IN THE COURT OF APPEAL

AT NAKURU

(CORAM: GACHUHI, TUNOI & SHAH, JJ.A)

CRIMINAL APPEAL NO. 24 OF 1995

BETWEEN

ABDI NOOR…………….....…..………..APPELLANT

AND

REPUBLIC…………………………..RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Eldoret (Aganyanya, J.) dated 17th September, 1993

in

H.C.CR.A. No. 179 of 1992)

JUDGMENT OF THE COURT

On the 18th day of March, 1992 the appellant Abdi Noor pleaded guilty to the offence of stealing in a dwelling house contrary to section 279(6) of the Penal code.

He was sentenced to 5 years imprisonment and ordered to receive 16 strokes of the cane.

He appealed against both conviction and sentence. One of the grounds of appeal he put forward before the High Court was that the theft was a domestic affair. The appellant attempted to resile from his unequivocal plea of guilty by stating (in the grounds of appeal) that he "took" the radio in the presence of the complainant.

The learned Judge in the High Court (Aganyanya, J.) dismissed the appeal for want of prosecution on 8th April, 1993. This in our view was clearly wrong. The appellant was at that time (as now) serving his sentence and could not have been present before the learned Judge unless the proper procedure for his attendance before the Judge was followed, when he had indicated his desire to be present at the hearing.

In the circumstances dismissal of the appeal for want of prosecution was wrong and we set aside that order of dismissal of the appeal for want of prosecution.

We have jurisdiction by virtue of section 3(2) of the appellate jurisdiction Act cap 9, in the circumstances of this appeal, to dispose of the appeal on its merits rather than refer the appeal to High Court for hearing. We say so because the appellant has only four months left to serve the sentence and if we were to refer

the appeal to High Court for a re-hearing, the whole purpose of the appeal would be defeated.

Section 3(2) of the Appellate Jurisdiction Act Cap. 9 says:

> "For the purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred by this Act, the Court of Appeal shall have, in addition to any other power, authority and jurisdiction conferred by this Act, the power, authority and jurisdiction vested in the High Court."

Having such jurisdiction, we, in considering the length of the term of imprisonment imposed on the appellant, are of the view that the same was excessive and the High Court in our view could have so said.

We would make it clear that the attempts by the appellant to extricate himself out of the plea of guilty recorded in the Magistrate's Court would not have succeeded in the High Court.

We order therefore that the term of imprisonment already served by the appellant be the sentence of imprisonment so that he is to be released forthwith from custody unless otherwise lawfully held.

However, we must consider the corporal punishment of 16 strokes ordered by the learned Magistrate. The section under which the appellant was charged states as follows where material:

> "The offender is liable to imprisonment for fourteen years together with orporal punishment."

We are not able to say that the learned Magistrate was wrong in ordering corporal punishment. But we are of the view that 16 strokes as ordered are not commensurate with the nature of offence. What was stolen was a radio worth KShs.4,000/-. Exercising our powers under section 3(2) of the Appellate Jurisdiction Act we reduce the number of strokes to six (6).

For avoidance of doubt we say, whilst reducing the sentence of imprisonment to the period already served, that the six strokes in question be administered before his release.

Dated and delivered at Nakuru this 21st day of February, 1995.

J.M. GACHUHI

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL