



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Appeal 605 of 2004

AHMED SULEIMAN IDDIAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

AHMED SULEIMAN IDDI is the Appellant herein. He was convicted on two counts of stealing contrary to Section 275 of the Penal Code. Upon conviction, he was sentenced to 3 years imprisonment one each count and the sentence was ordered to run concurrently. The Appellant was aggrieved by the conviction and sentence. He therefore lodged this Appeal.

In his amended or additional grounds of Appeal, the Appellant appears to be only concerned with Appeal on sentence. For he states:-

- (i). **THAT** he admitted the offence in his defence after becoming aware of the seriousness of the offence and understanding the context of the charges.
- (ii). **THAT** at the time when the incident took place there were a plethora of issues that were tormenting the Appellant psychologically due to some financial obligations that he had to fulfill.
- (iii). **THAT** he begs the Court to take a favourable view of the fact that there were no previous conviction.
- (iv). **THAT** he was not remorseful and deeply regret the loss and embarrassment suffered by the Complainant as he was a person who really trusted him.
- (v). **THAT** the duration of the time that the Appellant spent in remand, 7 months and the 19 months he has been incarcerated have taught him the importance of reciprocating trust bestowed upon him and have assumed a more trustworthy disposition.
- (vi). **THAT** he had learned the importance and value of hard work to get a genuine income unscrupulous methods have negative repercussions.
- (vii). **THAT** the Appellant is in poor state of health suffering from ulcers that have affected his nervous system.

(viii). **THAT** the Appellant has a family which is suffering due to his long incarceration as it wholly depends on him for subsistence.

(ix). **THAT** the Appellant prays for a review of the sentence in favour of a non-custodial one.

To my mind the aforesaid are basically pleas in mitigation and confirms that the Appellant was merely challenging the Appeal on sentence and not conviction. This fact was confirmed when the Appellant appeared before me for the hearing of this Appeal. He proclaimed from the onset that he was not pursuing the Appeal on conviction. Rather he was only keen to pursue the Appeal on sentence. In support thereof the Appellant submitted that he would rely wholly on what was stated in the amended additional grounds of Appeal that I have endeavoured to set out above verbatim.

Mrs. Obuo, Learned State Counsel appeared for the state and opposed the Appeal. She submitted that the Appellant was convicted for the offence of stealing contrary to Section 275 of the Penal Code. He was sentenced to 3 years imprisonment. The Appellant was therefore jailed for the maximum sentence allowed. The sentence was therefore legal. Finally Counsel pointed out that before imposing the sentence, the trial magistrate considered the mitigation by the Appellant.

Under Section 354 (3) of the Criminal Procedure Code, this Court has jurisdiction to alter a sentence meted out by a subordinate Court in a Criminal trial. The principals upon which the Court acts when reviewing or altering the sentence imposed by the Lower Court were set out as early as 1954 in the case of **OGALO S/O OWUORA VS REPUBLIC (1954) 21 EACA 270.** It was stated therein that the Court does not alter a sentence on the mere ground that if a member of the Court had been trying the Appellant he might have imposed a somewhat different sentence and that the Appellate Court will not ordinarily interfere with the discretion exercised by a trial Judge in matters of sentence unless:-

“...It is evident that the Judge has acted upon some wrong principle or overlooked some material factors.....”

(See JAMES VS REPUBLIC (1950) 18 EACA 147. The second consideration is that if the sentence is manifestly excessive in view of the circumstances of the case as to amount to a miscarriage of justice, the Appellate Court would intervene.

In the instant case, the Appellant was jailed for 3 years. This is the maximum jail term permissible under the Section that the Appellant was charged. The Appellant was a first offender. He was not a serial thief as to attract the maximum jail term. In her sentencing notes the Learned trial magistrate does not come out clearly as to why she found it necessary to impose a maximum sentence. In my view maximum sentences should only be imposed on those offenders who have previous records and or have made it their trade to commit similar offences. In other words he must be a serial offender. First offenders should rarely attract maximum sentence unless ofcourse the circumstances and manner in which the offence was committed were such that it is an affront to the society and or community. But again each case has to be considered on its own particular facts.

In the instant case, there was no justification at all for imposing the maximum sentence. In my view the sentence imposed in the circumstances of this case was harsh and excessive. It calls for intervention by this Court. This Court intervenes in the sentence imposed to the extent that it commutes the Appellant's sentence to the term so far served with the consequence that the Appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

Dated at Nairobi this 5th day of April, 2006.

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MAKHANDIA

JUDGE