



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS

Criminal Appeal 90 of 2006

BETH WANZA MAINGI

FRANCIS IVIA MUTIA

.....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

(Being Appeal from the judgment in Machakos Chief Magistrate's Court Criminal Case No. 1488 of 2003 by H.A. Omondi C.M. on 26/7/2006]

JUDGMENT

1. On 18.3.2009 when the Appeal herein came for hearing Mr. Mutuku for the Appellants abandoned the appeal on conviction and said that he would limit himself to the appeal on sentence only.
2. In his submissions, he stated that the sentences given to the Appellants were harsh and excessive and that having been in custody for 4 years prior to conviction, the sentence imposed should have been lenient.
3. Mr. Omirera opposed the appeal and stated that the circumstances surrounding the appeal were disturbing and in fact the sentences should be enhanced.
4. To put matters in prospective, the Appellants and one Walter Musyoka Mue were charged with the offences of robbery with violence contrary to section 296(2) of the Penal Code, being in possession of firearms without a firearm certificate contrary to section 4(2) (b) of the Fire Arm Act Cap 114, being in possession of ammunition without a firearm certificate contrary to section 4(2) (a) of the Firearm Act Cap 114, being in possession of public stores contrary to section 324((2) of the Penal Code and having suspected stolen property to section 323 of the Penal Code.
5. After a lengthy trial, the learned trial magistrate convicted them of the firearm related offences as well as that of being in possession of public stores and having suspected stolen property. For avoidance of doubt the alleged public store equipment was a police beacon marked "330" and the suspected stolen property was one communication machine S/No 603076823. For the twin firearm offences they were sentenced to serve 7 years in prison for each offence and for the other two offences, they were sentenced to serve 2 years in prison. All the 4 sentences were to run concurrently.
6. For an appellate court to overturn a sentence lawfully given, it must be shown that;

- i) the sentence imposed was manifestly harsh or excessive.
- ii) the trial court misapprehended the facts before him.
- iii) the trial court applied a wrong principle in imposing sentence.

7. In this case the sentence for an offence under sections 4 (2) and (b) and (3) of the Firearm Act is 7-15 years and under section 323 and section 324 (2) of the Penal Code the sentences are 2 years in prison in view of section 36 of the Penal Code. In this case the sentences meted out were fair and were certainly not too harsh. The fact that they were to run concurrently is clear evidence that the learned magistrate understood how the exercise of discretion to sentence should be done. In her Ruling on sentence, she was also alive to the fact that the 1st Appellant was already serving sentence on a capital offence and that the 2nd Appellant was a first offender. I see no misdirection on her part and I see no reason to interfere with the sentences meted out.

8. That being the case the Appeal before me has no merit and is dismissed.

9. Orders accordingly.

Dated and delivered at **Machakos** this **13th** day of **May 2009**.

Isaac Lenaola

Judge

In the presence of:

Isaac Lenaola

Judge