

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 929 OF 2003

(From original conviction (s) and Sentence(s) in Criminal case No. 522 of 2003 of the Chief Magistrate's Court at Nairobi (Mr. Injene Indeche –S.P.M.)

HARRISON NDAMBUKI WAMBUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellant was convicted of GARAGE BREAKING AND STEALING contrary to Section 306(a) of the Penal Code. He was sentenced to serve 5 years imprisonment. He was aggrieved by the conviction and sentence and thus filed this Appeal.

The Appellant was working for the Complainant as a night watchman. He was left inside the Complainant's compound and locked inside on the evening of 21st and 22nd November 2002. The next morning the Complainant found the Appellant missing and several items stolen from the garage.

From the proceedings of the court, it is quite clear that there was no dispute that a theft took place in the Complainant's garage on the night in question. The only ground contended by the Appellant is that he was a victim of the thieves who carried him away with them. He claims to have been abandoned in a bush in Athi River and to have gone back to the Complainant at an undisclosed time when the Complainant beat him up. That was however untenable because the Complainant's clear evidence is that he never saw the Appellant again until the Police arrested him. The Appellant did not cross-examine the Complainant on that point and his allegation that he ever went back to the Complainant was rejected by the trial magistrate as untrue.

The Appellant pleaded six grounds of Appeal. On examining them, I see that the Appellant was challenging the sufficiency of the Prosecution evidence to sustain a conviction. His Appeal was opposed.

The Appellant did not submit on the pleaded grounds of Appeal except to emphasis that he was a victim of circumstances. Learned counsel for the state, MISS MWENJE, submitted that the Appellant's conduct after the attack in failing to go back to the Complainant, failing to make any report to the Police and securing another job all strongly confirmed that he was involved with the offence.

I do agree that the evidence against the Appellant was purely circumstantial. He had been locked inside the Complainant's garage and left without the keys. The next morning he was missing and in addition, he left behind his uniform worn while on duty. From 21st November 2002 he was seen again in February 2003 by Police Officers who arrested him. In between that time, the Applicant made no attempts to contact his employer, the Complainant, or the Police neither did he file any report with the police.

I do find that the Appellant's conduct was that of a man with a guilty conscious. It was inconsistent to an innocent person or a person that was a victim of a circumstance. I agree with the learned trial magistrate's finding. Consequently the Appellant's Appeal against conviction lacks in merit and is dismissed.

On the sentence, the learned trial magistrate did not make any remarks before imposing the

sentence. The Appellant has pleaded for leniency and gave certain remarks as to his personal circumstances. No where does the record indicate that this were even regarded or taken into account in meting out the sentence. The learned trial magistrate did not apply any principles before passing sentence.

I have taken into account the Appellants mitigation together with the circumstances of the offence. I am of the view that 4 years imprisonment would suffice as punishment for the offence committed. In that regard I do allow the Appeal against the sentence by reducing the sentence passed from five to four years imprisonment. To that extent only the Appeal succeeds. Orders accordingly.

Dated at Nairobi this 21st day of September 2004.

LESIIT

JUDGE

Read, signed and delivered in the presence of;

LESIIT

JUDGE