



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

**Criminal Appeal 158 of 2005**

*(From original conviction and sentence in Criminal Case No.2659 of 2005 of the Chief Magistrate’s Court at Makadara, Mrs. Mbugua, RM)*

**RICHARD LOMOYAN AGETE.....  
.....APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

***RICHARD LOMOYAN AGETE*** the Appellant herein was charged with one count of theft by servant contrary to Section 281 of the Penal Code. The Particulars as given in the in the charge sheet were that on 7<sup>th</sup> February, 2005 at Lion Shop along Luthuli Avenue in Nairobi within Nairobi Area, being a servant to ***HUSSEIN MOHAMED ALIO*** employed as a shop attendant, the Appellant stole ninety six pieces of Fridge guards and, a trolley all valued at Kshs.101,000/= the property of ***HUSSEIN MOHAMED ALIO*** which came in to his possession by virtue of his employment.

The Appellant pleaded guilty to the charge. The facts as narrated to the trial Court and admitted by the Appellant were that:-

***“.....On 7<sup>th</sup> January, 2005 accused who was servant of Complainant in a shop in Luthuli was given property as per the charge sheet to take them to another shop at Nyamakima belonging to the Complainant. He never came back and accused never took the goods. Officers from Kamukunji were informed. Accused was traced 2 weeks later and arrested. Items valued at Kshs.101,000/= were not recovered. Accused was later charged.....”***

As the Appellant admitted the facts stated, the trial Court duly convicted him of the offence. The Appellant had nothing to offer in mitigation. The Learned Magistrate in sentencing the Appellant stated:-

***“.....Mitigation considered. Offence serious. Abuse of trust and accused sentenced to three (3) years imprisonment. ....”***

As already stated, the Appellant did not offer any mitigation. Could the Learned Magistrate, have considered non-existent mitigation? It would appear so. Anyhow this in my view was in inadvertent oversight. Nothing much turns on it anyway.

It is from the foregoing that the Appellant comes to this Court by way of Appeal. His Appeal is against sentence only. In support thereof the Appellant states that he pleaded guilty to the offence, is a first offender, a sole breadwinner of the family, remorseful and finally that the sentence imposed is harsh and excessive.

Miss Gateru, Learned State Counsel opposed the Appeal. She submitted that the offence for which the Appellant was convicted carries a maximum jail term of 7 years. The Appellant was only sentenced to a term of 3 years imprisonment. The sentence was thus lawful and even lenient according to the Learned State Counsel. The sentence being lawful, the Appeal had no merit and ought to be dismissed Learned State Counsel concluded her submissions.

The Appellant was convicted, on his own plea of guilty for theft by servant contrary to Section 281 of the Penal Code. He was upon conviction liable to be sentenced to 7 years imprisonment. The Learned Magistrate considered all the circumstances of the case in arriving at the sentence she imposed on the Appellant. I have on my part considered the circumstances under which the offence was committed as well as the mitigating circumstances proffered by the Appellant and it is my view that the sentence of 3 years imposed was neither harsh nor excessive in those circumstances. In imposing the sentence the Learned Magistrate did not take into account irrelevant considerations or failed to take into account relevant factors. Similarly, it would appear that the Learned Magistrate in arriving at the sentence did not exercise her discretion capriciously. See generally **SAYEKO VS REPUBLIC (1989) KLR 306.**

Accordingly there are no grounds to interfere with the sentence meted out on the Appellant. It will stand. Accordingly the Appeal is dismissed.

Dated at Nairobi this 20<sup>th</sup> day of September, 2006

.....

**MAKHANDIA**

**JUDGE**