



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL 359 OF 2007

FRANCIS MWANGI MAINA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Appeal from original Conviction and Sentence of the Senior Principal Magistrate's Court at Murang'a in Criminal Case No.1511 of 2005 by T.W. Murigi – S.R.M.)

J U D G M E N T

These two appeals have been consolidated for ease of hearing and as they arose from the same trial in the subordinate court. In the said court the appellants were tried, convicted and sentenced to 4 years imprisonment for the offence of Robbery contrary to *section 296 (1)* of the Penal Code although they had been initially been charged and tried for the offence of robbery with violence contrary to *Section 296 (2)* of the Penal Code. In reducing the charge to one of simple robbery, the learned magistrate observed:-

“.....It's the complainant's evidence that he was injured on his mouth by a blow. That being the case I find that the robbery was not violent and I reduce the charge to simple robbery contrary to *section 296 (1)* of the Penal Code.....”

Of course this was a gross misdirection in law on the part of the learned magistrate. Violence is not the only ingredient for the offence of robbery with violence.

That above misdirection notwithstanding, the learned magistrate committed yet another monumental mistake by convicting and sentencing the 1st appellant on the alternative count of handling stolen goods contrary to *section 322 (2)* of the Penal Code. This was highly irregular. The normal practice where an accused faces an alternative count is that once you convict the accused on the main count, the trial court should not make any finding on the alternative count. Accordingly the conviction and sentence on the alternative count of the 1st appellant is a nullity and is accordingly set aside.

Be that as it may, the appellants were aggrieved by the conviction and sentence aforesaid hence they preferred these appeal.

When the appeals came up for hearing, **Mr. Mukura**, learned Senior State Counsel issued a warning to the appellants and rightly so in my view that in the event that appellants went on with their appeals and were eventually found waiting and dismissed, he would be seeking for the enhancement of the sentence to one of capital robbery as the learned magistrate grossly erred in reducing the original charge to one of

simple robbery. Having understood the nature of the warning, the appellants beat a hasty retreat. They immediately abandoned their appeals on sentence and elected to pursue the appeal on sentence instead. **Mr. Makura** was not averse to idea. Accordingly, I granted the appellants' their wish.

In support of their appeals on sentence the appellants submitted that the sentence imposed was harsh and excessive.

Mr. Makura, opposed the appeal on the grounds that the sentence was legal, neither harsh nor excessive.

As stated by the court of appeal in the case of **Republic Vs Batista Lisoni Beni C.A. No.65 of 2004** (UR), sentencing is a matter for the discretion of the trial court. The discretion must however, be exercised judicially. The trial court must be guided by evidence and sound legal principals. It must take into account all relevant factors and exclude all extraneous or irrelevant factors.

There is no doubt at all that the appellants were lucky to have had the original charge reduced to one of simple robbery on very spurious grounds. The ingredients of robbery with violence had actually been met going by the evidence on record. Once the charge was reduced as aforesaid, the appellants were sentenced to 4 years imprisonment. The offence of simple robbery attracts a maximum of 14 years. The appellants cannot in circumstances proclaim that the sentence imposed as aforesaid was manifestly harsh and excessive. If anything it was manifestly lenient. The sentence imposed was certainly legal and I do not detect anything that would remotely suggest that in arriving at the sentence, the learned magistrate took into account irrelevant or extraneous factors and or that she exercised her discretion capriciously.

When all these circumstances are considered, I am of the view that the learned magistrate did not grossly misdirect herself on the sentence she came to nor did she err in principle by failing to take into account the core factors of this case. The sentence arrived at was in the circumstances appropriate and does not therefore call for my intervention. This appeal is accordingly dismissed.

Dated and delivered at Nyeri this 31st day of July, 2009.

M.S.A. MAKHANDIA

JUDGE