



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL DIVISION

CRIMINAL APPEAL NO. 784 OF 2003

(From original conviction (s) and Sentence(s) in Criminal case No. 2235 of 2003 of the Chief Magistrate’s Court at Thika (M. Kiptoo-SRM))

JAMES THANJU MBIYU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellant, **JAMES THANJU MBIYU** was charged and convicted of **STEALING** contrary **Section 275** of the Penal Code and **MALICIOUS DAMAGE TO PROPERTY** contrary to Section 239(1) of the Penal Code. He was sentenced to 2 years on each count with the prison terms running concurrently. Being aggrieved by the conviction and sentence the Appellant filed this Appeal.

The Appeal was opposed. In his grounds of Appeal, the Appellant pleaded that the case arose out of family matters and that it was a fabrication. He also pleaded that he was remorseful and that the sentence was harsh. He stated the same in his submission asking this court to reverse the sentence.

MISS GATERU, learned counsel for the state submitted that the evidence adduced was overwhelming in respect of both counts. She submitted that the sentences were lenient. I have perused the proceedings and judgment of the trial court. I am satisfied from the evidence on record that the offences charged were proved against the Appellant. The Complainant from the record, is the Appellants father. From his evidence, the Complainant seems to have given up on the son arguing that it was the third time the Appellant was coming before the court for similar offences. He alleged that he had been placed on probation twice before and was in fact serving that sentence when he committed this offence. That however was not confirmed by the prosecution. In that the prosecution submitted that the Appellant was a first offender.

Whereas I have no doubt that the offences were committed, it is my view that by taking evidence of the Appellant’s bad character in the evidence-in-chief of the Complainant, it was irregular and wrong. **The evidence of character can only be given in special circumstances as laid down under Section 154 to 157 of the Evidence Act. Such evidence cannot be given unless the conditions precedent to their admission are met as provided for in those sections.** The evidence attacking the character of the Appellant was uncalled for since the issue was irrelevant to the case before the court and conditions to adduce such evidence were not met. Whereas after perusing the evidence before the court, I have no doubt that the Prosecution proved the charge. I cannot say the same of the sentence. Having introduced evidence that portrayed the Appellant as an incorrigible offender, the court’s mind was biased by the time

it passed sentence. From the record, there is nothing to show that the learned trial magistrate disabused her mind of the bad character of the Appellant portrayed during the trial by the Complainant. Under those circumstances, I do find that the learned trial magistrate in passing sentence, had in mind matters that were extraneous and which were prejudicial to the Appellant. It is my view that in those circumstances there was a miscarriage of justice as far as the sentence was concerned.

The Appellant is alleged to have stolen paints worth 1100/- and destroyed property worth 5,700/-. He was a first offender. Offence was committed against the Appellant's father. That family factor was not considered by the trial court. It is my view that taking all these factors into consideration a sentence of 2 years in each count was excessive. This was a case that called for a non-custodial sentence. From the evidence before court, the Appellant seems to need counseling more than confinement. I will confirm the conviction but set aside the sentence to such a term as will secure the Appellant's immediate release. I substitute sentence to the term already served. I order that the Appellant should be set free unless he is otherwise lawfully held.

Dated at Nairobi this 6th day of October 2004.

LESIIT

JUDGE

Read, signed and delivered in the presence of;

LESIIT

JUDGE