

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 60 OF 1994

ANNA JEPTARUS KEMBOI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged in Kapsabet Senior Resident Magistrate's Court with two counts of stealing by agent c/s 283 (b) of the Penal Code in count 1, in count 2 with the offence of stealing contrary to section 275 of the Penal Code and in count 3 with the offence of being in possession of changaa c/s 3(1) as read with section 4(1) of the *Chang'aa* Prohibition Act cap 70 laws of Kenya. She was tried found guilty and convicted on count 1 and 2 but acquitted on count 3. She was sentenced to serve 15 months imprisonment on count 1 and 12 months imprisonment on count 2. Being aggrieved with the sentence she appealed to this Court citing 4 grounds of appeal namely that the learned District Magistrate erred in law and in fact in convicting the appellant on insufficient evidence as the respondent has failed to discharge the burden of proof, erred in law and in fact in sentencing the appellant to a too harsh custodial sentence not in consonant with the facts and circumstances of the case, erred in law and in fact in not considering the mitigating, circumstances of the appellant in sentencing the appellant, erred in law and in fact by allowing inadmissible evidence to be adduced and further convicted the appellant on the basis of inadmissible evidence.

The State was notified with the hearing date but did not turn up and the Court ordered that they be served afresh. This was done but there was no appearance for the State and the Court being satisfied that they were notified of the hearing date ordered the appellant's counsel to proceed.

In his submissions to Court, counsel for appellant abandoned appeal against conviction and instead pleaded for leniency so that the appellant is given a non custodial sentence. She is a widow having lost a husband in March, 1994. That it is the husband who took the said money and she is willing to restitute the same which can be deducted from the cash bail deposited with the Court. I have evaluated the evidence on the record on my own and I find that the money was entrusted to appellant to buy *sufurias* and sugar. She bought some *sufurias* but not sugar and the rest of *sufurias*. It is evident that she did not hand over this money when demanded. She alleges the money was taken by her husband. This is a case which should have fitted a civil action but since the conviction is not being challenged, I will not interfere with it.

On sentence I find that the appellant entrusted the money to her husband who passed away. He is the one who refused to hand over the money.

There were mitigating factors to the effect that appellant did not benefit from this money she is now willing to refund the same. This was a case fit for a non custodial sentence. More so, when, appellant is now the sole bread winner of her family. There are no previous convictions. I have no doubt that appellant given a chance she can reform.

I will therefore confirm conviction on both count 1 and 2 but allow the appeal on sentence. Set aside the imprisonment terms imposed in respect of both count 1 and 2 and substitute there to a non custodial sentence subject to a favourable report forth coming from the probation officer on the appellant's

character.

Secondly also subject to appellant depositing the total dues into Court belonging to the said women group.

Dated and Delivered at Eldoret this 30th day of June 1994.

R.NAMBUYE

JUDGE