



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET**

Criminal Appeal 36 of 2005

**(An Appeal from the judgment of S.M. Shitubi Senior Resident Magistrate Kapsabet
SRM.CR.NO.1390 OF 2000)**

TIMOTHY MUGODO KISANG:.....

APPLICANT

VERSUS

REPUBLIC:.....

RESPONDENT

JUDGMENT

The Appellant was charged together with two others on 16th May,2001 with the offence of robbery contrary to section 296(1) of the Penal Code. Upon the conclusion of the trial, the Trial Magistrate convicted the three accused and sentenced them as follows:-

1st Accused – Probation for 3 years

2nd Accused – Probation for 3 years

3rd Accused – 5 years imprisonment and thereafter 5 years police supervision.

The sentence was on 20th September, 2004. The Appellant then filed this appeal against conviction and sentence.

At the hearing, the Respondent placed it on record at the outset that the appeal was not opposed as far as **sentence** was concerned. The Respondent however, supported conviction. Due to this concession Counsel for the Appellant in effect accepted the concession and submissions were made only in respect of the appeal against sentence. It was common ground that the Learned Magistrate did not give any specific reasons for the disparity of sentencing. No justification was given for the different sentences.

In **MARANDO –V- THE REPUBLIC** 1980 KLR 114, The Court of Appeal held:-

“ The appeal against sentence causes us much concern. When two or more people are convicted of the same offence, it is wrong in principle to impose different sentences except for good reason. For instance, one man may have a bad record, but that is not the case here. The appellant is a first offender. The Judge gave no reason for sentencing the appellant to four years, and his co-

accused to one day's imprisonment....”

In the light of this legal principle, I agree with counsel that the Learned Magistrate erred in law when meting out different sentences, without expressing the reasons for the disparity or justification thereof.

The Appellant has been in custody since 20th September,2004 serving sentence. This is a period of over one year and eight months (1 year, 8 months). It is certainly a heavier punishment than probation for three years, which the Co-accused are still serving.

In the circumstances, I do hereby allow the appeal, set aside the sentence of 5 years imprisonment and 5 years police supervision and substitute it with probation for 3 years. In view of having served part of the sentence given by the Trial Court (to the extent of 1 year and 8 months), I hereby order that the sentence of probation for 3 years be and is hereby suspended.

The Appellant shall be set to liberty and released forthwith unless otherwise lawfully held.

DATED AND DELIVERED ON THIS 6TH DAY OF JULY,2006 AT ELDORET

M.K.IBRAHIM

JUDGE

2:30PM:

Ibrahim J

C/C - Chelang'a

Mr. Kipkosgei for the Appellant

Ms. Oundo for the Respondent

Judgment in their presence.

M.K. IBRAHIM

JUDGE