP. NO.91 OF 2005 (unreported)** held that:

“..... The court can only interfere with the sentence if it is shown to be unlawful.....”

In the instant case, the appellant was a first offender, yet he was sentenced to the maximum imprisonment term envisaged under the section that he was charged. In my view maximum sentences should be left to those convicts who have demonstrated serial tendencies. If it had been shown that the appellant was a serial shop breaker, then maximum sentence would have been justified. The Court of Appeal in the case of **GEORGE OTIENO OLOO VS. REPUBLIC, CA NO.137 OF 2004 (UNREPORTED)** had this to say on the issue of Maximum Sentences.

“.....The sentence of life imprisonment imposed on the appellant pursuant to his conviction has caused us grave concern. Apart from the statutory maxima, for example, those on the sentencing of persons convicted of robbery with violence contrary to Section 296 (2) of the Penal Code and murder, the appropriate sentence is a matter for the discretion of the sentencing magistrate or judge. This being the case, the magistrate and the judge must act judicially and not to award sentences capriciously. Of late, we have noted a trend where maximum and manifestly harsh sentences of imprisonment have been imposed on convicted persons on wrong factual basis. Though it is the duty of the court to protect the public and punish and deter the criminal, the trial courts must adopt a uniformity of approach.....”

This extract applies with equal force to the circumstances of this case. There are no sentencing notes by the trial magistrate justifying the award of the maximum sentence. The appellant having elected to plead guilty and in the process saved the court its valuable time, he should not have been subjected to the maximum jail term. To that extend therefore the sentence imposed was harsh and excessive. I will interfere with it. In my view the sentence served meets the end of justice. I will therefore allow the appeal on sentence, set aside the sentence of seven (7) years imprisonment imposed and substitute therefor with the sentence already served by the appellant.

The result is that the appellant shall be released forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 25th day of July 2006.

.....

MAKHANDIA

JUDGE