



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: R. MWONGO, J.

MISC CRIMINAL APPLICATION NO. 5 OF 2018

JOSEPH KIHU NYAMBURA.....APPLICANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

1. The Appellant was charged and convicted for stealing contrary to **Section 268** as read with **Section 275** of the Penal Code. The particulars are that he stole assorted clothes valued at Kshs 3,000/= on 28th August, 2017 from Janet Njeri at Muthaiga area Maai Mahiu.
2. In Counts 2 and 3, the Appellant was charged with stealing or dishonestly retaining chicken, chicken feeder and pens worth Kshs 5,000/=, and having stolen property, namely a bicycle, car batteries and a cylinder. The latter counts relate to offences committed on 31st October 2017 and 21st November 2017.
3. The record shows that he admitted all three counts of all charges, and a plea of guilty was entered. According to the record, the Appellant had no previous criminal records. In mitigation he stated: ***“I am sorry. I have children.”***
4. The Appellant was convicted and sentenced on 22nd November 2017 to 3 years imprisonment for each count with the sentences to run concurrently.
5. In his appeal he rotated on **“Mitigation Grounds of Appeal”** filed on 22nd March 2018, he states his **“grounds of appeal”**, none of which concern an appeal against the conviction. Ground 2 alleges that he was sentenced to three (3) years imprisonment despite being asthmatic. He seeks the mercy of the court.
6. At the hearing, he did not argue the appeal but challenged the sentence on grounds that the court did not consider that he was asthmatic.
7. I have considered with a measure of anxiety whether what is before me is an appeal at all, given that the grounds are essentially on mitigation. The **Criminal Procedure Code** requires an appeal to be filed by way of a petition of appeal which must contain particulars of matters of law or fact which are appealed from. This is contained in **Section 350(2) CPA** which provides that:

“A petition of appeal shall be signed, if the appellant is not represented by an advocate, by the appellant, and if the appellant is represented by an advocate, by the advocate, and shall contain particulars of the matters of law or fact in regard to which the subordinate court appealed from is alleged to have erred, and shall specify an address at which notices or documents connected with the appeal may be served.....and the appellant shall not be permitted, at the hearing of the appeal, to rely on a ground other than those set out in the petition of appeal”
8. Thus a so-called “mitigation appeal” does not properly fall to be called an appeal under **section 350** of the **CPC**. To that end, **Section 352(1)** of the **CPC** allows for summary rejection of an appeal by the Court, if it considers that: ***“there is no sufficient ground for interfering”*** with the lower court’s decision.
9. I have perused the lower court file. I have also considered the punishment prescribed under **Section 275** of the Penal Code for theft. The sentence to which an accused person is liable is three (3) years. The Appellant pleaded guilty to three counts of theft on three different dates.
10. I do not consider this to be an appropriate case for a non-custodial sentence on revision. The conviction and sentence are hereby affirmed.

11. Orders accordingly.

Dated and Delivered at Naivasha this 17th Day of July, 2019.

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Mr. Koima for the State
2. Joseph Kihiu Nyambura - Applicant in person
3. Court Clerk - Quinter Ogutu