REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

(NAIROBI LAW COURTS)

Criminal Appeal 574 of 2004

(From Original Conviction and Sentence in Criminal Case No.634 of 2004 of the Senior Resident Magistrate's Court at Githunguri – Lucy Mutai -SRM).

EARNEST MWAI MUYA..……...……..…….....……..…..APPELLANT

VERSUS

REPUBLIC…….…….....……..….RESPONDENT

JUDGMENT

The Appellant, ***EARNEST MWAI MUYA*** was charged before the Senior Resident Magistrate's Court at Githunguri with one count of robbery contrary to Section 296 (1) of the Penal Code.

The Learned Magistrate after a full trial convicted the Appellant and accordingly sentenced him to five (5) years imprisonment.

The Appellant was aggrieved by the conviction and sentence. Consequently he lodged this Appeal.

When the Appellant appeared before me for the hearing of his Appeal, he informed the Court that he was abandoning the Appeal on conviction. However he would pursue the Appeal on sentence. In support of his Appeal on sentence, the Appellant submitted that the sentence imposed was harsh and excessive. That he was remorseful and had become saved whilst in prison. The Appellant further submitted that he was ailing and indeed one of his kidneys had collapsed necessitating regular dialysis.

Mrs. Gakobo, Learned Counsel appeared for the State and opposed the Appeal on sentence. Counsel submitted that the sentence imposed was legal. That the Appellant was sentenced to 5 years for an offence which carries a maximum sentence of 14 years. The sentence was not therefore harsh and if anything it was lenient. Counsel further submitted that the Court considered the fact that the Appellant was a first offender in meting out the sentence.

I have considered the submissions by the Appellant and by the Learned State Counsel, as well as the facts and circumstances of this case and the law. Ordinarily an Appellate Court would not interfere with the sentence imposed by the trial Court unless it can be shown that:-

(i). The trial Court imposed an illegal or such harsh and excessive sentence as to amount to a miscarriage of justice.

(ii). The trial Court acted upon wrong principle, took into account immaterial factors or overlooked some material factors or

(iii). The trial Court exercised the discretion capriciously.

See generally ***OGALO S/O OWUORA VS REPUBLIC (1954) 19 EACA 270, JAMES VS REPUBLIC (1950) 10 EACA 147, NILSON VS REPUBLIC (1970) EA 599*** and ***WANJEMA VS REPUBLIC (1971) EA 493.***

The offence of simple robbery attracts a maximum sentence of 14 years. The Appellant was sentenced to 5 years. Certainly and as correctly urged by the Leaned State Counsel, the sentence was lawful. In my view it is neither harsh nor excessive. I have looked at the sentencing notes of the Learned Magistrate and noted that she was alive to sentencing principles. She certainly did not take into account irrelevant matters or failed to take into account material factors in arriving at the appropriate sentence. In my view the Learned Magistrate did not exercise her discretion in sentencing the Appellant capriciously. Were it not for the Appellant's failing health I would not have been inclined to interfere with the sentence. One of the Appellant's kidneys has however collapsed. He requires constant dialysis. Because of the limited resources within the prison service, regular and constant dialysis may not be possible in the long run. On that ground alone I will interfere with the sentence to the extent that I will commute the same to the term already served with the consequence that the Appellant shall forthwith be released from prison unless he is otherwise lawfully held.

Dated at Nairobi this 31st day of July, 2006.

……

MAKHANDIA

JUDGE