REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL 317 OF 2010

SIMON GITHIGA KARIUKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from original conviction and sentence in Nyahururu P.M.CR.C. No.3050 of 2009

by Hon. A.B. Mongare, Senior Resident Magistrate dated 22ndSeptember, 2010)

JUDGMENT

SIMON GITHAIGA KARIUKI (the appellant) had been charged with two counts of violently robbing SAMUEL KARANJA NJUGUNA of a mobile phone make Jin-Peng valued at Kshs.6000/=, and ERICK OMONDI ODHIAMBO of Ksh.500/=, an identity card, National Social Security Fund card and voting card.

The appellant denied the charges, and after trial in which prosecution called a total of four witnesses in support of its case, the appellant was acquitted on the 1st and 2nd counts of robbery. He was however convicted on a charge of handling stolen goods contrary to **Section 322 Penal Code** and sentenced to serve 5 years imprisonment although he had not been charged with the offence.

ERICK OMONDI ODHIAMBO (PW2) narrated to the trial court how he was at Subukia Centre where he had gone to buy some goods on 26/12/2009 at 9.00 p.m. The moment he got to the centre, he was ordered to sit down by people who were armed with a Maasai rungu and a walking stick. One of the people beat him up – they then robbed him of his wallet which had Kshs.500/= plus all the cards mentioned in the earlier part of the judgment. He suffered injury and was examined by **PETER MWANGI MUGO (PW1),** a clinical officer who confirmed he had injuries caused by a blunt object and produced his P3 form as exhibit.

PW1 told the court that he identified his attacker as the appellant because he was someone known to him prior to the incident. However on cross-examination he stated that what he recorded in his statement was that the person who attacked him was brown and short and that there wasn't enough light during the incident. On a further cross-examination, the witness stated:

". . . You had a cap on. I believed that is why I did not see you clearly. . . ."

He also stated that two wallets were pulled out of the appellant's pockets while at the police station.

According to **PC GEOFFREY GACHUGU (PW3)** when he met ERICK (PW2) on 26/12/2009 after the attack, the latter told him that he had been attacked by unknown people who robbed him. He was in the company of **PC ANDREW SIGUDA (PW4).** So the two officers rushed to the place known as MOGADISHU area (which is the place PW2 named as the scene of attack, where they found two people on the road – one ran away, but one was arrested. A quick body search led to the recovery of a rungu in the rear pocket, and two wallets containing all the cards bearing Erick Omondi's names. That arrested person is the appellant.

On cross-examination PW3 explained that an identification parade was not necessary because the appellant was known to PW3. This evidence is corroborated by that of **PC Siguda (PW4**).

Upon being placed on his unsworn defence, the appellant said he was arrested while on his way home from work, then police arrested two others, one was searched and a wallet and rungu recovered, and a wallet recovered from the other. When they got to the police station, they met the complainant who said he had been found with the said goods.

In her judgment, the trial magistrate noted that although a phone fitting the description of the one mentioned in count 1 was recovered from the appellant, the complainant in that count did not testify to confirm identity and ownership, so the appellant was acquitted on this count. I agree with the trial magistrate findings on that.

With regard to the second count, the trial magistrate noted that the complainant did not clarify who took away the goods from him, since it seemed appellant only knocked him. Secondly that opportunity for identification was not discernible as it was dark, and the source of light was not disclosed. It was on account of this that the charge of robbery contrary to section 296(2) failed.

However the trial magistrate was of the view that the appellant ought to have been charged with the offence of handling stolen goods as an alternative charge, so invoking the provisions of Section 179(1) Criminal Procedure Code, she held that the evidence proved such charge and convicted him thus.

The appeal is on sentence only on grounds that it is harsh and excessive.

In opposing the appeal, Mr. Omari submits that the sentence is not excessive and the court should uphold it. The offence for which the appellant was convicted carries a maximum sentence of 14 years imprisonment. The sentence is legal and not excessive. However, taking into account the value and nature of the items involved, the fact that the appellant was arrested almost immediately after the incident and all the items apart from the Kshs.500/= recovered, then it means that the appellant did not even benefit from his mischief. My view is that under the circumstances, 5 years is rather harsh especially so he had been in custody since 2009 plus the period served from 2010 September which is sufficient punishment.

I therefore interfere with the sentence by setting it aside and substituting it with the period already served. This means that the appellant shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this 30th day of May, 2012 at Nakuru.

H.A. OMONDI
JUDGE