



IN THE COURT OF APPEAL

AT MOMBASA

(Coram: Madan, Miller JJA & Simpson Ag JA)

CRIMINAL APPEAL NO. 93 OF 1981

BETWEEN

JOHN MUTUKU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

Simpson Ag JA On July 14, 1979, the appellant was convicted by a Resident Magistrate at Mombasa of two counts of stealing contrary to Section 275 of the Penal Code. He was fined Kshs 750 or six months imprisonment in default on each count. The fines appear to have been paid.

On July 21, 1979, the Attorney-General requested the Resident Judge to consider enhancement of the sentence but it was not until July 4, 1981, that the matter came before the learned judge who then substituted sentences of two years imprisonment on each count to run concurrently from that date. The appellant now appeals to this Court against this enhancement of his sentences.

When the offences were committed the appellant was a clerk attached to the court of a District Magistrate in Mombasa. Taking advantage of his position the appellant took Kshs 300 from a taxi driver purportedly in order to pay on his behalf a fine imposed on him for negligent driving. He gave no receipt and he kept the money. On the same day he persuaded another taxi-driver to hand over to him Kshs 200 in part payment of a fine of Kshs 1,000. This taxi-driver subsequently complained to the magistrate concerned who ordered the appellant to return the Kshs 200 which he reluctantly did while continuing to assert his innocence.

Although the appellant was a first offender having regard to his position of trust as a member of the court staff we think the original sentence was manifestly inadequate and enhancement would have been justified if ordered within a reasonable time.

In this case however a period of two years elapsed before appropriate action was taken. There is no indication in the record that the appellant took any steps to evade service of a notice of enhancement or indeed that any real attempt was made to trace him. Apart from a brief visit to Eldoret in search of employment the appellant appears to have been in Mombasa throughout this period. He stated that he had not even changed his residence.

The appellant lost his job as a result of his conviction and was unemployed for most of the intervening period. Following an application to British and American Insurance Company he successfully passed an insurance course and began work as an insurance salesman in May 1981. A month later he was seen and recognised by a Resident Magistrate. He was arrested and brought before the High Court for enhancement of the sentence imposed two years earlier.

We think with respect that enhancement after the lapse of two years, a lapse of time for which the appellant was in no way responsible, and at a time when the appellant had just embarked on a new career was wrong in principle.

We allow the appeal, set aside the enhanced sentences and restore the sentences imposed by the Resident Magistrate. If the fines have been refunded to the appellant these must be paid by him within twenty-one days.

Unless otherwise lawfully held in custody the appellant should be set at liberty forthwith.

As **Madan & Miller JJA** agree, it is so ordered.

Dated and Delivered at Mombasa this 22nd day of October 1981.

C.B.MADAN

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JUDGE OF APPEAL

C.H.E.MILLER

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JUDGE OF APPEAL

A.H.SIMPSON

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AG.JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR