No. 2805

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO. 248, 249 & 250 OF 2009

ASIFU NYAKUNDI ONYAMO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an Appeal from the original Conviction and Sentence in the Principal Magistrate's Court at Nyamira Hon. L. Komingoi in Criminal Case No. 249 of 2009, delivered on 8th December, 2009)

DOUGLAS EZEKIEL KISICHO alias KAMWANA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an Appeal from the original Conviction and Sentence in the Principal Magistrate's Court at Nyamira Hon. L. Komingoi in Criminal Case No. 249 of 2009, delivered on 8th December, 2009)

EVANS SAGERO MATHEWS.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

(Being an Appeal from the original Conviction and Sentence in the Principal Magistrate's Court

at Nyamira Hon. L. Komingoi in Criminal Case No. 249 of 2009, delivered on 8th December, 2009)

Initially ten accused persons namely **Evans Sagero Mathew**, **Andrew Momanyi Michira**, **Douglas Ezekiel Kisicho** alias **Kamwana, Keta Ongeri**, **Dickson Mocheche Onduku**, **Asitu Nyakundi Onyamo**, **Ben Okio Nyandigiso**, **Erick Gesore Michael** and **Erick Mabeya Gesicho** were arraigned before the Principal Magistrate's Court at Nyamira charged with the offence of robbery with violence contrary to section 296(2) of the **Penal Code**. They were also charged with three counts of Burglary and Stealing contrary to section 304(2) and 279(h) of the **Penal Code**, office breaking and committing a felony contrary to section 306(a) of the **Penal Code** and kiosk breaking and committing a felony contrary to section 306 (a) of the **Penal Code**. In the alternative they were charged with handling the various items stolen in the three counts above contrary to section 322 (2) of the **Penal code**.
They all pleaded not guilty to the charges and they were tried. At the close of the prosecution case however, the learned magistrate found **Andrew Momanyi Michira**, **Justus Atemba Nyamato**, **Keta Ongeri**, **Dickson Mocheche Onduku, Ben Okioi Nyandigiso, Erick Gesore Michael** and **Erick Mabeya Ogembo** had no case to answer in respect of the following charges, robbery with violence, burglary and stealing, office breaking and committing a felony and kiosk breaking. They were similarly acquitted of the alternative counts. However, the learned magistrate found that there was sufficient evidence to warrant **Evans Sagero, Douglas Ezekiel Kisicho** alias **Kamwana** and **Asifu Nyakundi Onyamo** who are the appellants being put on their defences. Having heard their respective defences, the learned magistrate was persuaded that the evidence led proved the lesser offence of simple robbery. Accordingly she substituted the initial charge of robbery with violence contrary to section 296(2) of the **Penal Code** with that of robbery contrary to section 296(1) of the **Penal Code** whereupon she convicted **Evans Sagero Mathew** and **Asifu Nyakundi Onyamo** of the same and sentenced them to ten (10) years imprisonment each. She also found both **Evans Sagero Mathew** and **Ezekiel Kisicho** alias **Kamwana** guilty for the offence of handling stolen goods contrary to section 322(2) of the **Penal Code** and sentenced them to seven (7) years imprisonment each. **Evans Sagero Mathew** was again sentenced to serve seven (7) years imprisonment on the two alternative counts of handling stolen goods. His sentence was however ordered to run concurrently.

The three were aggrieved by the conviction and sentence. They therefore lodged in this court separate appeals being Criminal Appeal Numbers 248, 249 and 250 of 2009 respectively. As the said appeals arose from the same trial in the subordinate court and also for ease of hearing, they were on 23rd June, 2010 by consent of the parties involved consolidated, with **Asifu Nyakundi Onyamo** being the 1st appellant, **Douglas Ezekiel Kisicho**, 2nd appellant and **Evans Sagero Mathews** being the 3rd appellant.

The 1st and 2nd appellants in their petitions of appeal complained that the learned magistrate erred in holding that the prosecution case had been proved beyond reasonable doubt, the learned magistrate erred in placing undue trust and importance to the prosecution case, she erred in rejecting their mitigation that was worth an acquittal and finally that the sentence imposed was overly harsh and excessive.

As for the 3rd appellant, besides the foregoing, he also lamented that exhibits recovered had not linked him with the crime, serious contradictions in the prosecutions were not closely evaluated and that section 211 of the **Penal Code** was not complied with.

When the appeals came up before **Makhandia J.** as a single bench for plenary hearing on 23rd June,

2010, as they had been admitted for hearing as single judge appeals **Mr. Mutai**, learned senior state counsel put the 1st appellant on notice that should their appeals fail, he would be seeking for the enhancement of the sentence to one of capital robbery since the elements of robbery with violence were proved during the trial in the subordinate court. The trial court had therefore erred when it reduced the charge from capital robbery to one of simple robbery. Having understood the essence of the warning, the appellants asked for time to ponder over the effects and consequences of the notice.

On 22nd July, 2010 the appeals came, up for hearing before the single-Judge bench. The appellants then indicated to court that having reflected on the notice given by the state, they nonetheless wished to prosecute the appeals. At this juncture, **Mr. Mutai** applied that the appeals be deffered for hearing before a bench of two judges. His wish was duly granted.

The appellants then came before us for hearing of the appeals on 28th March, 2011. The 1st appellant surprisingly recanted his earlier position. He opted to abandon the appeal. As for the 2nd appellant he prayed for more time to decide on the way forward on his appeal following the notice. The 3rd appellant was determined to have his day in court. 2nd appellant's wish was nonetheless granted and the two remaining appeals were re-scheduled for hearing on 30th March, 2011. On this occasion, the 3rd appellant opted to abandon the appeal on conviction. However, he wished to pursue the appeal on sentence.

