



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

(NAIROBI LAW COURTS)

Criminal Appeal 265 of 2005

(From original conviction and sentence in Criminal Case No. 2087 of 2004 of the Senior Principal Magistrate’s Court at Kiambu – M. W. Wachira - SPM)

PETER KINYANJUI ELIZABETH..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The only issue raised in this Appeal is on sentence. The Appellant was charged with the offence of having suspected stolen property contrary to Section 323 of the Penal Code. He pleaded not guilty to the charge. However following a full trial, he was convicted and sentenced to five years imprisonment. He was aggrieved by the conviction and sentence. He preferred the instant Appeal both on conviction and sentence.

However when the Appeal came up for hearing, the Appellant abandoned the Appeal on conviction and elected to pursue the Appeal on sentence only.

The Learned State Counsel, Mrs. Gakobo conceded the Appeal on sentence. Counsel submitted that sentence of five years imprisonment imposed was illegal. According to Counsel the maximum sentence upon conviction which the Learned Magistrate should have imposed was two years. Counsel therefore urged me to interfere and correct the illegal sentence imposed by the Learned Magistrate.

The Appellant welcomed the gesture by the State and also associated himself with the submissions of the State Counsel in conceding to the Appeal on sentence.

This being a first Appeal, this Court has powers to interfere with the sentence meted out by the trial Court. However my interference would only be necessary if there was a clear breach of the Law or principle since it was within the discretion of the trial Court to assess the appropriate sentence to impose in all the circumstances of the case. In the instant case the sentence imposed by the Learned Magistrate was clearly illegal. The offence with which the Appellant was charged was a misdemeanor. Section 36 of the Penal Code provides for General Punishment for a misdemeanor. It provides inter alia:-

“.....When in this Code no punishment is specifically provided for any misdemeanor, it shall be punishable with imprisonment for a term not exceeding two years or with a fine or with both....”

As already stated the offence charged was a misdemeanor. The Section creating the offence for which the

Appellant was charged is silent on the punishment to be meted out on conviction. Accordingly in sentencing the Appellant, the Learned Magistrate should have reverted to the Provision of Section 36 of the Penal Code aforesaid. Had she done so, she would not have imposed five years imprisonment. Rather she would have imposed imprisonment term not exceeding two years. Due to this deliberate and or inadvertent error or oversight on the part of the Learned Magistrate in imposing the sentence that is patently illegal, the Appellant has suffered injustice as he has already served 1 ½ years of the illegal sentence. It reflects badly on the Judiciary for an illegal sentence to be imposed.

As the sentence imposed was clearly illegal, I will interfere with it to the extent that I will commute the same to that term already served with the consequence that the Appellant shall forthwith be released from prison custody unless he is otherwise lawfully held.

Dated at Nairobi this 30th day of November, 2006.

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MAKHANDIA

JUDGE

Judgment read, signed and delivered in the presence of:-

Appellant

Mrs. Gakobo for State

Erick – Court clerk

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MAKHANDIA

JUDGE