REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Criminal Appeal 118 of 2003

ANTONY SHIROKO SHIMWATA .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

The Appellant, Anthony Shiroko Shimwata, challenged his conviction and sentenced meted out by the Resident Magistrate, S.R. Rotich, in criminal case No. 269 of 2003 at Butere on the ground that the plea was not unequivocal.

The offence against him was Robbery with violence contrary to section 296(1) of the Penal Code. The particulars of the offence were that on 12.4.2003 at Mwiberenya village in Mwikalikha sub location of Kisa North Location in Butere/Mumias District, Western Province robbed one Kassim Ambusi of a bicycle valued at shs. 3500/- and at or immediately after the time of the robbery threatened to use actual violence to the said Kassim Ambusi.

The appellant admitted the offence as well as the facts constituting the offence and was convicted accordingly. In reply to the charge he said "it is true". In reply to the facts constituting the offence he said, "the facts are true." The charge and the facts were read out to him in Kiswahili. After conviction and sentence, he did not complain or protest that his pea had been misconstrued.

In his appeal, the Appellant alleged that he had been tortured and that that is why he pleaded guilty. He also alleged that the charge was tramped up by the complainant. When the appeal came up for hearing on 2.2.2005, the Appellant stated that he had taken the bicycle from the complainant who owed him money but did not intend to sell it. He asked the court to be lenient with him.

The Principal State counsel, Mrs. Kithaka, submitted that the plea was unequivocal and the Appellant was rightly convicted. The record shows that the charge was read to the Appellant in a language he understood, namely Kiswahili as were also the facts constituting the offence. He admitted both. He did not protest or raise any complaint nor did he tell the court that he was tortured. It seems to me the allegations in the petition of appeal have no substance and appear to be an afterthought. The Appellant was convicted on his plea of guilty which was clear and unequivocal. The appeal has no merit whatsoever in this regard.

With regard to sentence, the Appellant was treated as a first offender. The record shows that he was required to mitigate but said nothing. The trial court proceeded to sentence him to 6 years in prison with 6 strokes of the cane. The trial magistrate did not indicate that he took into account the mitigating

circumstances, to wit the fact that the appellant had pleaded guilty and was a first offender. Nor did the trial magistrate indicate what circumstances, if any, he took into account in imposing the sentence. Moreover he did not indicate if a severe or a light sentence was called for. Normally an appellate court will not interfere with the discretion exercised by the trial court unless it is evident that the court acted upon the wrong principle or overlooked some material factor or the sentence is manifestly excessive in the light of the circumstances of the case. In an earlier case, (*Stanley Luganji v Republic, Kakamega H.C. Criminal Appeal No. 121 of 2003)* I indicated that "it is necessary for the trial court in passing sentence to indicate why a severe sentence has been imposed or why a light sentence has been given and the circumstances that the court has taken into account in doing so."

In the circumstances of this case, the sentence meted out as aforesaid was excessive. It is set aside. In its place is substituted as sentence of four years imprisonment only.

Dated at Kakamega this 22nd day of April, 2005

G.B.M. KARIUKI

J U D G E