



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 92, 105 & 106 of 2002

JOSEPH MAINA NDERITU.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

CRIMINAL APPEAL NO. 105 OF 2002

GEOFFREY MIMANO GIOKO.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

CRIMINAL APPEAL NO. 106 OF 2002

MWANGI MURAGE.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(Being Appeals Against Conviction And Sentence of C. D. Nyamweya, Senior Resident Magistrate, In The Chief Magistrate's Criminal Case No. 765 of 2001, Nyeri).

JUDGMENT

These three appeals were consolidated for hearing and in this judgment I will be referring the appellants therein as the First Appellant, Second Appellant and Third Appellant in the order in which they are set out on the first page.

In count one the three appellants were charged with robbery with violence contrary to *Section 296(2)*

of the Penal Code particulars alleging that on the night of 16th to 17th March 2001 at Kianyaga Village in Nyeri District the three appellants jointly with others not before court and armed with dangerous weapons namely iron bars, pangas and axes robbed Joseph Maina of cash Sh.1200/= and his jacket valued Ksh.900/= using violence.

Count two alleged shop breaking and stealing contrary to *Section 306(a)* of the Penal Code particulars being that on the night of 16th to 17th March 2001 at Gakinda Trading Centre in Nyeri District the appellants jointly with others not before court, broke and entered a shop of Samuel Kiragu Mwaniki and stole Shs.70,000/=, eight dozens of Eveready batteries, twenty packets of assorted cigarettes and fifteen packets of assorted medicines all to the total value of Shs.87,000/=.

The First Appellant and the Second Appellant each faced a separate alternative count of handling stolen goods contrary to *Section 322(2)* of the Penal Code each on 22nd March 2001. The First Appellant was alleged to have dishonestly received or retained three packets of Sportsman Cigarettes, four packets of super match cigarettes and two pairs of Eveready batteries knowing or having reason to believe them to be stolen goods or to have been unlawfully obtained. The Second Appellant was similarly charged with dishonestly receiving or retaining three packets of supermatch cigarettes, two packets of S M cigarettes and three pairs of Eveready batteries.

The Appellants were all acquitted on count one but were convicted and sentenced to seven years imprisonment plus three strokes of the cane on count two. Nothing was said on the alternative counts.

As against the First and Second Appellants, the Third Appellant mentioned them in his repudiated statement under inquiry which was detailed and amounted to a confession. The Third Appellant mentioned them as his collaborators in the crime committed by the Third Appellant. That confession having been repudiated was evidence of the weakest nature against the First and Second Appellants. But that was not all. The First Appellant led the police to the place where the Second and Third Appellants were and recoveries as mentioned earlier in this judgment were made from the First Appellant and the Second Appellant. The items recovered were positively identified by P.W.1 Samuel Kiragu Mwaniki the Complainant in count two who not only identified the items but also recognized his handwritings on some of the containers of the recovered items. He had written prices on the containers by his own hand and could recognize the handwriting. Moreover, those were items stolen within five days only. Significantly they were found in possession of suspects revealed by the Third Appellant from spots not far apart and in amounts which made it difficult to accept that had been innocently purchased by the First and Second Appellants for use at home. There was no evidence that appellants were traders in those types of goods and even if appellants were traders, the items should have been in their respective shops.

As against the Third Appellant, he was arrested within minutes of the alleged crimes from an escaping group of people suspected to have committed the alleged crimes as they were pursued by the group in which P.W.2, the watchman John Kamau Theuri and Administration police Sgt. Wilson Gichuki P.W.3, were; Crude weapons were recovered – though no shop items were recovered. P.W.2 identified the Third Appellant as one of the four people who had earlier on asked him to tell them where the home of a doctor was and had subsequently threatened to shoot him and he had ran away to look for police assistance. The Third Appellant subsequently recorded a statement under inquiry amounting to a confession which he repudiated at the trial but found corroborative evidence from what was obtained by the police before the statement was recorded and what was obtained after the statement was recorded like leading the police to the place where the First and Second Appellants were plus resulting recoveries.

The above being the position, I come to the conclusion that the Appellants were properly convicted and I should not interfere with that conviction.

On the sentence, each appellant was sentenced to maximum seven years imprisonment and ordered to receive three strokes of the cane. Corporal punishment has been abolished though that has not made corporal punishment in the instant case unlawful but could still be interfered with in the spirit of the present law. The Appellants must have learned some lesson by now from the duration of the sentence they have served.

Accordingly the appeal of each appellant against his conviction is hereby dismissed. The sentence imposed upon each appellant is hereby set aside and substituted with a sentence four years imprisonment without corporal punishment.

Dated this 28th day of February 2005.

J. M. KHAMONI

JUDGE