

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 249 of 2006

**(From original conviction and sentence of the Chief Magistrate’s Court at Nyahururu in
Criminal Case No. 5510 of 2005 – S.M. Mungai[P.M.]**

PATRICK GITAU MUCHUKU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Patrick Gitau Muchuku was charged with the offence of Robbery with Violence contrary to Section 296 (1) of the Penal Code. The particulars of the offence were that on the night of the 25th November 2005, at Mairo Inya trading centre in Nyandarua District, the appellant jointly with others not before court robbed Abraham Kahiga Wachira of a mobile phone make Nokia 3310 and Ksh.500/= cash and at or immediately before or immediately after the time of such robbery used actual violence to the said Abraham Kahiga Wachira. The appellant was alternatively charged with **Handling Stolen Goods contrary to Section 322 (2) of the Penal Code**. The particulars of the offence were that on the same day, and in the same place, otherwise than in the course of stealing, the appellant dishonestly received or retained one mobile phone make Nokia 3310 knowing or having reason to believe it to be stolen or unlawfully obtained. The appellant pleaded Not Guilty. After a full trial, the appellant was found guilty of the first count of robbery and sentenced to serve five years imprisonment. The appellant was aggrieved by his sentence and has appealed to this court.

In his petition of appeal, the appellant pleaded with the court to exercise leniency on him. He stated that he was remorseful for the offence that he had committed, and given a chance, he would not repeat the offence again. He now realises that crime does not pay. He states that the sentence of five years imprisonment imposed upon him was harsh in the circumstances and therefore the court should consider reducing the sentence. He stated that he had undergone occasional training while in prison and would be a useful member of the society if released from prison. At the hearing of the appeal, the appellant reiterated the contents of his petition of appeal. He stated that he was a first offender and had learnt his lesson in the period that he has been incarcerated in prison. He urged the court to treat him with leniency. He promised to be a useful member of the society if released from custodial sentence. Mr. Njogu for the State opposed the appeal. He submitted that the appellant was lucky to have escaped with a prison sentence. In his view, the appellant ought to have been convicted of the more serious offence of **Robbery with Violence contrary to Section 296 (2) of the Penal Code**. He submitted that the sentence of five years imprisonment was lenient in the circumstances. He urged the court not to interfere with the said sentence.

I have considered the plea by the appellant for reduction of sentence. I have also considered the submission made by Mr. Njogu on behalf of the State in opposing the appeal on sentence by the appellant. The Court of Appeal in **Samuel Githua Njoroge vs Republic CA Criminal Appeal No.53 of 2006 (Nakuru) (Unreported)** held at page 2 as follows;

“The principles upon which an appellate court can interfere with the discretion of a trial [Magistrate] as regards sentence are well settled. The appellate court can only interfere where the trial [Magistrate] in assessing the sentence has acted on wrong principles or imposed a sentence which is manifestly inadequate or manifestly excessive. (See Diego vs Republic [1985] KLR 621.)”

In the present appeal, the appellant has not stated that the trial magistrate acted on the wrong principles of the law when he sentenced him to serve the said custodial sentence. In fact, from the evidence adduced by the prosecution witnesses, the appellant ought to have been convicted of the more serious offence of **Robbery with violence contrary to section 296(2) of the Penal Code**. There was evidence that the appellant, in company of others, waylaid the complainant, attacked him and robbed him of his mobile phone and Ksh.500/=. The complainant was injured in the process. The appellant was therefore extremely lucky that he was not convicted of the more serious offence with the implication that he would have been sentenced to the mandatory death sentence. In the circumstances of this case, the sentence of five years imprisonment was extremely lenient. I agree with Mr. Njogu that the appellant ought to ride on his luck. I will not interfere with the sentence of the trial magistrate.

The appeal by the appellant on sentence is for dismissal and is hereby dismissed. The appellant shall serve the sentence that was imposed by the trial magistrate. The conviction and the sentence by the trial magistrate is hereby confirmed.

DATED at NAKURU this 31st day of OCTOBER 2007

L. KIMARU

JUDGE