REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL 71 OF 2004

DUNCAN NDEGWA KURIA………….......................…………..……APPELLANT

VERSUS

REPUBLIC…………………………….....................…………....RESPONDENT

JUDGMENT

The appellant, Duncan Ndegwa Kuria was charged with the offence of **robbery contrary to Section 296(1) of the Penal code**. The particulars of the charge were that on the 6th of November 2003 at Naivasha township near Nakuru main stage, the appellant jointly with others not before court robbed Samuel Mukia Wanjiru of one mobile phone Nokia 3210 and Kshs 2,030/=. The appellant denied the charge and after a full trial he was convicted as charged. He was sentenced to serve five years imprisonment. Being aggrieved by his conviction and sentence the appellant appealed to this court.

Although in his "*memorandum of appeal*" the appellant challenged the decision of the trial magistrate in convicting and sentencing him, at the hearing of the appeal he abandoned his appeal against conviction. Instead he made submissions urging this court to consider reducing the term of imprisonment that was imposed upon him. He submitted that he had been in prison for a period of two years and while in prison had learnt to be a person of good behaviour. He had learnt that crime did not pay. He told the court that he had reformed. He submitted further that he was a first offender. He submitted that he was married with two children. He told the court that his family had been displaced during the Enoosupukia land clashes and since their displacement they depended on him. He further told the court that while in prison, he had learnt a trade. He had attained grade III Government trade test in electrical wiring. He told the court that he would now be in position to take care of his family if released. Mr Gumo, the Assistant Deputy Public Prosecutor left the issue of sentence to the court.

I have carefully considered the submissions made by the appellant in this case with a view of persuading this court to reduce the sentence that was imposed upon him. I have also carefully re-evaluated the evidence which was adduced by the witnesses during the hearing before the trial magistrate that led to the conviction of the appellant. The appellant was charged with the offence of **robbery with violence contrary to Section 296(1) of the Penal code**. From the evidence adduced, it is clear that the complainant, a secondary school student, was robbed of his mobile phone and the sum of Kshs 2,030/= by the appellant while he was in the company of two others. The three of them accosted the complainant at the bus stage while masquerading as police officers. They then physically manhandled the complainant and robbed him of the said mobile phone and the cash. During the struggle the appellant was able to rob the mobile phone from the complainant. He then handed over the mobile phone to his accomplice who ran away with it. The complainant held on to the appellant and with the assistance of the members of public, was able to apprehend the appellant and take him to the police station.

These facts have been admitted by the appellant on this appeal. The facts of this case disclose an offence of **robbery with violence contrary to Section 296(2) of the Penal Code**. As was held by the Court of Appeal in **Muthike –vs- Republic [2002] 1 KLR 745** at page 749

"***Mr Kigotho took up the issue of there being no violence used and there being no prove of injury. He urged that on that the magistrate was right in reducing the offence to that of simple robbery contrary to Section 296(1) of the penal code. That may be so but Section 296(2) of the said code envisages that when the robbery is committed by more than one person one of the ingredients of an offence under that subsection is satisfied. That being so the sentence meted out by the superior court was the legal***

one. The reduction of the charge to simple robbery by the magistrate was a misdirection”.

In this case, the appellant was in the company of two others when they robbed the complainant of his mobile phone. He ought to have been charged with the more serious offence of robbery with **violence contrary to Section 296(2) of the penal code**. The appellant was lucky that he was charged with the lesser offence of **robbery contrary to Section 296(1) of the Penal Code**. He should therefore ride on his luck. The sentence of five years imprisonment imposed by the trial magistrate considered in the context of the facts of this case and the fact that he could have been sentenced to death as required by **Section 296(2) of the Penal Code,** was lenient. I will not interfere with it. The appellant shall serve the said sentence.

In the circumstances of this case, in spite of his mitigation, this court is not inclined to allow his appeal. His appeal is consequently dismissed. The conviction and the sentence of the trial magistrate is hereby confirmed.

DATED at NAKURU this 1st day of March 2006.

L. KIMARU

JUDGE