REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 99 of 2005

FRANCIS CHEGE KARERI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Appeal from the original Conviction and Sentence in the Senior Resident Magistrate's Court at Murang'a in Criminal Case No. 1089 of 2004 dated 15th March 2005 by T. W. Murigi – SRM)

J U D G M E N T

Francis Chege Kareri, the appellant herein was charged before the Senior Resident Magistrate's Court at Murang'a with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. He pleaded not guilty to the charge. He was tried and at the end of the day, the learned magistrate found that the offence proved on the recorded evidence was one of simple Robbery i.e. robbery contrary to section 296 (1) of the Penal code. That holding was premised on the ground that in robbing the complainant the appellant was not armed with any offensive and or dangerous weapon. That though the appellant was threatening to shoot the complainant if he did not give him money and though he kept putting his hand in his pocket like he had a gun, however the complainant and his wife never saw the gun.

There is evidence on record that in robbing the complainant, the appellant was not alone. He was in the company of five or so other accomplices. The offence of robbery with violence is committed as we all know:

(1) If the offender is armed with any dangerous or offensive weapon or instrument, or

(2) If he is in company with one or more other persons, or

(3) If, at or immediately before or immediately after the time of the robbery; he wounds, beats, strikes or uses any other violence to any person. See Johana Ndungu v/s Republic, MSA Cr. App. No. 116 of 1995 (unreported)

Thus if the facts show that at the time of the commission of the robbery as defined in section 295 of the Penal Code, the offender comes within the three sets of circumstances aforesaid, then it is mandatory for the court to convict. In this case the robbers were more than one. We are therefore satisfied that the charge of robbery with violence under section 296(2) of the Penal Code had been proved. It was therefore a gross misdirection in law for the learned magistrate to have reduced the charge to one of simple robbery on the pretext that the appellant was not armed with a dangerous or offensive weapon or instrument.

The appellant is lucky that he did not mount this appeal on both conviction and sentence. He only did so on sentence. Had he been minded to file the appeal against both conviction and sentence, we would have been minded to revisit the twin issues of conviction and sentence upon of course giving appropriate notice to the appellant. There is no doubt at all that the evidence linking the appellant to the crime was sound and overwhelming. His conviction was therefore inevitable. Our hands are however tied in view of the fact that the appeal is only against sentence.

Upon mistakenly reducing the charge to one of simple robbery, the learned magistrate sentenced the appellant to seven years imprisonment. He was aggrieved by the sentence and hence preferred this appeal which as we have already stated is limited to sentence only. In his self-drawn petition of appeal, the appellant has raised eleven grounds of appeal which in our view are nothing but pleas in mitigation.

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 principles on sentencing. The trial court must take into account all relevant factors and eschew extraneous or irrelevant matters.

We have looked at the sentencing notes of the learned magistrate. We do not discern any capricious exercise of discretion nor do we discern any consideration of irrelevant or extraneous matters in determining appropriate sentence to be handed down. The learned magistrate had at the back of his mind correct sentencing principles.

We are now asked to interfere with that sentence and we have the power to do so as a first appellate court. However we can only do so in terms aforesaid and if there was a clear breach of the law or principle since it was within

the discretion of the trial court to assess the appropriate sentence in all the circumstances of the case.

The offence for which the appellant was convicted attracts fourteen years imprisonment. The appellant was however sentenced to half the term. Given that the appellant could have been equally convicted on the initial charge and sentenced to death, we do not agree that the sentence imposed was manifestly excessive and harsh as to attract our intervention. The learned magistrate considered the appellant's mitigation before arriving at the sentence. The same mitigation have been put forth as grounds of appeal. The sentence imposed was in our view well deserved.

Accordingly we reject this appeal and hold that the sentence imposed by the trial court was well merited, if not lenient. The appeal is therefore dismissed.

Dated and delivered at Nyeri this 15th day of May 2008

MARY KASANGO

JUDGE

M. S. A. MAKHANDIA

JUDGE