

REPUBLIC OF KENYA

AT THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL 33 OF 2005

(From original conviction and sentence of the Senior Resident Magistrate's Court at Eldama Ravine in Criminal Case No. 622 of 2003 – KAGENDO W. M. [R.M.]

ROBERT KIPROP.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant Robert Kiprop was charged with the offence of **robbery with violence** contrary to **Section 296(1)** of the **Penal Code**. The particulars of the offence were that on the night of 31st of July 2003 at Kaptana area in Koibatek District, the appellant robbed Job Kipruto of Kshs 5,750/=, a mobile phone and a dozen sachets of Merry Cane Vodka, all valued at Kshs 12,050/= and at or immediately before or immediately after the time of such robbery, the appellant threatened to use violence to the said Robert Kipruto. The appellant pleaded not guilty to the charge. After a full trial, the appellant was convicted as charged and sentenced to serve four years imprisonment. The appellant was aggrieved by his conviction and sentence and has appealed to this court.

Although the appellant appealed against both conviction and sentence, at the hearing of the appeal the appellant abandoned his appeal on conviction and instead pleaded with the court to exercise mercy on him and reduce the sentence that was imposed upon him by the trial magistrate. The appellant presented to this court written submission urging this court to consider his plea for reduction of sentence. He stated that he had served a substantial part of his sentence and was ready to be rehabilitated back to the society. He stated that he was the sole breadwinner of his family and should be released so that he could be enabled to provide for them. Mr. Mugambi Learned State Counsel opposed the appeal. He submitted that the trial magistrate has correctly exercised her discretion when she sentenced the appellant. He urged this court not to interfere with the said sentence.

I have carefully considered the submissions made before me by the appellant and by Mr. Mugambi on behalf of the State. The appellant is not appealing against conviction. He is appealing against sentence. He is asking this court to interfere with the exercise of discretion by the trial magistrate when she sentenced him to serve the said term of four years in prison. For an appellant to succeed in his appeal on sentence he must establish that the trial magistrate wrongly exercised her discretion when sentencing him. He must establish that the trial magistrate applied the wrong principles of the law or sentenced him to an illegal sentence. In the present appeal, the appellant is making no such allegation that the trial magistrate wrongly exercised her judicial discretion. Instead the appellant is pleading with this court to, as it were, exercise mercy on him and discharge him from his sentence.

Having carefully considered the facts of this case, I hold that there are no grounds placed before this court to enable it exercise discretion in the favour of the appellant. In fact, the appellant was lucky not to be charged with the more serious offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. He should ride his luck. The facts of this case clearly disclose that the appellant, while armed with dangerous or offensive weapons, attacked the complainant and robbed him of his properties.

The appellant was known to the complainant. In fact they had walked together for a distance of about five kilometres before the appellant attacked the complainant and robbed him. Some of the items which the appellant robbed from the complainant were recovered in his house. In the circumstances of this case therefore, the sentence imposed on the appellant was lenient. I will not interfere with it.

The appeal filed by the appellant against conviction and sentence is hereby dismissed. The conviction and sentence of the trial magistrate is hereby upheld and confirmed by this court. The appellant shall serve the sentence that was imposed on him by the trial magistrate on the 28th of January 2005.

It is so ordered.

DATED at NAKURU this 29th day of November, 2006.

L. KIMARU

JUDGE