

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

crim app 88 of 03

JOSEPH WANYAMA WAMALWA APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The Appellant was arraigned before the Chief Magistrate's Court at Makadara on a charge of robbery contrary to Section 296 (1) of the Penal Code. Facts as revealed by the charge sheet are that on the 29th November, 2001, at Wananchi bar, Soweto Village Nairobi, within Nairobi Area, jointly with others not before the Court the Appellant robbed JOSEPH NGUMBI of cash money Kshs.12,000/=, a mobile phone Nokia and a wrist watch make Seiko five all valued at Kshs.32,000/=. The Appellant pleaded not guilty to the charge.

At the trial, the prosecution called a total of 4 witnesses. In her defence the Appellant opted for unsworn stated. After the Court had given due consideration to the evidence adduced by the prosecution and the defence advanced by the Appellant with regard to the charge the Learned trial Magistrate found for the prosecution. Accordingly the Appellant was convicted and sentenced to 5 years imprisonment and to be under Police supervision for 5 years after the sentence.

The Appellant as dissatisfied by the conviction and sentence. She consequently lodged this Appeal against both the conviction and sentence. When the Appeal came up for hearing, the Appellant at the very commencement of the hearing notified the Court that she was abandoning the Appeal on conviction. However she was prepared to proceed with the Appeal on sentence alone. The State through Miss Mwenje Learned State Counsel did not object to these course of events. In her submissions regarding sentence, the Appellant stated that the sentence imposed was harsh and excessive considering that she was a first offender. The Appellant pleaded for leniency from the Court stating that she had children whose fate she does not know following her incarceration. On the part of the State, Miss Mwenje submitted that the offence carries a jail term of 14 years. For the Appellant to have been goaled for only 5 years the trial Court was more than lenient to the Appellant, she added. She further submitted that the offence was serious and rampant. In the premises she urged this Court not to interfere with the sentence imposed.

It is trite law that the first Appellate Court should not interfere with sentence imposed by the trial Court solely on the ground that it is heavy, unless it is also shown to be manifestly excessive. (See GRIFFIN – VS- REPUBLIC (1981) KLR 121 and WANJEMA –VS- REPUBLIC (1971) EA 494 . The Appellant was a first offender. It would appear that the Court did not take into consideration her mitigation and the circumstances under which the offence was committed. Had the trial Magistrate considered the foregoing I am certain that she would have imposed slightly different sentence.

The sentence of 5 years imprisonment and 5 years of Police supervision would in the circumstances of this case appear to be manifestly excessive. The order for Police supervisions was totally uncalled for. The law is that the Court may order Police supervision of a convicted person for a period not exceeding 5 years after release. The trial Magistrate did not give any reasons why she felt that the maximum period was necessary. In any event Police supervision should not be ordered for first offenders. This statutory provision has received judicial clarification from two cases of KIMANZIA –VS- REPUBLIC (1972) EA

429 and OSMAN & ANOR VS REPUBLIC (1972) EA 429.

In the instant case the Appellant having been treated as a first offender, the Court had no power to order Police supervision. That aspect of the sentence was therefore illegal. Luckily Police supervision as an aspect of sentence has since been outlawed courtesy of the Criminal Law (Amendment) Act, 2003. As I have already stated, it would appear that the sentence of 5 years imprisonment in the circumstances of this was excessive. I would therefore interfere with the sentence and reduce it pursuant to the powers conferred to this Court by Section 354 (3) (a) (II) of the Criminal Procedure Code. I would reduce the sentence from 5 years imprisonment for a term of 2 years 6 months effective from 27th January, 2003.

Accordingly the Appeal on sentence succeeds to that extent.

It is so ordered.

Dated at Nairobi this.....day of2004.

M. S. A. MAKHANDIA

Ag. JUDGE