



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI**

Criminal Appeal 323 of 2008

JAMES MAINA GITHIOMI.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

***(Appeal from the original conviction and sentence of the Senior Resident Magistrate's Court
at Karatina in SRMCR.317 of 2007 by L. MBUGUA - SRM)***

J U D G M E N T

The appellant was initially charged with the offence of attempted robbery with violence contrary to *Section 297 (2)* of the Penal Code. It was alleged in the charge sheet that the appellant on 12th day of March, 2007 at Njathaini village in Nyeri District of the Central Province while being armed with a metal rod attempted to rob one **Joseph Muriithi Mahu** of one mobile phone make Motorola C113 valued at Ksh.2000/= and at or immediately before or immediately after such attempt used actual violence to the said **Joseph Muriithi Mahu**. The appellant too faced a charge of causing grievous harm contrary to section 234 of the Penal Code. Particulars being that on the same date and place, he did cause grievous harm to **Joseph Muriithi Mahu** by breaking his right hand. In a bid to prove its case, the prosecution called a total of two witnesses. At the conclusion of the trial, the learned trial magistrate found that the offence disclosed on the evidence was attempted robbery contrary to *Section 297 (1)* of the Penal code and not attempted robbery with violence. She accordingly reduced the charge and sentenced the appellant to 7 years imprisonment. She also found the appellant guilty of the 2nd count of grievous harm and similarly sentenced him to 7 years imprisonment. The learned magistrate however made no mention as to whether the aforesaid sentences would run concurrently or consecutively meaning therefore that the sentences would effectively run consecutively.

The appellant was aggrieved by the conviction and sentence and consequently lodged this appeal.

When the appeal came up for hearing, the appellant abandoned his appeal on conviction and elected to pursue the appeal on sentence only. He submitted that the sentence meted out on him was harsh and excessive considering that he was a first offender. That further the trial magistrate should have ordered the sentence to run concurrently.

The state appeared through **Mr. Makura** learned senior state counsel who submitted that the sentence should have been ordered to run concurrently as the two offences arose from the same transaction.

In the case of **Griffin Vs Republic, (1981) KR 121**, it was held that the first appellate court should not interfere with the sentence imposed by the trial court solely on the ground that it was heavy, unless it was also manifestly harsh and excessive. Similarly in the case of **Wanjema Vs Republic (1971) EA 493** it was held:

“An appellate court should not interfere with the discretion which a trial court exercised as to sentence unless it is evident that it overlooked some material factors, took into account some immaterial factors, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case.”

The offences for which the appellant was convicted and sentenced carries maximum sentence of seven (7) years and life imprisonment respectively. The appellant was sentenced to the maximum sentence on the first count and a mere seven years imprisonment on the second count. On the face of it, the sentence do not appear to be manifestly excessive considering the fact that the appellant broke the complainant’s right arm. The learned trial magistrate advanced reasons why she felt such sentences were necessary and or appropriate. Perhaps the only omission committed by the learned magistrate was to fail to order that the sentences imposed as aforesaid should run concurrently. Afterall the two offences were committed in the same transaction.

As I have previously stated the sentence imposed appears on the face of it to be legal and not manifestly excessive considering the circumstances of the case. I would in the premises without altering the conviction and sentence nonetheless order that the sentence to run concurrently.

It is therefore the order of this court that the appeal on sentence succeeds to that limited extent. The appellant shall serve seven years imprisonment on each count. However the sentences shall run concurrently.

Orders accordingly.

Dated and delivered at Nyeri this 25th day of January, 2010.

M.S.A. MAKHANDIA
JUDGE