REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL (REVISION) CASE NO 18 OF 1978

REPUBLIC.....APPELLANT

VERSUS

ELIJAH MUNEE NDUNDU .....RESPONDENT

JOSEPH MASESI MWENGE.....RESPONDENT

JUDGMENT

Both the respondents were charged before the Senior Resident Magistrate, Nairobi, upon one charge sheet but with separate counts of stealing by a servant, contrary to section 281 of the Penal Code. It would have been better to proceed with the charges against them separately as the prosecution had done initially, but no objection to the joinder was taken before the magistrate, where they were represented, and I am satisfied that it has occasioned them no failure of justice. The application for revision was also presented to this Court against both the respondents together, and it has been jointly argued by both counsel. Since I am of the view that it is just and convenient that I should deal with both the respondents together, I will now so proceed.

The facts, briefly, as found by the magistrate, were that the two respondents were employed as house-servants by the complainant. On or about 9th October 1977, both of them separately disappeared from the complainant's home. Upon checking their property, the complainant and his family found that a lot of their household goods had disappeared. Suspicion centred on the two respondents since there was no evidence of any breaking into the complainant's home, but naturally the complainant could not say which respondent was responsible for the theft of any particular goods. A report to the police was made, and a police officer went to the homes of two respondents in Ukambani area, where searches were conducted. The first respondent was found with property worth Shs 4550, while the second respondent was found with property valued at Shs 3825. All that property was subsequently identified by the complainant and his family as having been stolen from their home. The two respondents, in effect, claimed that the property had been lying in the complainant's home at all the time, and that they had been framed by the complaint because of a dispute over wages. The magistrate rejected the defence and accepted the prosecution case, and consequently convicted both the respondent of stealing by a servant. Against those convictions there has been no appeal.

However, the magistrate then asked for, and obtained, probation reports in respect of both the respondents, noted that the offences were very serious, that they were well-paid house-servants who used to enjoy other privileges and gifts from the complainant yet they abused all that by stealing masses of clothing and property from him. However, she felt that, because of strong mitigating circumstances, she should given them a chance on probation, and she placed each of them on probation for two years.

Against those orders, the Republic has made an application for review.

Mr Rao, Assistant Deputy Public Prosecutor, who appeared for the Republic, argued that probation was not appropriate in the circumstances of the case since the two respondents had made allegations of a frame-up against the complainant, had abused the trust placed in them by stealing a large quantity of goods from their employer, had shown no remorse whatsoever and hence the sentences were manifestly inadequate. On the other hand, Mr Onyango Otieno for the two respondents argued, in effect, that the magistrate weighed all the pros and cons of the case before placing them on probation, that she had exercised her discretion properly, that since the probation orders were made the two respondents had behaved well, that the complainant's eventual loss was almost nil, and that the Republic had failed to make out any case which necessitated this Court's interference with the magistrate's order.

The principles on which a Higher Court will interfere with a sentence passed by a lower court are well settled. I have dealt with them in some detail in *The Republic v Benjamin Ogweno Koyier*, page 158, and I need not reiterate them, but will content myself with saying that the High Court will interfere only where the sentence passed is grossly and manifestly inadequate.

With respect to Mr Otieno, in my view this is such a case. I have dealt with two of the decisions cited by Mr Otieno in *Koyier's* case, and with both of which I respectfully agree, ie *R v Jamal-ud-din* (1934) 1 EACA 68 and *R v Ratilal Amarshi Lakhani* [1958] EA 140. But Mr Otieno has also sought to place much reliance on the judgment of Biron J in the Tanzanian case of *R v Hasham* [1971] EA 348, and I will now deal with it before proceeding further. Reformation is a fair enough consideration but not the main object of penalties in criminal cases. One of the aims of punishment is to deter the individual offender and also to deter others who may be tempted to commit similar offences (see *Samuel v The Republic* [1968] EA 1). It is an important function of any State to protect its citizens. This involves protection of society from crime and criminals.

Courts, being an important organ of the State, have the duty to see that members of society are protected from the repetition of offences. It then becomes right for them to achieve this by imposition of preventive sentences. In considering whether to impose custodial sentences, and particularly long terms of imprisonment, one consideration that plays an important role is the need to remove the offender from society. However, as stated by Lord Denning before the Royal Commission on Capital Punishment, the punishment for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them.

It is a mistake to consider the object of punishment as being deterrent or reformative or preventive and nothing else ... The ultimate justification of any punishment is not that it is a deterrent but that it is the emphatic denunciation by the community of a crime and from this point of view there are some murders which, in the present state of public opinion, demand the most emphatic denunciation of all, namely the death penalty.

