

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.266 OF 2012

(An Appeal arising out of the conviction and sentence of HON. D. Kinaro - SRM delivered on 24th January 2012 in Makadara CM.C. CR. Case No.369 of 2012)

FEDELIS OMUNGA ODHIAMBO....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Fedelis Omunga Odhiambo was charged with the offence of **stealing from a person** contrary to **Section 279(a)** of the **Penal Code**. The particulars of the offence were that on 18th January 2012 at Ring Road Pumwani in Nairobi County, the Appellant stole a handbag belonging to Dorothy Akoth Juma (the complainant) from her person which had various items, including a mobile phone, a bible and Kshs.230/- cash. He was alternatively charged with **handling suspected stolen goods** contrary to **Section 322(1) and (2)** of the **Penal Code**. The particulars of the offence were that on the same day and in the same place, other than in the course of stealing, the Appellant dishonestly retained a handbag containing various items including a mobile phone, a bible and Kshs.230/- cash having reason to believe the said handbag to be stolen. The Appellant pleaded guilty to the charge when he was arraigned before the trial magistrate's court. He was sentenced to serve fourteen (14) years in prison. The Appellant was aggrieved by his sentence and duly filed an appeal to this court.

In his petition of appeal, and in his submission before court, the Appellant pleaded with the court to reduce the custodial sentence that was imposed on him. He admits committing the offence. He was remorseful. In the period of his incarceration, he had learnt his lesson. He told the court that he was a sole bread winner for his elderly grandmother. He promised the court that if released, he would be a useful member of the society. Mr. Mureithi for the State conceded that the sentence imposed on the Appellant was excessive taking into consideration the fact that all the items that were stolen were recovered. He urged the court to revisit the sentence.

When the trial magistrate sentenced the Appellant to serve the custodial sentence, he was exercising judicial discretion. This court can only interfere with such exercise of discretion if it is established either that the sentence was too harsh or too lenient in the circumstances. The court will also interfere with the imposition of the custodial sentence if it is established that the trial magistrate applied the wrong principles of the law in sentencing the Appellant. In the present appeal, it was clear that the trial magistrate erred when he sentenced the Appellant to serve the said period in prison. There was no evidence to suggest that the Appellant threatened to use violence on the complainant when he committed the offence. All items stolen from the complainant were recovered soon after the theft. It was clear to this court that the trial magistrate applied the wrong principle of the law when he sentenced the Appellant to serve the said period in prison. **Section 275** of the **Penal Code** provides the sentence when a person is convicted for stealing. That sentence is three (3) years imprisonment. In the circumstances of this case, there was no reason why the Appellant was sentenced to serve a period in prison more than that stipulated by the law. Mr. Mureithi for the State, correctly in my view, conceded to the appeal.

In the premises therefore, the appeal lodged by the Appellant on sentence has merit and is hereby

allowed. The custodial sentence imposed by the trial magistrate is set aside and substituted by a sentence of this court commuting the sentence of the Appellant to the period already served. The Appellant is therefore set at liberty forthwith and ordered released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 20TH DAY OF JULY 2015

L. KIMARU

JUDGE