



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

Criminal Appeal 96 of 2003

*(From original conviction and sentence in Criminal Case No. 613 of 2002 of the
Principal Magistrate's Court, Nyahururu –C. N. Sifuna –R.M Esq.)*

STEPHEN MWANGI WAMBUGU.....1ST APPELLANT

SIMON MWANGI MAINA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G E M E N T

The Appellant has appealed against the original conviction and sentence in Criminal Case No. 613 of 2002 of the Principal Magistrate's Court, Nyahururu. In that case the appellants had been charged for the offence of Robbery, contrary to section 296(1) of the Penal Code. The alternative charge against the appellants was that of Handling stolen property, contrary to section 322(2) of the Penal Code.

The facts of the prosecution case as stated in the charge sheet for the main count are as follows:-

“On the 23rd February, 2002 at Manguo Estate in Laikipia District within the Rift Valley Province jointly robbed Bethwel Mwaura of cash Kshs.1,600/= and one T.V. Set make Sony and at or immediately before or immediately after the time of such robbery threatened to cut Bethwel Mwaura with a panga.”

After a full trial, the appellants were found “**Guilty**” and they were convicted accordingly. Consequently, the learned magistrate viz, C.N. Sifuna, Resident Magistrate, Nyahururu sentenced each of the appellants to 4 years imprisonment. Besides the above, he also ordered that the 1st appellant should receive 3 strokes of the cane. According to the Probation Report, the wife of the 2nd appellant died out of HIV AIDS related ailments. The 2nd appellant was later tested and also found to be positive of the above scourge. Seeing the above, the learned magistrate exempted the 2nd appellant from receiving any corporal punishment. During the hearing of the appeal, the 1st appellant viz, Stephen Mwangi Wambugu explained to the court that he had been arrested on the way. He denied that he had been arrested in the house as alleged by the PW6. Besides the above, the 1st appellant also urged the court to reduce the sentence that was imposed on him.

According to the 2nd appellant viz, Simon Mwangi Maina he was arrested in the house of Gachanja – though the latter escaped. The 2nd appellant later explained the escape to the vigilante group which turned down what he had stated. Apart from the above, the 2nd appellant told this court that, though he had given a sworn statement in his defence, the same was **not** considered by the lower court. In addition to the above, the 2nd appellant pointed out that the prosecutor in the case was Sgt. Maina who was **not** qualified in law to have conducted the case. Apart from complaining about his failing health, the 2nd

appellant also decided to hand in written submissions.

On the other hand, Mr. Koech, Snr. State Counsel submitted that the two appellants were charged for the offence of Robbery on the basis of being found with stolen property. He recalled that the T.V. of the complainant that was stolen was recovered with the appellants within 24 hours and that the same was later identified by the PW1. In addition to the above, Mr. Koech also submitted that the appellants had used violence and that they had been arrested by the PW6 who was the leader of the vigilante group. According to Mr. Koech, the defence of the appellants was considered by the lower court – though the latter failed to give an explanation on how they came across the T.V. within 24 hours. As far as Mr. Koech was concerned, the conviction was safe and the sentence was lenient.

In conclusion, he conceded that the prosecutor was not qualified and hence he urged the court to order for a re-trial.

In response to the above, the 1st appellant never objected to a re-trial. On the other hand, the 2nd appellant acknowledged his HIV- positive status and objected to any re-trial. The 2nd appellant complained of the bad environment in the prison and urged the court to release him.

This court has carefully perused the above, together with the record of appeal. It is apparent that the appellants were sentenced to 4 years imprisonment on 5th March, 2003. That means that they have already served over half of the sentence. This court also notes that the appellants only stole cash Kshs.1,600/= and a T.V. – Sony that had been bought at Kshs.17,000/= in the year 1999. Fortunately, the stolen T.V. was recovered on the following day when the same was intact. Luckily, the complainant and his wife were not injured.

Apparently, the case was conducted by Sgt. Maina who was not authorized to do so. Section 85(2) of the Criminal Procedure Code states as follows:-

***“The Attorney General, by writing under his hand, may appoint any advocate of the High Court or person employed in the public service, not being a police officer below the rank of Assistant Inspector of police, to be a public prosecutor for the purpose of any case.*”**

In view of the above, I hereby quash the conviction and set aside the sentence of 4 years imprisonment. I also set aside the 3 strokes of the cane since corporal punishment has been outlawed. Given the above clear circumstances, the court hereby declines to order for a re-trial for both appellants. They should be released forthwith unless they are held lawfully.

Those are the orders of the court.

MUGA APONDI

JUDGE

Judgement read, signed and delivered in open court in the presence of the Appellants and Mr. Gumo, Assistant Deputy Public Prosecutor.

MUGA APONDI

JUDGE

21ST JULY 2005