



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

CRIMINAL APPEAL NO. 153 OF 2016

JOEL MBURU MUIRURI alias

JOHN KIMANI GACHAIYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the

Chief Magistrate's Court at Milimani Cr. Case No. 1870 of 2012

delivered by Hon. M.W Njagi, PM on 15th September, 2016).

JUDGEMENT

The Appellant was charged with six counts of stealing contrary to **Section 268(1)** as read with **Section 275 of the Penal Code**. It was alleged that on diverse dates in the months of November and December, 2012, at Chase Bank Eastleigh Branch in Nairobi stole various amounts of money, the property of the said bank. In count VII, he was charged with attempted stealing contrary to Section 389 as read with 275 of the Penal Code in that jointly with others not before court he attempted to steal US Dollars 35000 equivalent to Kshs. 3,010,000/= the property of the said Chase Bank.

He was convicted in respect of all the counts. In counts I and II, he was sentenced to pay a fine of Kshs. 51,000/= in default serve one year imprisonment respectively. In counts III, IV and VII, he was sentenced to a fine of Kshs. 100,000 in default serve one year imprisonment respectively, in count V a fine of Kshs. 200,000/= in default one year imprisonment and in count VI a fine Kshs. 300,000/= in default serve two years imprisonment. He was dissatisfied with the sentence against which he solely appealed.

Learned counsel Mr. Mathenge for the Appellant in submission told the court that the Appellant was an old man aged 72 years and that at the time of conviction he had a sick wife. He also suffers from diabetes and hypertension. He urged the court to consider that throughout the trial, the Appellant did not abscond despite the fact that he had been released on a cash bail of Kshs. 300,000/=. Mr. Mathenge submitted that the said cash bail was never refunded to the Appellant and that should the appeal not succeed, the Appellant had no objection to it being utilized as part of the fine. He added that the Appellant was remorseful and had since learnt the consequences of committing an offence. Further that for the nine months he has been in prison was sufficient punishment. In the alternative of his release, counsel urged for a non-custodial sentence. Counsel also urged the court to give regard to the Sentencing Policy Guidelines in arriving at a verdict in this appeal.

Learned State Counsel Miss Aluda opposed the appeal. She submitted that despite the Appellant's age, he knew what he was doing and he stole the money gradually until it accumulated to 1.3 million. She submitted that the Appellant began with stealing little amounts which increased as the days went by within a period of two months. In any event, the sentence imposed was lenient because the Appellant was in prison because he could not afford the reasonable fines imposed.

On the request to utilize the cash bail as part of the fines, learned counsel submitted that that request should have been made before the trial court. Finally, it was the learned counsel's submission that the Appellant did not deserve leniency because the money stolen belonged to clients of the bank and in any event he was never ordered to compensate the bank as recommended by the Sentencing Policy Guidelines.

With regard to count I to VI, under Section 275 of the Penal Code, ***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 things stolen some other punishment is provided, to imprisonment for three years.*** In the instant case, the learned trial magistrate exercised her discretion in sentencing by imposing fines with a default sentence. It is gainsaid that in exercising the discretion in sentencing the trial court must give regard to a number of factors which include but are not limited to the seriousness of the offence, the prevalence of the offence, the circumstances under which the offence is committed, whether the accused is a first offender and the blameworthiness of the offender.

In counts I and II where fines of Kshs 51,000/= respectively were imposed, the amounts involved was Kshs. 200,000/= in each of the counts. This contrasts the fines imposed in count III of Kshs. 100,000/= yet the amount involved therein was Kshs. 150,000/=. There would also no justification for imposing a similar fine of Kshs. 100,000/= in count IV where the amount involved was Kshs. 400,000/=. The court can only be deemed to be fair and balanced if the penalties are both commensurate with the offence and are uniform where the subject matter in a charge is similar. Where the court imposes varied sentences and the subject matter in the charges is similar, it may be implied that the discretion of the court was not applied judiciously. A court cannot then stand to defend its decision as impartial and in accordance with the rule of law. For purposes of this judgment, the court must correct that anomaly. Further, it is clear that the penalty imposed in count VI did not conform to **Section 28(2) of the Penal Code**. The same provides that where the fine is Kshs. 50,000/= and above, the default sentence is limited to a maximum of one year imprisonment.

On other issues raised by the counsel for the Appellant, it was submitted that the trial court did not give regard to the Sentencing Policy Guidelines. Counsel cited non-compliance with paragraphs 7.1, 3, 6, 18 and 19. These provisions call on the court in sentencing to take into account the time spent in custody by an accused prior to sentencing, to impose consecutive sentence where the accused faces more than one offence, not to impose a custodial sentence unless it is extremely call for and in imposing either custodial or non-custodial sentence the court must give regard to the following factors;

- a. *Gravity of the offence,*
- b. *criminal history of the offender*
- c. *interest of children who are in conflict with the law*
- d. *character of the offender*
- e. *protection of the community and*
- f. *offenders responsibility to third parties*

In the instant case, the Appellant was on bail prior to sentencing and therefore, no period in custody required to be considered. On circumstances of the case, the trial magistrate duly considered that the Appellant sought to rip from where he had not sowed. She also considered that the offence was prevalent

within the court's jurisdiction and that the Appellant was a first offender. In my view then, although the actual provisions under the Sentencing Policy Guidelines were not cited, the learned trial magistrate duly considered relevant factors. Having said that, it is my view that the sentence imposed was reasonable although the fines imposed were not uniform and to some extent not commensurate with the offence itself as observed above. I am also of the view that although the appellant is an old man, he must take responsibilities for his mistakes because he was well aware of the consequences of what he was doing. As noted by the trial court, he ripped where he did not sow and he must therefore be ready to shoulder the burden of his mistakes. As such, it is the view of this court that this appeal shall only partially succeed to the extent of adjusting some fines.

In the result, I substitute the fines as follows. In counts III the Appellant shall pay a fine of Kshs. 30,000/= in default serve six months imprisonment. In counts IV and V, he shall pay a fine of Kshs. 70,000/- in default serve one year imprisonment and in count VII, a fine of Kshs. 100,000 in default, one year imprisonment. All other sentences remain undisturbed. The sentences will run consecutively in the event that the Appellant is unable to pay the respective fines.

On whether the cash bail deposited in the lower court should be utilised to pay the fines, it may be administratively cumbersome to transfer monies paid from the lower court for utilization for any purpose in the High Court. It would also cause delay in achieving the intended purpose of this judgment. I therefore ruled that the Appellant should revert to the lower court and request for refund of the cash bail. For purposes of the fines imposed, he should seek funds independently. It is so ordered.

DATED and DELIVERED this 20th day of **July, 2017**.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:

1. *Mr. Mathenge for the Appellant*
2. *M/s Sigei for the Respondent.*