

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
APPELATE SIDE
CRIMINAL APPEAL NO.319 OF 1999

**(From Original Conviction and Sentence in Criminal Case No.1144 of 1997
of the Senior Resident Magistrate's Court at Nairobi: C.W. Meoli (Mrs)**

SIMON KAMAU SAMSON APPELLANT
VERSUS
REPUBLIC RESPONDENT

Coram: Osiemo, J.,
Appellant present and represented
Mr. Sande for the Appellant
Mrs Ondieki (State Counsel) for the Respondent

J U D G M E N T

The appellant was charged with 9 counts of stealing by clerk contrary to section 281 of the Penal Code. He was tried convicted and sentenced to 3 years imprisonment for each count sentences to run concurrently. His appeal to this court is against sentence only.

This being the first appeal the court is entitled to evaluate the evidence on the lower court record. The record shows after the trial magistrate had convicted the appellant he ordered for a probation report. But after the same was produced in court by the Probation Officer and which had recommended that the appellant be given a chance on probation the learned trial magistrate decided to ignore it and sentenced the appellant to 3 years imprisonment.

This was wrong. Once the trial had made up her mind to order for a probation report, she ought to have given it due consideration before she decided to award the appellant a custodial sentence. The probation report filed by the Probation Officer was favourable.

In addition there is a medical report on the appellant by Dr. C.M. WAHOME dated 24th April, 1999 which indicates that the appellant is suffering from severe Endogenous Depression.

In his opinion the doctor has recommended that the appellant should not be confirmed under harsh prison conditions. For the above reasons I allow the appeal. Set aside sentence of 3 years imprisonment and substitute the same with 3 years probation.

Dated and delivered at Nairobi this 18th day of May, 1999

J.L.A. OSIEMO

JUDGE