Edmund Davies J said, in addressing a meeting of magistrates (who were, after all, concerned with day-to-day sentencing in the Courts):

> ... There are those who speak and write as if the sole object of punishment is the reformation of the accused.

Now I think that is so excessively benevolent as to be capable of being positively mischievous. The prime object is ... to protect the public by the maintenance of law and order. The test ... is what is the best thing to do in the interest of the community, always remembering that the convicted person, despite his wrongdoing, remains a member of the community.

In case it is of assistance to Courts concerned with the day-to-day sentencing of offenders, I would set out this passage from the New Zealand case, *R v Radich* [1954] NZLR 86, 87:

> One of the main purposes of punishment ... is to protect the public from the commission of such

> crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment. In all civilised countries, in all ages, that has been the main purpose of punishment, and it will continued so. The fact that punishment does not entirely prevent all similar crimes should not obscure the cogent fact that the fear of severe punishment does, and will, prevent the commission of many that would have been committed if it was thought that the offender could escape without punishment. If a Court is weakly merciful, and does not impose a sentence commensurate with the seriousness of the crime, it fails in its duty to see that the sentences are such as to operate as a powerful factor to prevent the commission of such offences. On the other hand, justice and humanity both require that the previous character and conduct, and probable future life and conduct of the individual offender, and the effect of the sentence on these, should also be given the most careful consideration although this factor is necessarily subsidiary to the main considerations that determine the appropriate amount of punishment.

It is to be observed that in *Hasham's* case, the accused person had pleaded guilty. In my view, the first consideration for placing a person under probation is that he is repentant or remorseful for what he has done, is genuinely sorry for his unlawful actions and willing to learn from them and to reform in order to become a good citizen for the future. Mr Rao has correctly pointed out that all these basic elements are missing in the case of both the respondents. They have made serious allegations of a frame-up against the complainant. Those allegations were rejected by the magistrate. Even in the reports of the probation officer there is no show of repentance or realisation of the gravity of the offences by either of the respondents. In this connection I am unable to find any logic in the probation officer's report in respect of the respondent Elijah Munee Ndundu that:

> according to the employer ... the [respondent] had worked faithfully and very conscientiously and appears to have been influenced into absconding duty by the first [respondent] ...

or in the report in respect of Joseph Masesi Mwenge that:

> it appears that a misunderstanding developed during the [respondents'] working period which made them quit their jobs without notice, which is not very clear to us ...

All this was contrary to the magistrate's own findings. Mr Otieno also submitted that, since the respondents had been behaving well since they were placed on probation, it would not now be proper to substitute any other form of punishment. In that regard I am also aware of the decision of this Court in *Nathan Godfrey Odhiambo Obiero v R* [1962] EA 650; but, as this Court ruled in *The Republic v Abdul Mohamed Rahim* (unreported), where a lower court acting on wrong principles discharges an accused person the High Court is not thereby deprived of its powers of correcting mistakes of the lower court, merely because the accused person's later conduct has been without blemish (although it is a factor to be taken into consideration).

In *Ogola s/o Owuora v R* (1954) 21 EACA 270, the Court of Appeal for Eastern Africa was of the view that sentences imposed in previous cases of a similar nature, while not being precedents, afford material for consideration. In the *Law Quarterly Review* for April 1970, volume 86, pages 152, 153, the following passage occurs:

There are two reasons why a Court in passing sentence on a person convicted of committing a crime may take into consideration the sentences that other Courts have given for similar crimes. The first is that general agreement concerning the length of a sentence is more likely to be recognised as being fair than is the sentence given by an individual judge as he may have been influenced by his idiosyncratic point of view or even by own peculiar prejudice. The second reason is that as most people agree that *prima facie* justice is found in equality, there ought to be an equality in the award of punishment. This does not mean that deviations cannot be made in individual cases, but if this is done, then as a general rule an explanation ought to be given for the difference.

In the instance case, bearing in mind the gravity of the offence, the position of trust held by the

respondents which they abused, the large quantity of articles which they stole and their general conduct but balancing it against all their mitigating circumstances, in my view any sentence of imprisonment of less than nine months' imprisonment (for an offence carrying imprisonment up to seven years) would be totally and grossly inadequate. Accordingly, I hold that the Republic has made a good case for exercise of my revisionary powers. I set aside the orders of probation in respect of each of the two respondents and substitute sentences of nine months imprisonment on each of them. They will be taken in custody forthwith, and will commence serving their sentences as from today.

Order accordingly.

Dated and delivered Nairobi this 14th day of July 1978.

S.K SACHDEVA

JUDGE