



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Madan, Miller & Potter JJA)

CRIMINAL APPEAL NO. 117 OF 1981

Between

ONSERIO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the High Court at Kisumu, Scriven J)

JUDGMENT

February 23, 1982, **Madan, Miller & Potter JJA** made the following Judgment.

This appellant and a co-accused named Nyangeso were originally charged together in the court of the Senior Resident Magistrate, Kisii, with stealing contrary to section 275 of the Penal Code. Nyangeso pleaded guilty. He was sentenced to a fine of Kshs 1,500. Subsequently, a charge of stealing by servant, contrary to section 281 was substituted against the appellant. He was convicted of that charge and sentenced to 15 months' imprisonment. The new charge sheet showing the substituted charge against the appellant is not on the record of appeal before us. Our examination of the file of the magistrate's court tells us that the substituted charge of stealing by servant appears in order.

The appellant was employed as a salesman in the shop of Ngugi Karanja in Kisii Township. On May 30, 1981, Karanja's thirteen year old son Samuel, his wife Grace, the appellant and another employee named Mburu, were in the shop. The appellant was attending Nyangeso as a customer. The two of them discussed the price of two pairs of trousers at some length. There was overwhelming evidence that the appellant put the two pairs of trousers in Nyangeso's handbag. He picked up two more pairs of trousers, and discussing the price, he told Nyangeso that it appeared he could not afford to buy them. The appellant then put back the second two pairs of trousers in the shop. Nyangeso was caught by Mburu as he was leaving the shop with the two pairs of trousers in his handbag. He tried to run. Grace snatched his handbag from him.

The appellant tried to take it away from her. He stopped when Grace threatened him with a pair of scissors. Nyangeso was beaten up. The appellant went out of the shop. Later Karanja came to the shop. He called over the appellant who was standing near the market gate, and escorted him and Nyangeso to police station, Kisii. The appellant was convicted on the evidence of Samuel, Grace and Mburu.

Scriven J summarily rejected the appellant's first appeal to the High Court under section 352(2) of the Criminal Procedure Code. He added:

“As to sentence, I agree with the appellant’s counsel (referring to ground 6 of the memorandum of appeal before him) that disparity between this Accused’s sentence and his co-accused is such that I must interfere to prevent a genuine sense of grievance developing. Pursuant to my revisionary powers therefore sentence varied to a fine of Kshs 2,500 or 6 months in default.”

The memorandum of appeal to us complains:

- “1.The judge misdirected himself in summarily rejecting the appellant’s appeal as the same was not brought on the ground that the conviction was against the weight of evidence.
- 2.The judge misdirected himself in that having held in his order that the disparity between the appellant’s sentence and the co-accused was great he could not summarily reject the appeal.”

We agree that the appeal ought not to have been summarily rejected. It was a ground of appeal to the High Court that the appellant’s sentence of fifteen months’ imprisonment on a first offender, coupled with a differential sentence passed on Nyangeso, was manifestly excessive and wrong in principle. As there was material in the circumstances of the case to lead the judge to the opinion that the sentence ought to be reduced, as he did, the summary rejection of the appeal was contrary to the express provisions of section 352(2), which could not and ought not to have been avoided by invoking the revisionary powers of the court. A point of law had been advanced on appeal. As to summary rejection of appeals, we again draw attention to our judgment in *Ombewa and another*, Criminal Appeal No 36 of 1981 (Kisumu).

We have evaluated the evidence for ourselves.

Before receiving Samuel’s evidence, who, because of his age, appears a child of tender years, the magistrate did not inquire whether he did not understand the nature of an oath, and whether he was possessed of sufficient intelligence to justify the reception of his evidence though not given on oath (section 19(1) Oaths and Statutory Declarations Act, (cap 15)). The appellant could only be convicted on Samuel’s evidence if corroborated by other material evidence in support thereof implicating him (section 124, Evidence Act).

Samuel’s evidence was corroborated by the material evidence of Grace and Mburu which implicated the appellant. Even if Samuel’s evidence was totally disregarded, the evidence of Grace and Mburu who both saw the appellant putting the two pairs of trousers in the handbag of Nyangeso, amply justified his conviction.

The appellant’s sworn defence that Grace accused him falsely because he refused to join in beating Nyangeso, was both pathetic and puerile. On the prosecution evidence the appellant’s conviction was inevitable. He should consider himself fortunate that his sentence of imprisonment was reduced to a fine.

The appeal is ordered to be dismissed.

Dated and delivered at Nairobi this 23rd day of February , 1982.

C.B MADAN

.....

JUDGE OF APPEAL

H.E MILLER

.....

JUDGE OF APPEAL

K.D POTTER

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR