



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS
Criminal Appeal 255 of 2005

(From original conviction and sentence in Criminal Case number 2643 of 2005 of the Chief Magistrate's Court at Kibera, - Ms. Muchira, SRM)

MWENDE MWINI

APPELLANT

VERSUS

REPUBLIC

.....RESPONDENT

JUDGMENT

The Appellant, [*particulars withheld pursuant to section 76(5) of the Children Act, 2001*] was arraigned before the Chief Magistrate's Court at Kibera on one count of stealing by servant contrary to Section 281 of the Penal Code. He pleaded guilty the charge and was accordingly convicted on her plea of guilty. Upon conviction the Appellant was sentenced to four (4) years imprisonment. Being aggrieved by the sentence, the Appellant lodged the instant Appeal limited to sentence only.

In her petition of Appeal on sentence, the Appellant stated that being a first offender the sentence imposed was too excessive.

In her oral submissions in support of the Appeal on sentence, the Appellant reiterated that the sentence imposed was harsh ad excessive. That she was remorseful. That she had a six months child whom she gave birth to whilst in prison. Finally she submitted that she was fifteen years old.

Mr. Makura, Learned State Counsel who appeared for the State opposed the Appeal. According to the Learned State Counsel, the sentence of 4 years of imprisonment imposed was legal considering that the maximum sentence permitted upon conviction for such an offence is 7 years imprisonment. Counsel submitted further that the trial Magistrate exercised her discretion properly.

Sentencing is a matter for the discretion of the trial Court. The discretion must however be exercised judicially and not capriciously. The trial Court must be guided by evidence and sound legal principles.

The Court must take into account all relevant factors and exclude all extraneous or irrelevant factors. The trial Court's notes on sentence in this matter are sketchy. In a case, as this one, where the Appellant is sentenced to such long prison term, the Court seized of the case is obliged to make detailed notes on the matters the Court has taken into account in arriving at the sentence. Such detailed notes are however not essential in cases where only one sentence is provided by the Penal provisions such as capital offences.

I have been asked to interfere with the sentence. As I stated earlier sentencing is discretionary and unless it is shown that the sentence is manifestly harsh and excessive, an Appellate Court would hardly interfere. See **WANJEMA VS REPUBLIC (1971) EA 493**. The offence for which the Appellant was convicted carries a maximum jail term of 7 years imprisonment and hard labour. In the instant case, the Appellant was handed a jail term of 4 years. Although the sentence is legal, however considering that the Appellant was a first offender, it would appear that the sentence was excessive. As already stated, the trial Court's notes on sentence were sketchy and consequently, I am unable to tell the basis upon which the Learned Magistrate opted to impose on the Appellant imprisonment for a term of 4 years. Instead of perhaps placing her on probation or community service orders. That being the case I am obliged to reconsider the facts and circumstances of this case. The Complainant was a house help who stole money from her employer. The amount involved was not substantial. In sentencing the Appellant to 4 years imprisonment the Learned Magistrate considered the fact that the house helps are important people in society. However this alone did not call for such harsh and excessive sentence. After all the Appellant was a first offender. There is also the issue that the Appellant was a child at the time of the commission of the offence. I observed her during the hearing of the Appeal, and I was convinced that she was not at all an adult at the time of the commission of the offence. That being the case, had the trial Court taken the trouble to ascertain the age of the Appellant, perhaps it would have come to the conclusion that the Appellant's case was best handled by the children's Court.

I have agonized over the appropriate order to make in the circumstances of this case. I have been tempted to invoke the provisions of the children Act and impose any of the sentences recommended under Section 191 of the said Act. However, I am cognizant of the fact that the Appellant now has a child of 6 months who is incarcerated alongside the Appellant. The Appellant has also served 1½ years of her jail term. If remission is taken into account, she may be left with another 1 year or so to serve.

Taking into account all the foregoing, the order which best commends itself to me is to commute the Appellant's jail term to the term so far served with the consequence that the Appellant should forthwith be released from prison custody unless otherwise lawfully held.

Orders accordingly.

Dated at Nairobi this 2nd day of October, 2006.

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MAKHANDIA

JUDGE