



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 104 OF 2015

JOB MUSILL.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an appeal from the original conviction and sentence in **Kyuso Principal Magistrate's Court Criminal Case No. 72 of 2015** by Hon. E. M. Mutunga RM on 08/04/15)*

J U D G M E N T

1. The Appellant was charged with two (2) Counts:

1) **Stealing** contrary to **Section 268(1)** as read with **Section 275** of the **Penal Code**. Particulars of the offence were that on the **3rd** day of **April, 2015** at **Kalonzo Secondary School** in **Kyuso Sub-county** within **Kitui County** stole three panties, one bag and one biker all valued at **Kshs. 1,400/=** the property of **Stella Muthengi**.

In the alternative he was charged with the offence of **Handling Stolen Property** contrary to **Section 322(1)** as read with **Section 322(2)** of the **Penal Code**. Particulars of the offence were that on the **3rd** day of **April, 2015** at **Ngaai Location** in **Kyuso Sub-county** within **Kitui County** otherwise than in the course of stealing dishonestly received or retained three panties, one bag and one biker knowing or having reasons to believe them to be stolen property or unlawfully obtained.

2. **Stealing** contrary to **Section 268(1)** as read with **Section 275** of the **Penal Code**. Particulars of the offence were that on the **3rd** day of **April, 2015** at **Kalonzo Secondary School** in **Kyuso Sub-county** within **Kitui County** stole a pair of rubber shoes, a pair of socks, one blouse and one pant all valued at **Kshs. 1,200/=** the property of **Faith Mumbe**.

In the alternative he was charged with the offence of **Handling Stolen Property** contrary to **Section 322(1)** as read with **Section 322(2)** of the **Penal Code**. Particulars of the offence were that on the **3rd** day of **April, 2015** at **Ngaai Location** in **Kyuso Sub-county** within **Kitui County** otherwise than in the course of stealing dishonestly received or retained a pair of rubber shoes, a pair of socks, one blouse and one pant knowing or having reason to believe them to be stolen property or unlawfully obtained.

2. He admitted having committed the offences as charged, he was convicted and sentenced to serve **two and a half years imprisonment** for the two counts which translates to **five (5) years imprisonment**.

3. Being aggrieved by the sentence he now mitigates on the same. At the hearing he sought leniency. He prayed to be allowed to serve only **two (2) years imprisonment**.

4. **Mr. Wanjala**, learned State Counsel for the State/Respondent opposed the Appeal arguing that having pleaded guilty the Appellant was warned of the consequences and he maintained the plea of guilty. He invited the Court to consider the provisions of **Section 348** of the **Criminal Procedure Code** and uphold the sentence.

5. My duty as a court is to reconsider the trial court record and come up with my own conclusion.

6. Considering what the Appellant stole it may have called for a non custodial sentence. However, the Prosecution submitted that the Appellant was a repeat offender having been sentenced to **two (2) years imprisonment** on **28th May, 2013** for a similar offence. His mitigation where he prayed for a non-custodial sentence was considered by the learned trial Magistrate who found it expedient to sentence him to the sentence aforesaid.

7. The Appellant was of two (2) offences that emanated from a single transaction which would behove the Court to make an order on how the sentence should be served.

8. **Section 12** of the **Criminal Procedure Code** stipulates thus:

“Any court may pass a lawful sentence combining any of the sentences which it is authorized by law to pass.”

9. In the case of **Sawedi Mukasa s/o Abdulla Aligwaisa (1946) 13 EA CA 97** the Court of Appeal for Eastern Africa stated that the practice is where a person commits more than one offence at the same time and in the same transaction, save in very exceptional circumstances, to impose concurrent sentences.

10. This is a case where the offence was committed in a single act as stated. The Court was legally expected to make an order directing how the sentences were to be served. This was omitted. I therefore correct the error by ordering the Appellant to serve **two and a half years** on each count. Sentences shall run concurrently from the date the Appellant was sentenced.

11. The Appeal succeeds to that extent.

12. It is so ordered.

Dated, Signed and Delivered at Kitui this 19th day of January, 2017.

L. N. MUTENDE

JUDGE