

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIM APP 176 OF 2000

SABURI HOHAMED ::: APPELLANT

VERSUS

REPUBLIC ::: RESPONDENT

J U D G E M E N T

The court heard that the appellant with another were charged in the lower court at Kitui with theft C/S 275 Penal Code. It was not easy to say what they stole because the petition of appeal did not contain a copy of the charge sheet! (shown as at PAGE 2 of the petition which infact is a bond form CRIMINAL 95!). But from the Learned Trial Magistrate’s judgement delivered on 23.7.97 the two accused stole Rodah Mbuti’s bundle of clothes worth Sh.11,155/-. The pair was found guilty and convicted. The Learned Trial Magistrate heard them in mitigation and said: “..... the court discharges the accused persons U/S 35(1) Penal Code on condition that they make arrangements to compensate the complainant for her loss within 60 days from today.”

It was submitted that the appellant and his mate went off but they did not pay compensation to Rodah. It is not clear how much each was to pay but it can be assumed 10 that this would be in the ratio of 50-50. The time limit was 60 day. But on 22.11.2000, so Mr. T. Musyoki for the appellant went on, a lawyer acting for Rodah appeared before the same Learned Trial Magistrate and prayed for summons to issue to the appellant to appear in court and show cause why he should not be sentenced to serve a prison term for failing to pay the compensation ordered on 23.7.97. Quite probably the appellant had nothing or nothing satisfactory to put in as explanation and the Learned Trial Magistrate ordered him to serve 9 months in prison – hence the 3 – point appeal which Mr. T. Musyoki argued. He put grounds 1 and 2 together and point 3 on its own.

That the Learned Trial Magistrate was in error to review his sentence three years after the order of discharge and he had no basis to entertain such a review. Then that the sentence of 9 months was excessive. The Learned State Counsel conceded that appeal on the basis that Rodah’s lawyer had no authority to appear in a criminal case to pray for the orders as he did here without a written consent found the person of the Honourable the Attorney – General who alone conducts public prosecutions personally or through people/bodies he may so authorise in writing. The appeal was allowed and now follow the reasons. S.35 of the Penal Code where the appellant with his mate, said to be since deceased, were discharged reads:

“35 (1) Where a court by or before which a person is convicted of an offence is of opinion, having regard to the circumstances including the nature of the offence and the character of the offender, that it is inexpedient to inflict punishment and that a probation order under the Probation of Offenders Act is not appropriate, the court may make an order discharging him absolutely, or, if the court thinks fit, discharging 10 him subject to the condition that he commits no offence during such period, not exceeding twelve months from the date of the order, as may be specified therein.”

The section goes on to enjoin the court marking the discharge order under S.35(1) to explain to the convict in ordinary language that if he commits another offence during the period of conditional discharge he shall be liable to be sentenced to the original offence. Further that that court may also order the convict to pay same or all of the costs incidental to his prosecution and any compensation adjudged under S.31

Criminal Procedure Code which reads: “31. Any person who is convicted of an offence may be adjudged to make compensation to any person injured by his offence, and the compensation may be either in addition to or in substitution for any other punishment.” In our present case after the Learned Trial Magistrate convicted the appellant he deemed it fit to discharge him, it can be, said absolutely because it does not appear that he was told that if he committed another offence within the next 12 months, he could be brought back to court and to be sentenced to this theft charge. The Learned Trial Magistrate however was inclined to order the appellant to compensate the complainant for her clothes that were stolen – in 60 days. Although the Learned Trial Magistrate termed this payment of compensation a condition under S.35(1) Criminal Procedure Code, it was not because such condition is not provided for there. It was a distinctly separate and extra order under S.35 (3) Criminal Procedure Code as propounded above. So if he was moved properly on 27.11.2000, it could still be found that S.35 (3) Criminal Procedure Code was to be invoked and not S.35 (1) Criminal Procedure Code because put simply on 23.7.97 the Learned Trial Magistrate orders can be put into this paraphrase: “I have discharged you unconditionally but I order you to pay compensation to the complainant whose clothes I found on evidence that you stole. This you must do in 60 days.” Failure to honour the compensation order was a separate matter and in this court’s view did not fall to be visited by a prison term right there. Mr. K. Musyoki had moved the lower court, and this forms the next stage in this determination, to issue summons for the appellant to come to court and say why he had not paid compensation. Or that the “sentence” of 23.7.93 should be varied. The appellant told the Learned Trial Magistrate that he was not to pay the money alone. Granted, his portion was not specified and it was over three years since the order. But this court s of the view that the Learned Trial Magistrate had no authority to recall the order of 23.7.97 and vary it as it was done here. Any condition under S. 35 (1) Criminal Procedure Code, and is not paying compensation, lasts 12 months only – a convict not to commit any offence or he is sentenced for the original offence. To pay compensation under S. 35(3) Criminal Procedure Code takes on the nature of a civil debt and in any case if an order/sentence in a criminal matter ought to be revisited, it falls in the docket of the Attorney General or his duly authorised prosecutor. Mr. K. Musyoki Advocate on behalf of the complainant had no such docket because none seems to have been placed before the Learned Trial Magistrate. The record at least does not say that the Attorney General had authorised Mr. K. Musyoki in writing to raise and present matters in the realm of criminal prosecutions. So on both limbs this court is of the considered view that the orders of 27.11.2000 were of no validity. The Learned Trial Magistrate had no jurisdiction/authority to recall and vary/review his earlier orders the way he did and Mr. K. Musyoki had no authority to agitate such a state of things. The way forward probably was for this lawyer to pursue the course the Learned Trial Magistrate set out on 23.7.97.

“The complainant has a remedy in civil law against the accused persons and managements of the bus (Highway Bus Company).” Appeal allowed. Reasons now given.

Delivered on 18th December 2000.

J. W. MWERA

JUDGE