REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 210 of 2006

PURITY WANGUI WANGARI ……...……APPELLANT

VERSUS

REPUBLIC ……..…….. RESPONDENT

(Appeal form original Conviction and Sentence of the Resident Magistrate's Court at Othaya in Criminal Case No.449 of 2006 by MUTUKU M.W. – RM)

J U D G M EN T

The appeal herein is limited to sentence only. The appellant was charged and convicted for the offence of robbery contrary to *section 296 (1)* of the Penal Code. Upon conviction she was sentenced to 3 years imprisonment. She was aggrieved by both the conviction and sentence. She therefore preferred this appeal setting out 5 grounds of appeal.

One of the grounds and which concern us in this appeal was that the sentence of 3 years imprisonment was too harsh. When the appeal came up for hearing, the appellant informed the court that she was no longer keen to pursue the appeal on both conviction and sentence. Rather she wished to abandon the appeal on conviction but pursue the appeal on sentence. Her wish was granted, **Mr. Orinda** learned Principal State Counsel not objecting to the same.

In support of the appeal on sentence, the appellant submitted that the sentence of 3 years imposed on him was harsh and excessive. On his part**, Mr. Orinda** opposed the appeal saying that the sentence of 3 years was neither harsh nor excessive.

Sentencing being an exercise in discretion save for statutory maxima offences such as murder and or robbery with violence, an appellate court will rarely interfere with such exercise unless it is demonstrated that in arriving at the sentence, the sentencing court;

(i) Acted capriciously and not judicially.

(ii) Imposed an illegal sentence

(iii) Imposed a manifestly harsh and illegal sentenced

(iv) Acted on wrong principle, and

(v) Failed to take into account correct principles.

See generally **Ogola S/O Owuora V Republic (1954) 19 EACA 270, Nilson V Republic (1970) EA 599 and Wanjema V Republic (1971) EA 493.**

The appellant herein was convicted for the serious offence of robbery contrary to *section 296(1)* of the Penal Code. That offence carries a maximum sentence of 14 years. Yet the appellant was only sentenced to 3 years imprisonment. There is no doubt therefore that the sentence was legal and not manifestly harsh and or excessive. Infact it was extremely leniently considering further that the appellant was not a first offender. According to the records of the appellant produced by the prosecutor she had earlier on been convicted in Criminal Case number 571/04 in the same Court and sentenced to serve 12 months imprisonment. This was way back on 24th June, 2005. The offence giving rise to this appeal was committed on 10th May, 2006, hardly a month after she had been released.

The learned Magistrate took this aspect of the matter into account and rightly so in my view. She committed the offence immediately after her release which is indictment to our penal system. Clearly the appellant had shown no signs of reform for the period she was in jail for the earlier offence.

Indeed the appellant was lucky this time around for being charged with the offence of simple robbery. In my view she ought to have been charged with the more serious and capital offence of robbery with violence. In robbing the complainant, the appellant was in the company of two other people. They also inflicted injuries to the complainant if the evidence of PW3, **Dr. Munene** who attended to the complainant following the robbery and filled his P3 form was anything to go by. There was therefore overwhelming evidence to support two of the three ingredients of robbery with violence. **See Johana Ndungu V Republic, CR.APP. No.116 of 1995** (unreported). There was absolutely no reason why the appellant was not charged with capital robbery.

The appellant having benefited from the deliberate and or inadvertent error on the part of the prosecution in preferring a lesser charge, she should be contend and thank her God for the small mercies.

The appeal on sentence has no merit. Accordingly it is dismissed.

Dated and delivered at Nyeri this 30th day of June, 2008.

M.S.A. MAKHANDIA

JUDGE

Delivered by;

MARY KASANGO

JUDGE