REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 157 & 159 of 2005

CHRISTOPHER GICHERU MUHIA……….…...…APPELLANT

VERSUS

REPUBLIC …………………………………….. RESPONDENT

CONSOLIDATED WITH

HIGH COURT CRIMINAL APPEAL NO.159 OF 2005

JOSPHAT KIRANGO MAINA……………..…..….APPELLANT

VERSUS

REPUBLIC …………………...…………………..RESPONDENT

(Form original Conviction and Sentence of the Senior Principal Magistrate's Court at Murang'a in Criminal Case No.830 of 2004 by T.W. MURIGI – SRM)

J U D G M E N T

Christopher Gicheru Muhia and Josphat Kirango Maina the appellants herein were originally charged with the offence of robbery with violence contrary to *section 296 (2)* of the Penal Code. The particulars of the charge were that on the 14th day of May, 2004 at Mugeka village in Murang'a District within Central Province, with another not before court robbed Stephen Kairu Njona of one Mobile Phone make Siemens A36 valued at Kenya shillings 6,000/= and at or immediately before or immediately after the time of such robbery struck the said Stephen Kairu Njona. The two pleaded not guilty to the charge and their trial ensued. At the conclusion thereof, the learned Magistrate found that the offence proved was robbery contrary to *section 296 (1)* of the Penal Code and not as previously charged. His conclusion aforesaid was based on the fact that "the accused persons were not armed with any weapon…." This was gross misdirection in law on the part of the learned Magistrate. For avoidance of doubt the offence of

robbery with violence is committed once the offender is armed with any dangerous or offensive weapon or instrument, or he is in the company with one or more person or persons, or if at or immediately before or immediately after the time of such robbery, he beats, strikes or uses any personal violence to any person. See Johana Ndungu V Republic, Criminal appeal No.116 of 1995 (unreported). Any one of the three ingredients aforesaid if successfully proved by the prosecution is sufficient to constitute the offence of robbery with violence under *section 296 (2)* of the Penal Code. We must emphasize here once again that any of the three sets of ingredients aforesaid would be sufficient to constitute the offence of robbery with violence under *section 296 (2)* of the Penal Code.

It is manifestly clear from the evidence on record that the ingredients of the offence of robbery with violence under *section 296 (2)* of the Penal Code had been satisfied and the appellants had committed an offence under the section and ought to have been convicted under it. The appellants were in the company of more than two persons at the time of robbery! They also committed the act of beating, striking and assaulting the complainant. As the prosecution had proved beyond reasonable doubt that the offence of robbery with violence under *section 296 (2)* of the Penal Code had been committed, the trial Magistrate had no authority to reduce it to one of simple robbery under *section 296 (1)* of the Penal Code.

We must state here however that we did not administer a warning to the appellants of the consequences that may befall them if they persisted with their appeals and they failed. This is so because the appellants suddenly changed tact and abandoned the appeals on conviction and only wanted to be heard on sentence. That tact has certainly saved them from the hangman's noose.

Upon conviction for the offence of simple robbery, each appellant was sentenced to 4 years imprisonment. It is this sentence that the appellants are now calling on us to intervene.

At the hearing of the two appeals and with the consent of the parties herein we ordered for the consolidation of the two appeals. In support of his appeal, the 1st appellant submitted that he was involved in an accident whilst in prison and had his three fingers severed off by timber machine. They had not healed completely and required further medical attention that is unavailable in the prison precincts. As for the 2nd appellant he submitted that he was drunk when he was arrested. Mr. Orinda, Principal State Counsel opted to leave the matter to court.

The learned Magistrate in sentencing the appellants stated:

"I have considered the accused persons mitigation. I have also considered the fact that they are first offenders. However the offence they are charged with is quite serious that would require a deterrent sentence. Each accused person is sentenced to serve 4 years imprisonment."

Upon conviction of the offence the appellants were liable to be sentenced to 14 years imprisonment. They were however, sentenced to serve only 4 years in prison. The trial Magistrate considered all the circumstances of the case in arriving at the sentence imposed on the appellants. We have, on our part, considered the circumstances under which the offence was committed as well as the mitigating circumstances put forward by the appellants and it is our view that the sentence imposed was neither harsh nor excessive in those circumstances. Infact it was extremely linient. Accordingly we find no merit in these appeals and we order that the same be and are hereby dismissed.

Dated and delivered at Nyeri this 29th day of May, 2008.

MARY KASANGO

JUDGE

M.S.A MAKHANDIA

JUDGE