Mr. Mutuku learned senior principal state counsel did not object to the course taken by the 3rd appellant. We therefore allowed the 3rd appellant to argue his appeal limited, however to sentence only. Otherwise the appeal on conviction was marked as abandoned. As for the 2nd appellant he elected to pursue his appeal on both conviction and sentence.

Dealing first with the appeal on sentence by the 3rd appellant, in support thereof, the 3rd appellant submitted that he was a student in form III when he was arrested in 2009. He wished to have the sentence scaled down so that he could resume and continue with his studies.

In response, **Mr. Mutuku** argued that the sentence imposed was linient given the seriousness of the offence. It was a matter of judicial notice that currently, prisons were offering education facilities to inmates. It is in the public domain that prison candidates had excelled in examinations more than those outside prison walls. In the premises the ground advanced by the appellant for the review of sentence was not sound. The sentence imposed was not excessive. It was legal and lawful.

As stated by **Trevelyn J**. in **Wanjema –vs- Republic (1971) E.A 494**, ***"… a sentence must in the end, depend upon the facts of its own particular case. In the circumstances with which we are concerned a custodial order was appropriately made. But that which was made cannot possibly be allowed to stand. An appellate court should not interfere with the discretion which a trial court has exercised as to sentence unless it is evident it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case…".*** This passage epitomizes the principles by which we must be guided in determining this appeal on sentence.

The 3rd appellant was convicted and sentenced on two main counts; one, of simple robbery and two handling stolen goods and on two alternative counts of handling stolen goods. He was thereafter sentenced to ten (10) years imprisonment on the first count and seven (7) years imprisonment on the remaining counts. It is instructive to note that when called upon to mitigate before the passing of the sentence, the appellant opted to say nothing. We cannot therefore tell in the circumstances what sentence, the learned magistrate would probably have imposed had the appellant mitigated. It may well be that perhaps a more linient sentence would have been imposed. The appellant can only blame himself for the resultant sentence.

The offences of simple robbery and handling stolen goods both attract a maximum sentence of fourteen (14) years imprisonment. Yet the appellant was sentenced to ten (10) and seven (7) years respectively. The sentences imposed as aforesaid were perfectly legal. In imposing the sentence, the learned magistrate considered the fact that the appellant was a first offender but the offences committed were serious to merit detterent sentence of imprisonment. The magistrate was perfectly entitled to take such a factor into account. This was a material consideration. We cannot discern any immaterial factor that the court took into account in arriving at the appropriate sentences it meted out nor do we discern wrong principles applied in arriving at the sentences. We think that the magistrate exercised her discretion as to sentencing properly and we see no need to interfere with the same.

Of course it is not lost on us that the appellant had been charged with capital robbery. The ingredients of the offence were met during the trial. In utter misdirection in law and without any legal basis or justification the magistrate on her own motion decided to reduce the charge to one of simple robbery. The appellant should count himself lucky that he opted not to pursue the appeal on conviction. Most likely the results would have been devastating for him. It is also apparent that the appellant and his cohorts had gone an orgy or robberies and burglaries with devastating consequences. The need for him to be punished as appropriate cannot therefore be gainsaid. Accordingly, the sentence imposed was merited. For all the foregoing reasons the appeal on sentence by the 3rd appellant is dismissed.

The 2nd appellant was convicted and sentenced for the offence of handling stolen goods contrary to section 322(2) of the **Penal Code**. It was alleged that on 19th April, 2009, at Bundo sub location in Nyamira District within Nyanza Province, otherwise than in the course of stealing, dishonestly received or retained a camera Yashica knowing or having reason to believe it to be stolen goods. According to PW7, **Peter Moturi,** this appellant took to him a camera with intention of selling it to him. He testified further that he asked for a receipt but the appellant did not have it. He left the camera with him saying that he was going for the receipt from his wife. He later came back after 1½ hours and told him that his wife had gone to deliver and he needed kshs. 200/= urgently on the strength of the camera. He gave him the amount but the appellant never came back thereafter. After 2 to 3 days the appellant came with the police and the witness was asked about the camera. He surrendered it to them and was taken to Nyamira Police Station and placed in the cells. He was however released after one day having recorded a statement. Apparently that camera was one of the items stolen from the house of PW3 **Donald Omasire Morarie** within Sanganyi Tea Factory. On 18th April, 2009, whilst the said witness was away on duty as stores clerk, at Sanganyi Tea factory his house was broken into and several items stolen therefrom, one of the items was a camera, Yashica. The same was positively identified by PW3 at the police station. This was hardly a day after the burglary. There is no doubt at all as correctly observed by the learned magistrate that the appellant was in constructive possession of the camera on 19th April, 2009 when arrested. This is because much as the camera was in the physical possession of PW7, the appellant had not completely parted with possession thereof. He had been advanced kshs. 200/= by PW7 pending the production of the receipt so that they could conclude the transaction. This was however not to be as he was arrested before he could finalize the transaction.

PW7 was forthright in his testimony as to the circumstances by which he came by the camera. He is a person well known to the appellant. There is nothing to suggest that he had falsely testified against the appellant. There was no reason for him to do so or frame the 2nd appellant with the case. We are thus satisfied that the appellant was found in constructive possession and handling stolen property, to wit, Yashica camera belonging to PW3.

In the premises we hereby dismiss this appellant's appeal on both conviction and sentence.
The final orders in these appeals are as follows:

1st appellant: Appeal marked as abandoned.

2nd appellant: Appeal on both conviction and sentence dismissed

3rd appellant: Appeal on conviction abandoned. However appeal on sentence dismissed.

Judgment dated, signed and **delivered** at Kisii this 20th day of May, 2011.

ASIKE-MAKHANDIA **RUTH NEKOYE SITATI**

JUDGE **JUDGE**