



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 40 OF 2017

BETWEEN

KENNETH NJOKI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGEMENT

(From the original conviction and sentence in the Senior Principal Magistrate's

Court at Kangema Cr. case No.205 of 2017 delivered by Hon. D.M. Kivuti – SRM on 16th June, 2017).

1. Kenneth Njoki, the Appellant herein was charged with the offence of stealing contrary to Section 275 of the Penal Code. It was alleged that on the 5th day of May, 2017 at Rwathia Location, Kangema sub-county within Murang'a County stole television make TOUSDA valued at ksh.13,000/- the property of Susan Njoki Warui.

2. In the alternative he was charged with the offence of handling stolen property Contrary to Section 322(2) of the Penal Code. The particulars were that on the 5th day of May, 2017 at Rwathia Location, Kangema sub-county within Murang'a County otherwise than in the course of stealing dishonestly received OR retained one television make Tousda knowing or having reason to believe it to be stolen good.

3. The Appellant was convicted on his own plea of guilty and sentenced to serve 5 years imprisonment. Dissatisfied with the sentence he preferred the instant appeal. In a Petition of Appeal filed on 28th June, 2017 he was dissatisfied that the sentence was harsh and excessive in the circumstances. He pleaded for leniency claiming that he was drunk and disorderly when he committed the offence. In his submissions in court he stated that the complainant was his mother who had no problem with him. In addition, he submitted that he had learnt life support skills in prison which would enable him to engage in lawful and gainful employment as opposed to stealing. His prayer is that the sentence be set aside and be substituted with a non-custodial one.

4. Learned State Counsel, Mr. Mutinda did not oppose the appeal more so, because the sentence imposed was illegal and did not accord with Section 275 of the Penal Code. He also noted that that the subject value of the stolen good did not attract the serious sentence meted against the Appellant. It was his view that the Appellant had learnt his lesson and deserved the leniency of the court.

5. I have accordingly considered the submissions tendered before the court. Section 275 provides as under;

“Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years”

6. From the above provision, it is clear that the maximum penalty provided for stealing is three years imprisonment. The learned trial magistrate therefore imposed an illegal sentence. This is a good ground why the appeal must succeed. On the other hand, it is paramount to note that the subject matter of the charge was a television set valued at ksh.13,000/-. This is not a charge that ought to attract in the first instance a custodial sentence unless there are aggravating factors. From the record of proceedings the court was not informed whether or not the Appellant was a first offender.

7. The Appellant however placed good mitigation before the trial court indicating that he was a casual labourer, a young man of 25 years and was a standard 8 dropout. Based on this mitigation the court ordered for a victim impact statement. Subsequently, the mother to the Appellant one Susan Njoki Warui presented herself to court and she indicated that the Appellant was a problem to her and had just been released from custody on Presidential pardon. Based on this statement, the trial court directed its mind that the Appellant was not wanted by his family and a custodial sentence with such severance that would keep him away from the society was warranted. The court then proceeded to impose the illegal 5 years imprisonment.

8. Although the Appellant may not have been a first offender and was a problem to his mother a sentence must carry the blameworthiness of the offender. In this case, the mitigating factors ought to have played in to warrant a much lenient sentence. Most paramount being that the Appellant had pleaded guilty to the offence and therefore saved the court's time and that the value of subject matter of the offence was low.

9. Having regard to the foregoing, I find that this is an appeal that is merited. I allow it by setting aside the balance of the sentence and substituting it with an order that the Appellant has served sufficient sentence. I order that he be forthwith set free unless otherwise lawfully held.

It is so ordered.

Dated and delivered at Murang'a this 5th day of September, 2019.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Appellant in person*
2. *Mr. Mutinda for the Respondent*