REUBEN MAINA KAMARI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Appeal from original Conviction and Sentence in the Senior Principal Magistrate's Court at Murang'a in Criminal Case No. 1362 of 2004 dated 24th October 2005 by Mr. T. W. Murigi – SRM)

CONSOLIDATED WITH

DUNCAN KIRIGI KIHARA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Appeal from original Conviction and Sentence in the Senior Principal Magistrate's Court at Murang'a in Criminal Case No. 1362 of 2004 dated 24th October 2005 by Mr. T. W. Murigi – SRM)

J U D G M E N T

Reuben Maina Kamari and **Duncan Kirigi Kihara**, hereafter referred to as the 1st and 2nd appellant respectively were convicted on various counts of handling stolen property contrary to section 322(2) of the penal code. For the 1st appellant he was convicted on two counts of handling whereas the 2nd appellant was convicted on three similar counts. However they had been initially charged with six counts of robbery with violence contrary to section 296(2) of the Penal Code.

Upon being arraigned in court, the appellants pleaded not guilty to the main counts and their trial ensued in earnest. At the close of the prosecution case, the learned magistrate acquitted the pair on the six main counts aforesaid pursuant to the provisions of section 210 of the criminal procedure code. However the learned magistrate found that the appellants had a case to answer with regard to the alternative counts of handling stolen property contrary to section 322(2) of the penal code. They were thus put on their defences. Upon hearing the defences, the learned magistrate concluded that they were guilty as charged on the alternative counts and sentenced them to 5 years imprisonment each. However the learned magistrate was not clear whether the 5 years sentence would apply to each count and or on all the counts and whether the sentence would run concurrently and or consecutively. I wish to point out that where an accused person is convicted and sentenced on various counts it is important for the record to show how the sentence has been imposed and how it will be served. It should not be left to speculation and conjecture as in this case. I do not know whether the sentence of 5 years imposed by the learned magistrate was to apply across the board or whether it applied on each count. It is also not clear whether the sentence was to run concurrently or consecutively. This kind of careless approach to sentencing more so from a Senior judicial officer ought to be frowned upon and indeed discouraged.

Be that as it may, the appellants were aggrieved by the conviction and sentence. They therefore preferred separate appeals challenging both the conviction and sentence. However when the appeal came

up for hearing and at the request of **Mr. Orinda,** Principal State Counsel the two appeals were consolidated for ease of hearing and as they arose from the same trial in the subordinate court. At the same time, **Mr. Orinda** put the appellants on notice that he would be seeking for the enhancement of the sentence to death as the evidence on record ought to have persuaded the learned magistrate to convict them on the capital robbery charges initially preferred, if the doctrine of recent possession was to be applied. Having considered the implications of the learned principal state counsel's Notice the appellants beat a hasty retreat and abandoned their appeal on conviction and rightly so in my view as the prosecution evidence against them was simply overwhelming. The appellants however elected to pursue their appeals on sentence.

In support thereof the appellants submitted that the sentence imposed was manifestly harsh and excessive. That they had been in custody since August 2004, had school going children and were sole breadwinners. They had reformed, successfully undertaken various courses whilst in prison that would hold them in good stead in the event that they were released into society. That they were first offenders.

Mr. Orinda, learned state counsel appeared for the state and opted not to oppose or support the appeal on sentence. Instead he left the matter to court.

It has been repeatedly stated that sentencing is a matter for the discretion of the trial court. The discretion must however, be exercised judicially and not capriciously.

The sentencing court must be guided by sound sentencing principles. It must take into account all relevant factors and eschew all extraneous or irrelevant considerations. It should not impose a sentence which is illegal, harsh or manifestly excessive as to amount to a miscarriage of justice. See generally, **James v/s Republic (1950) 10 EACA 147, Ogalo s/o Owuora v/s Republic (1952) 2 EACA 270, Nilson v/s Republic (1970) EA 599** and **Wanjema v/s Republic (1971) EA 493.**

The sentencing court's notes on sentence in this mater are detailed enough. The trial magistrate justified why he felt that a deterrent sentence was called for in the circumstances of this case. I do not discern any capriciousness on the part of the learned magistrate in sentencing the appellants. Neither did he consider extraneous or irrelevant matters in arriving at the sentence imposed. The offences for which the appellants were ultimately convicted carries a maximum jail term of fourteen (14) years with hard labour. The appellants were only sentenced to 5 years imprisonment. That being the case, the appellant cannot be heard to complain that the sentence imposed was harsh and manifestly excessive. In my view, it was even manifestly lenient considering that they had even escaped the hangman's noose due to misdirections in law on the part of the learned magistrate and on spurrious grounds. I therefore have no reason to interfere with the sentence imposed. It will stand. However there are corrections and clarifications which I need to make with regard to the sentence;

(a) Each appellant is sentenced to 5 years imprisonment on each of the counts that the appellants were convicted.

(b) The sentences shall however run concurrently.

(c) The sentences shall further be served with hard labour.

It would appear that the learned magistrate had inadvertently omitted to impose this aspect of the sentence when he was imposing the aforesaid sentences on the appellants. It is so ordered.

Dated and delivered at Nyeri this 25th day of January 2008

M. S. A. MAKHANDIA

JUDGE