



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CRIMINAL APPEAL NO. 17 OF 2005**  
**(From original conviction and sentence of the Principal**  
**Magistrate's Court at Naivasha in Criminal Case No. 5005 of**  
**2004 – S. R. WEWA (R. M.)**

**GEORGE OMAMBIA MOCHAMA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, George Omambia Mochama, was charged with the offence of stealing by servant contrary to **Section 281 of the Penal Code**. The particulars of the offence were that on the 27th of December 2004 at Kings Meal Bakery, Gilgil, Nakuru District, the Appellant being a servant of Devshi Premji Hiran stole from the said Devshi Premji Hiran one and a half kilogram (1 1/2 kg) of sugar valued at Kshs 83/=. The Appellant pleaded guilty to the charge. He was convicted on his own plea of guilty and sentenced to serve six months imprisonment. The Appellant was aggrieved by the said conviction and sentence and has appealed to this court.

Although the Appellant had appealed against conviction and sentence, at the hearing of the Appeal the Appellant abandoned his Appeal on conviction and instead concentrated all his energy in urging the court to allow his Appeal on sentence. Mr Makori, Learned Counsel for the Appellant submitted that the Appellant was a first offender. He argued that the trial magistrate had not considered the mitigation offered by the Appellant which was that the Appellant was a sole bread winner for his family. The Appellant was aggrieved that the trial magistrate had not considered the fact that the item that was admitted to be stolen by the Appellant was such that it could not attract a custodial sentence more so the sentence imposed of six months imprisonment.

The Appellant was further aggrieved that the trial court had not addressed itself to the mitigating circumstances of the case before arriving at the said decision sentencing the Appellant to a custodial sentence. It was the Appellant's view that the sentence imposed by the trial magistrate was excessive in the circumstances of the case and should accordingly be reviewed and an appropriate sentence be ordered.

Mr Koech, Learned State Counsel opposed the Appeal. He submitted that the plea taken was unequivocal. He further submitted that the offence committed by the Appellant was a felony whose maximum punishment as provided by the said section of the penal code is seven years imprisonment. He argued that the sentence of six months imposed, was lenient in the circumstances. He reiterated that the Appellant could not justify his Appeal on sentence just because the value of the stolen item was minimal. He argued that the sugar which was stolen by the Appellant was an item capable of being stolen and indeed was stolen by the Appellant. Mr Koech submitted that the trial magistrate court had properly exercised its discretion in sentencing the Appellant to a custodial sentence which sentence was appropriate in the circumstances of this case. He urged the court to dismiss the Appeal.

As the first Appeal court in criminal cases, this court is required by law to reevaluate the evidence placed before the trial magistrate afresh and reach its own independent conclusion whether or not to uphold the sentence imposed. Sentencing of an accused person is the discretion of the trial magistrate. This discretion may only be interfered with by the appellate court if the sentence imposed was excessive in the circumstances of the case. The said discretion may further be interfered with if the trial magistrate did not consider the relevant factors or considered irrelevant circumstances before sentencing an accused

person. (See Dismas –versus- Republic [1984] K.L.R. 634 and Wagude –versus- Republic [1983] K.L.R. 569). In the present case it has been submitted by the Appellant that the trial magistrate did not consider the mitigation of the Appellant before sentencing him to a custodial sentence. The Appellant was further aggrieved that the trial magistrate had not considered the value of the item which was stolen before sentencing him to a custodial sentence, which according to him, was harsh and excessive. On the other hand, Mr Koech, the Learned State Counsel submitted that the sentence imposed was lenient considering the fact that the Appellant had been convicted of committing a felony whose maximum sentence is seven years imprisonment. He further submitted that in sentencing the Appellant, the trial magistrate was not mandated in law to consider the value of the stolen item. I have considered the rival arguments made in this Appeal. The Appellant rightly abandoned his Appeal against conviction. The plea of guilty recorded by the court and the subsequent conviction of the Appellant of his own plea of guilty was according to the law. While it may be true that the Appellant was convicted for committing the felony of theft, in my view the sentence imposed by the trial court was excessive in the circumstances of this court. I am not persuaded by the submission made by the Learned State Counsel, that the trial court ought not to consider the value of the stolen item when sentencing a convicted person. In my opinion, in some circumstances, the value of the stolen item must be considered when considering the sentence to be imposed on a convicted person. In the instance, the trial magistrate failed to consider the value of the item which was stolen and thereby exercising the discretion wrongly in sentencing the Appellant to a custodial sentence. The Appellant was a first offender. He had admitted stealing one and half kilogrammes of sugar valued at Kshs 83/=. The sentence of six months imprisonment imposed was way out of proportion to the offence committed. In Ambani –versus- Republic [1990] K.L.R. 161 where Bosire J (as he was then) considered the Appeal by an Appellant who had been convicted of stealing a pair of shorts worth Kshs 40/=, he had this to say: (at page 162):

*“.. The value of the stolen item was minimal that I do not consider the exercise of discretion by the trial court in sentence was proper. Although as rightly pointed out by the trial magistrate that the Appellant abused the trust bestowed on him by his employer, the item stolen was so negligible a value that he did not deserve the harsh treatment which the court gave him. Sentences imposed on accused persons must be commensurate to the moral blameworthiness of the offender.”*

Having considered all the circumstances of this case, I do hold that the discretion exercised by the trial magistrate in convicting the Appellant to custodial sentence was unlawful. I will therefore interfere with the said sentence imposed. The sentence imposed was excessive and harsh considering the offence committed. I hereby set aside the sentence of six months imprisonment imposed on the Appellant and substitute with a sentence of this court commuting the sentence of the Appellant to be period already served. The Appellant shall consequently be set at liberty unless otherwise lawfully held.

**DATED at NAKURU this day of 2005.**

**L. KIMARU**

**JUDGE**