REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 46 of 2005

GITHUKA WAIRUGO MAINA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Appeal from original Conviction and Sentence in the Senior Principal Magistrate's Court at Murang'a in Criminal Case No. 951 of 2003 dated 1st February 2005 by Mr. G. K. Mwaura – P.M.)

J U D G M E N T

This is an appeal from the judgment of **G. K. Mwaura**, **P.M.** in which he sentenced the appellant herein **Githuka Wairugo Maina** to serve ten (10) years imprisonment on the alternative count of handling stolen property contrary to section 322 (2) of the Penal Code. Initially the appellant had been charged with five others with two counts of robbery with violence contrary to section 296(2) of the Penal Code. The appellant alone faced the alternative count aforesaid. They all pleaded not guilty to the charges and after a full trial, the appellant and all his co-accused were acquitted on the main counts under section 215 of the Criminal Procedure Code. The appellant was however convicted on the alternative count and sentenced to serve ten years imprisonment with hard labour as already stated. The Appellant was aggrieved by the sentence and hence preferred this appeal.

During the admission of the appeal, **Justice Khamoni** inadvertently directed that the appeal be heard before two judges. He also directed that a warning be issued to the appellant. These directions must have been given by the judge on the basis that the learned magistrate might have erred in law in reducing the charge from robbery with violence contrary to section 296 (2) to some other charge. Secondly, that the appeal was on both conviction and sentence.

However the record of the trial magistrate says otherwise. The appellant was convicted on the alternative count of handling stolen property contrary to section 322 (2) of the Penal Code. This was after the learned magistrate discounted the application of the doctrine of recent possession in respect of the main charges. The learned magistrate did not therefore reduce the charge by misdirecting himself in law such as would have invited this court to correct that misdirection, hence the need for the warning. Further the appeal lodged by the appellant was not both on conviction and sentence, but was only limited to sentence. This being the case, the appeal ought to have been heard by one judge and not two of us. This fact only came to our attention whilst we were in the middle of the hearing of the appeal. Nonetheless we opted to proceed with the appeal, the foregoing notwithstanding.

Before this court the appellant appeared in person. The grounds for his appeal were stated by him in his petition of appeal as follows:-

"**1. That I pleaded not guilty to this charge.**

2. That I am the sole bread winner in the family of three school going children.

3. That I have suffered in remand for 19 months yet the delay was unwarranted and was not considered anywhere.

4. That I am a first offender and have never been arraigned before Court of law in any criminal charge.

5. I am a man aged 43 and I am suffering from a serious chest problem due to my continued incarceration.

6. That I was induced by police officers that if I accepted the radio was sold to me by PW1 the magistrate would consider this as minor offence and give a non-custodial sentence.

7. That I am a layman in law and wasn't aware of the penalties one can suffer in an offence against the state.

8. That I am an orphan having lost both parents in the year 2000.

9. That the trial magistrate convicted me without an option of a fine and he dismissed my mitigation as nonsense.

10. Your lordship I wish this honourable court will consider my application and show leniency of a non-custodial sentence. With an option of fine"

In **Diego v/s Republic [1985] KLR 621** in a judgment of **Todd J**. and **O'Kubasu, J** (as he then was) in the Court held as follows:-

"**5. An appellate Court should not interfere with the discretion by a trial Judge as to sentence except in such cases where it appears that in assessing the sentence the judge acted on some wrong principle or has imposed a sentence which is manifestly inadequate or manifestly excessive. The appellate court would not interfere with the sentence imposed on the appellant."**

The offence for which the appellant was convicted carries a maximum sentence of fourteen years plus hard labour. The appellant was however sentenced to ten years plus hard labour. The sentence imposed is legal. It is not manifestly inadequate or manifestly excessive as to attract our intervention. We have looked at the sentencing notes of the learned magistrate and we do not discern anything that would remotely suggest that the learned magistrate acted capriciously in the exercise of his discretion in sentencing. He did not consider extraneous matter or failed to take into account relevant matters in deciding on the appropriate sentence to be meted out on the appellant. Accordingly we do not consider that we should interfere with the sentence ordered by the learned magistrate. The appeal therefore stands dismissed.

Dated and delivered at Nyeri this 22nd day of May 2008

MARY KASANGO

JUDGE

M. S. A. MAKHANDIA

JUDGE