



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**APPELLATE SIDE**

**CRIMINAL APPEAL NO 548 OF 1983**

**(From original conviction and sentence in criminal case No 799 of 1983 of the Resident Magistrate's court at Kibera: M A Ang'awa (Miss) Esq.)**

**JOHN NDUNGU KANYORO.....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

**CORAM:**

O'Kubasu, J Appellant absent not wishing to be presented and unrepresented. F Nabutete (State Counsel) for Respondent.

**JUDGMENT**

The appellant was convicted of stealing contrary to section 275 of the Penal Code (Cap 63) and sentenced to three (3) years imprisonment. Evidence on record showed that the appellant hired Peter Karebu Kiraru (P W 2) to carry iron sheets from Nairobi West. This was on the 31st January 1983. The appellant set upon a kiosk and started demolishing it. While the appellant was demolishing the kiosk the owner of the kiosk arrived and inquired what the appellant was up to. The appellant answered that he had been sent by somebody else. The appellant was however not able to point out the person who had sent him to collect the iron sheets.

The appellant made a defence statement which, in my view, was rightly rejected. On my own part I would say that the appellant was convicted on very clear evidence and hence I see no merit in his appeal against conviction and the same is dismissed. As regards the sentence of three years imprisonment I notice that this is the maximum provided for under section under which the appellant was convicted. The appellant a first offender. The value of stolen iron sheets, which in any case were recovered, was shs 60 only.

It would appear that the learned trial magistrate did not consider mitigating circumstances of this case. The appellant was sentenced to maximum term of imprisonment under the section as if he was the worst offender to be convicted under that particular section. Maximum sentence unless in very exceptional cases should be left to the worst offenders. The learned authors of Gardiner and Lansdown's Criminal Law (5th Edition) at p.534 of the work says:

“A maximum punishment is intended for the worst offence of the class for which the punishment is provided. A court, in sentencing for an offence should consider whether it may be likely that for worse instances of the same class may in future come before it, and should keep some penalty in reserve in order to be able more severely to punish the greater offender. Thus it is undesirable to punish a first offender who steals a lamb with the maximum penalty provided for a stock theft by Act 26, 1923, for then no greater penalty can be inflicted on the hardened criminal, who steals an ox or a horse or a number of sheep, unless he happens to come within the provisions allowing a greater punishment in case of a second or subsequent conviction”.

In this appeal the appellant was convicted for stealing iron sheets worth shs 60/= only. The iron sheets

were recovered immediately. The appellant was a first offender. He was convicted under section 275 of the Penal Code (Cap 63) which provides three years imprisonment as the maximum sentence. Surely to sentence the appellant to the maximum of three years imprisonment was excessive in the circumstances of this case. Hence appeal against sentence is allowed to the extent that his sentence is reduced to such a period that will result in his being released from prison today unless otherwise lawfully held. Order accordingly.

**Delivered at Nairobi this 15th day of March, 1984.**

**E O'KUBASU**

**JUDGE**