REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL 96 &97 OF 2005

(From original conviction and sentence of the Chief Magistrate's Court at Nakuru in Criminal Case No. 569 of 2005 – A. B. Mongare [S.R..M.])

MARY NYAMBURA WAWERU……..…...…….1ST APPELLANT

LOISE WAIRIMU MWANGI……...…….….2ND APPELLANT

VERSUS

REPUBLIC…….…….....…….…….RESPONDENT

JUDGMENT

The appellants, Mary Nyambura Waweru (*hereinafter referred to as the 1st appellant*) and Loise Wairimu Mwangi (*hereinafter referred to as the 2nd appellant*) were charged with robbery with violence contrary to **Section 296(1)** of the **Penal Code**. The particulars of the offence were that on the 26th of February 2005 at Nakuru Township, the appellants jointly with others not before court robbed Jane Kemunto Ogero of Kshs 3,000/=, mobile phone make Sagem, a wrist watch make Quinta and a black handbag all valued at Kshs 14,700/= and at or immediately before or immediately after the time of such robbery the appellants threatened to use violence to the said Jane Kemunto Ogero. When the appellants were arraigned before a trial magistrate's court, they pleaded not guilty to the charge. After a full trial, they were found guilty as charged and each sentenced to serve seven years imprisonment. The appellants were aggrieved by their conviction and sentence. Each appellant filed a separate appeal to this court against her conviction and sentence. The said appeals were consolidated and heard as one during the hearing of the appeals.

In their petitions of appeal, the appellants put forward contrasting grounds of appeal. The 1st appellant was aggrieved that she was convicted against the weight of evidence that was adduced before the trial magistrate. She pleaded with the court to consider her mitigation and reduce the term of imprisonment that was imposed on her by the trial magistrate. On the other hand, the 2nd appellant did not challenge her conviction by the trial magistrate. She however pleaded with the court to consider her appeal against sentence. In her view, the sentence that was meted out on her by the trial magistrate was harsh and excessive. She has pleaded with this court to reduce the said term of imprisonment imposed.

At the hearing of the appeal, the 1st appellant reiterated the contents of her petition of appeal. She

submitted that she was wrongly convicted as having robbed the complainant in the case before the trial magistrate. She submitted that at the time the robbery took place, she was at home. She submitted that the prosecution had adduced contradictory evidence which could not stand up to legal scrutiny. She urged this court to consider reducing the sentence that was imposed on her by the trial magistrate because her two young children were suffering and needed their mother. Miss Njagwa, learned counsel for the 2nd appellant pleaded with this court to reduce the sentence that was imposed upon the 2nd appellant. She submitted that the 2nd appellant had been sufficiently punished in the one year and eight months that she has been in prison. She reiterated that the 2nd appellant had learnt her lesson and had been rehabilitated since she was incarcerated in prison.

Miss Njagwa took issue with the fact that the trial magistrate had failed to consider the mitigation of the 2nd appellant and further had considered extraneous factors when he made the decision to sentence the 2nd appellant to a custodial sentence which in her view was harsh and excessive in the circumstances. She lamented that the trial magistrate had failed to consider the fact that the value of the subject matter was such that it could not attract such a harsh sentence. Learned counsel for the 2nd appellant referred this court to several decided cases in support of her submission. She urged this court to review the sentence imposed on the 2nd appellant by the trial magistrate.

Mr. Koech for the State opposed their appeals. He submitted that the appellants were properly convicted by the trial magistrate as the prosecution had adduced sufficient evidence to sustain a conviction on the charge of robbery. He submitted that the complainant was robbed by the appellants in broad daylight. Immediately after the robbery, the complainant met with PW2 Sospeter Omari who saw that she appeared confused and disoriented. The complainant told PW2 that she had been robbed. She described the persons who robbed her. PW2, a *boda boda* bicycle operator, recalled that he had ferried the women who fitted the description to a place within the suburbs of Nakuru.

