



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**APPELLATE SIDE**  
**CRIMINAL APPEAL NO. 61 OF 2001**

**(From Original Conviction and Sentence in Criminal Case No. 273 of  
2001 of the District Magistrate's Court at Machakos: G. W. Ngenye  
Miss, on 6.4.2001)**

**GEOFREY M. KIKEMU ::: APPELLANT**

**VERSUS**

**REPUBLIC ::: RESPONDENT**

**J U D G E M E N T**

20 Before the lower court the appellant was charged under s.275 Penal Code in that on 16.1.2001 at Mbumbuni Market, Kisau Location Makueni, he stole a SATTOR weighing machine worth Sh.15000/= the property of Daniel Mbolonzi.

After trial the appellant was found guilty and given a 3 month prison term with effect from 6.4.2001.

Mr. Makau filed a 6-point appeal which he argued to the effect that the charge was not proved; that the Learned Trial Magistrate was in error to conclude that the weighing machine belonged to the complainant and that she shifted the burden of proof onto the shoulders of the appellant. It looked like the sentence had been served by the time the appeal was heard or it was about to end. According to Mr. Makau, the appellant went to borrow the weighing machine. But he conceded that when the complainant's employee in his shop one Janet Mbula (P.W.2) declined to give it the appellant slapped her and by force took the machine. Down in his submission it appeared that the appellant had been sent by his employer Justus Nyamai (D.W.2) to 10 retrieve his weighing machine from the complainant's shop. The two seemingly are shop owners on Mbumbuni market.

The Learned State Counsel opposed the appeal.

On this court's own review of the whole of the lower court record the state of the things is that the appellant went to the shop of P.W.1 where Janet (P.W.2) with Joseph Munyao (P.W.3) worked. He demanded to be given the weighing machine. P.W.2 was reluctant to give it out. The appellant slapped her and took it away. It was kept at a home of D.W.2's sister from where it was collected when the matter became 20 a police case. The appellant had no right to take this weighing machine and even pass it to others to keep. The lower court was satisfied that the weighing machine was the property of P.W.1 Daniel Mbolonzi on evidence before it. This court has not been shown any better reason to hold otherwise. Even had the machine belonged to Justus Nyamai (D.W.2), it cannot be said that the appellant was in the course of his duty to D.W.2 to slap Janet as he took the item and to go and hide it elsewhere. Indeed it appears that with the use of force the appellant stood to face a more serious offence of robbery! However he was lucky to get away with 3 months only in prison. Perhaps such a lenient sentence should have been served for example by performing community service. But that it is served or about served may it remain so. The conviction and sentence cannot be disturbed. The appeal is dismissed.

The court however wishes to point out to the Learned Trial Magistrate that the proper way to set down a judgement is provided for in SS. 268, 269 Criminal Procedure Code.

All the evidence from both sides must be set out and then appreciated before finding for instance that the prosecution evidence is overwhelming. In this case, and this court does not think it fatal, the Learned Trial Magistrate was

***“..... convinced that the evidence adduced by the prosecution is sufficient to sustain a conviction and that the case was proved beyond a reasonable doubt,”***

before she set out and looked at the defence case – which she ultimately found worth 20 not much – and rightly by so. In sum this appeal is dismissed. Judgement accordingly.

**Delivered on 11th June 2001.**

**J. W. MWERA**

**JUDGE**