REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (Milimani Law Courts)

HCCR – APP 465 OF 2004

(From original conviction and sentence in Criminal Case number 2365 of 2001 of the Chief Magistrate's Court at Nairobi,- Mary Mugo (Mrs.) C.M).

DAVID MUTHEE MWANGI ……..…….....…..…..……. APPELLANT

VERSUS

REPUBLIC …….....…..……..RESPONDENT

JUDGMENT

DAVID MUTHEE MWANGI hereinafter referred to as the Appellant, was arraigned before the Chef magistrate's Court at Nairobi on 19th October, 2001 charged with one count of robbery with violence contrary to Section 296(2) of the Penal Code. Following a full trial, the Court convicted the Appellant for the lesser charge of attempted robbery contrary to Section 297 (1) of the Penal Code.

Upon conviction the Appellant was sentenced to 7 years imprisonment and 6 strokes of the cane. After his release form prison the Appellant was ordered to be subject to Police supervision for 5 years. The Appellant was aggrieved by both the conviction and sentence and hence lodged the instant Appeal.

When the Appeal came up before me for hearing, and the Court having warned him of the possibility that if the Appeal failed conviction and sentence could be enhanced to that of the initial charge i.e. Robbery with violence in the light of the evidence on record and the misdirection in law by the trial magistrate in reducing the charge the Appellant opted to abandon the Appeal on conviction and instead pursue the Appeal on sentence only.

In support of his Appeal on sentence, the appellants submitted that the sentence imposed was harsh and excessive. The Appellant further pointed out that he was diabetic and ailing.

Miss Nyamosi, Learned State Counsel who appeared of the state opposed the Appeal sentence. Counsel submitted in support of her position that the sentence imposed was neither harsh nor excessive. It was indeed lawful counsel therefore urged me to dismiss the Appeal on sentence.

I have carefully considered the submissions of the Appellant as well as those of the respondent. The principles upon which an Appellant Court acts when dealing with issues of sentence are now well settled. To start with in the case of ***OGALO S. O. OWUORA VS REPUBLCI (1954) 19 EACA, 270*** it was stated:-

(i). The Court does not alter a sentence on the mere ground that if the member of the Court had been trying the Appellant, he might have passed a somewhat different sentence, and it would not ordinarily interfere with the discretion exercised by the trial Magistrate unless it is evident that the Magistrate

acted upon some wrong principles or overlooked some material factors. (See also <u>JAMES VS REPUBLIC (1950) 10 EACA 147)</u>

2. The trial criterion is that if the sentence is manifestly excessive in view of the circumstances of the case, the sentence will be disturbed. The Appellate Court should not interfere with the sentence of a lower Court unless it is satisfied that the same was so severe as to amount to a miscarriage of justice. <u>(SEE NILSON VS REPUBLIC (1970) EA 599)</u>

Finally in the case of ***<u>WANJEMA VS REPUBLIC (1971) EA 493,</u>*** the Court stated thus:-

"…….***Appellate Court should not interfere with the discretion which a trial Court exercised as to sentence unless it is evident that it overlooked some material factors, took into account some immaterial factors, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case……"***

In a nutshell therefore the Appellate Court will only interfere with the sentence passed by the subordinate Court when it is evident that:-

(i). The trial Court exercised the discretion wrongly.

(ii). The trial Court acted upon wrong principles.

(iii). The sentence imposed is illegal

(iv). The sentence imposed is so severe as to amount to a miscarriage of justice.

The offence for which the Appellant was convicted of carrying maximum sentence of seven years. The Appellant was not a first offender and the Learned trial Magistrate deemed it necessary to impose maximum sentence of seven years imprisonment plus six strokes of the cane and Police supervision for five years. In imposing the sentence, the Learned Magistrate took into account the fact that the Appellant was not a first offender. He was a condemned convict in another case and was not at all remorseful. In my view the trial Magistrate did not in arriving at the sentence did not exercise his discretion wrongly or acted on wrong principle. The sentence was certainly legal and was to as severe as to amount to a miscarriage of justice. Considering the brevity with which the offence was committed and the resultant injuries t PW2, I think that the sentence of seven years imprisonment was neither harsh not excessive. It was certainly lawful and was in ones mind deserved. I see no basis to disturb the subordinate Court's decision save to the extent that the Corporal punishment of six strokes of the cane in respect shall not be meted out on the Appellant. Corporal punishment was outlawed by Act number 5 of 2003. Save for that limited alteration in the sentence the sentence of seven years plus Police supervision for 5 years upon completion of the jail term remains. Otherwise the Appeal on sentence is dismissed.

Dated at Nairobi this 23rd day of May, 2006.

……..

MAKHANDIA

<u>JUDGE</u>