PW2 immediately offered to show the complainant the houses of the suspects. A report was made to the police. The police accompanied by the complainant went to the houses of the suspects (*the appellants in this case*) and were able to recover some of the items which were robbed from the complainant. Mr Koech submitted that the prosecution had proved all the essential ingredients that constitute the charge of robbery with violence contrary to **Section 296(1)** of the **Penal Code**. It was his further submission that the value of the robbed item was immaterial as long as the prosecution proved that the complainant had been robbed.

This is a first appeal. As the first appellate court this court is required to re-evaluate and subject to fresh scrutiny the evidence that was adduced before the trial magistrate's court so as to reach an independent determination whether or not to uphold the conviction of the appellant. This court is expected to arrive at the said decision after putting into consideration that it neither saw nor heard the witnesses as they testified (*See* **Njoroge –vs- Republic [1987] KLR 19**). The issue for determination by this court is whether the prosecution proved its case against the appellants to the required standard of proof beyond reasonable doubt. I have re-evaluated the evidence that was adduced before the trial magistrate's court and considered the grounds of appeal argued before me by the appellants and by Mr. Koech on behalf of the State.

The 2nd appellant in this appeal did not appeal against her conviction. She admitted having participated in the robbery of the complainant. On the other hand, the 1st appellant challenged her conviction by the trial magistrate. She submitted that she was elsewhere when the robbery of the complainant took place. I have carefully considered the grounds advanced in support of her appeal and also the arguments made during the hearing of the appeal. The record of the trial magistrate clearly shows that the prosecution proved its case to the required standard of proof beyond reasonable doubt. The complainant was robbed in broad daylight. She was able to identify her assailants. Although she was disoriented and confused when she met PW2, she was able to give a vivid description of the persons who robbed her.

PW2 recalled having ferried the appellants to a residential estate of Nakuru Township. He also recalled that the women (*the appellants in this case*) were carrying the items which the complainant described as

having been robbed from her. The police were informed. PW2 escorted the complainant to the houses of the appellants. The complainant was able to identify the appellants as being among the group of persons who robbed her. Some of the items which were robbed from the complainant were recovered in possession of the appellants. I therefore find no merit with the appeal by the 1st appellant against conviction. The prosecution adduced sufficient evidence to sustain the conviction of the 1st appellant. Her appeal against conviction is therefore dismissed.

On sentence, both appellants have pleaded with this court to consider reducing the term of imprisonment imposed upon them. Miss Njagwa made spirited submission on behalf of the 2nd appellant for reduction of sentence. They are both asking this court to interfere with the exercise of discretion by the trial magistrate when she sentenced them to serve the term of seven years in prison. For the appellants to succeed in their appeals on sentence, they must establish that the trial magistrate wrongly exercised her discretion when sentencing them. They must further establish that the trial magistrate applied the wrong principles of the law or sentenced them to an illegal sentence.

In the present appeals, the appellants were sentenced to serve seven years in prison. The maximum sentence for a person who is found guilty of **robbery with violence** contrary to **Section 296 (1)** of the **Penal Code** is fourteen (14) years imprisonment. In the present appeal, it has been submitted that the trial magistrate applied the wrong principles of the law when she sentenced the appellants to the said terms in prison. I have evaluated the reasons advanced by the trial magistrate before she sentenced the appellants. I am not prepared to hold that she wrongly exercised her discretion when she sentenced the appellants to serve the said terms in prison.

However, having considered the submission made by the appellants on this appeal, especially the mitigation on behalf of the 2nd appellant by Miss Njagwa, I am persuaded that the trial magistrate failed to consider that the appellants were first offenders and was mothers of young children. In the circumstances therefore, I will interfere with the exercise of discretion by the trial magistrate and set aside the said sentence imposed. I will substitute the said sentence of seven years imprisonment with an appropriate sentence of this court. I sentence the appellants to serve four (4) years imprisonment. The said sentences shall take effect from the 24th of May 2005 when the appellants were sentenced by the trial magistrate.

It is so ordered.

DATED at NAKURU this 30th day of November, 2006.

L. KIMARU

JUDGE