

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

Criminal Appeal 686 of 2003

(From Original Conviction and Sentence in Criminal Case No.3775 of 2001 of the Senior Principal Magistrate's Court at Kiambu- G. M. Njuguna - SRM).

MARTIN OKOBA USIKUAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant alongside **MICHAEL OTIENO WATAYO** and **KYALO MULI ZAMARO** were initially charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. They were however convicted of the lesser offence of simple robbery contrary to Section 296 (1) of the Penal Code. They were upon conviction thereafter each sentenced to six years imprisonment plus 5 strokes of the cane and were ordered to be under Police supervision for a period of 5 years after the completion of the sentence. It would appear that the Appellant alone was aggrieved by the conviction and sentence and consequently lodged this Appeal. When the Appeal came up for hearing the Appellant opted to abandon the Appeal against conviction but opted to pursue the Appeal on sentence.

In support of the Appeal against sentence, the Appellant submitted that he was ailing, had a heart condition which is not being properly attended to whilst in prison.

Miss Okumu, Learned Stated Counsel appeared for state and opposed the Appeal against sentence. Counsel submitted that considering the circumstances of the case, 6 years imprisonment was legal. Whereas Counsel sympathized with the Appellant's heart condition, She was nonetheless of the view that the Appellant could obtain treatment within prison facilities. Finally she submitted that the sentence was not excessive.

Under Section 354 (3) of the Criminal Procedure code, the High Court has power to alter a sentence passed by a Lower Court. The principles upon which the Appeal Court will act in reviewing sentences were clearly outlined in the case of **OGALO S/O OWUORA VS REPUBLIC (1954) 21 EACA 270**. First, the Court does not alter a sentence on the mere ground that if the members of the Court had been trying the Appellant they might have passed a somewhat different sentence, and it will not ordinarily interfere with the discretion exercised by a trial Judge in matters of sentence unless:-

“..... It is evident that the Judge has acted upon some wrong principle or overlooked some material factor...”

(See **JAMES VS REPUBLIC (1950) 18 EACA 147**. Secondly, if the sentence is manifestly excessive in view of the circumstance of the case, as to amount to a miscarriage of justice, the Appellate Court would interfere.

This power of the Appellate Court to review sentences imposed by lower courts is an important safeguard against the apparent injustice in the Magistrate Courts and a recognition of the principle that sentence should fit the crime as well as the offender himself.

In my view the Appellant was lucky to even have had the charge reduced to one of simple robbery. The evidence on record clearly disclosed a capital offence. For the simple robbery offence, the Appellant was sentenced to 6 years imprisonment plus 5 strokes of the cane and Police supervision for a period of 5

years. The maximum sentence that the offence carries is fourteen (14) years. Having considered the circumstances under which the offence was committed a sentence of 6 years imprisonment cannot be said to be manifestly harsh or excessive as to attract this court's intervention. It was well merited. It cannot even be said that the trial Magistrate exercised her discretion capriciously or overlooked some material factors. The only aspects of the sentence that perhaps call for intervention by this Court are those to do with Corporal punishment and Police supervision. By act number 5 of 2003, Corporal punishment and police supervision as modes of punishment were outlawed. That being the case, the Appellant cannot be subjected to those modes of punishment now. Consequently it is the order of this Court that the Appeal as to sentence is dismissed save that the Appellant will not be subjected to corporal punishment or be under Police supervision for 5 years upon completion of his jail term.

Orders accordingly.

Dated at Nairobi this 11th day of January, 2006

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MAKHANDIA JUDGE