



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 21 OF 2016

BOB OTIENO OUMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal from the sentence of the Chief Magistrate's Court Kisumu

(Hon. A. Adawo RM) dated the 23rd June 2016 in Kisumu CMCCRC No. 17 of 2016]

JUDGMENT

The appellant was sentenced to serve two years imprisonment for theft by servant. His appeal is against the sentence only. The grounds of appeal as stated in the Petition of appeal are:-

“1. That I pleaded not guilty to the charge;

2. That the trial court's decision was harsh and excessive as a whole hence my prayers for the Honorable court's order for a more lenient sentence;

3. That the trial court erroneously imposed the sentence of 2 yrs while failing to consider an option of fine;

4. That the trial court erred in judicial principals by ordering for a custodial sentence for a petty offence of this nature even after it was established that I was a first offender and displayed total remorsefulness for the offence I committed thus going against the prison decongestion program.”

At the hearing of the appeal he told this Court that he is an orphan and sole bread winner for his siblings who now have to endure suffering due to his imprisonment. He implored this Court to substitute the sentence of imprisonment with a non-custodial one.

Mr. Muia, Prosecution Counsel opposed the appeal. He submitted that the offence herein is a felony that attracts seven years imprisonment with no option of fine and that the sentence of two years imprisonment was neither harsh nor excessive. He urged the Court to disregard the appeal for lack of merit.

The facts of the case were that the appellant was employed by the complainant as a driver cum salesman. His employer was a soda distributor. On 12th December 2015 he collected soda worth

Kshs.287,552/= which he went and sold but did not remit the proceeds as required. The matter was reported to the police. He was arrested after twenty eight days.

In his testimony he alleged to have remitted the proceeds to his employer. However after evaluating the evidence the trial magistrate found him guilty and convicted him. His appeal as I have stated is only against the sentence.

As an appellate Court I may interfere with the sentence only if it appears that the trial magistrate acted on some wrong principle or it was manifestly excessive – (see **Wagude V. Republic [1983] KLR 570** and **Muoki V. Republic [1985] KLR 322**).

In this petition the appellant states that the Trial Magistrate erred by failing to consider the option of a fine and for imposing a term of imprisonment for a petty offence despite that he was a first offender.

The offence of Stealing by Servant is a felony and cannot be any stretch of imagination be described as petty. It attracts a sentence of seven years imprisonment but in this case the trial magistrate sentenced the appellant to two years imprisonment. This as stated in her judgment was after considering the nature of the offence, the accused's plea in mitigation and the fact that he was a first offender.

I am not persuaded that she acted on a wrong principle or that the sentence is manifestly excessive in the circumstances. Accordingly the appeal is dismissed.

Signed, dated and delivered at Kisumu this 8th day of September 2016

E. N. MAINA

JUDGE

In the presence of:-

Ms. Nyamosi for the state

Appellant in person

CC: Felix