REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL APPEAL NO. 1017 OF 2001

PATRICK MACHARIA…… APPELLANT

VERSUS

REPUBLIC……. RESPONDENT

(From Original Sentence in Criminal Case No.1950 of 2000 of the Chief Magistrat e's Court at Nairobi)

JUDGMENT

The appellant herein appealed to this Court against the sentence of 5 years imprisonment and 4 strokes plus 5 years police supervision on release, passed upon him on 21.05.01 by the trial Court.

Appellant's grounds of appeal are basically:-

1. that the sentence is very harsh and excessive;

2. that nobody was hurt or any property damaged during the commission of the offence;

3. that the stones used during the robbery were not produced as part of the evidence;

4. that he did not benefit from the loot;

5. that he is a first offender; and

6. that while serving sentence he was diagnosed as being HIV positive and he should be released to seek medical care outside.

In the latter connection, he asked this Court to order Kenyatta National Hospital where he had earlier been referred to for further investigations to produce a report or certificate on his HIV status.

Learned counsel for the respondent, Miss Okumu did not oppose the appellant's appeal against sentence, noting that he had conceded the conviction. She observed, however, that the appellant had so far not supported his claim of being HIV positive with medical evidence. Counsel left the matter of sentence to the Court.

I shall deal with ground 6 regarding the appellant's HIV status last. As to the first 5 grounds, I shall deal with them in reverse order.

Regarding ground 5 that the appellant is a first offender, it is noted that the prosecutor asked the trial Court to treat him as a first offender. The trial magistrate did not , however, make any specific reference to this matter. The appellant pleaded for leniency in his mitigation. The magistrate did not make specific

mention of this plea either during the sentencing process. The magistrate did, however, state the offence she had convicted the appellant of, i.e. robbery under section 296 (1), to be serious. It would have been better if the magistrate made express note of these two matters raised in mitigation. The seriousness of the offence cannot, however, be gainsaid. The magistrate's omission has not occasioned any miscarriage of justice.

Under ground 4, the appellant said he did not benefit from the loot. Whereas that may be so, it is to be recalled that the evidence on which he was convicted, which he has not challenged, shows him to have been an active participant in the robbery. Under section 20 (1) (a) of the Penal Code, his participation makes him as guilty of the offence as the colleague he had teamed up with. The appellant cannot now be heard to ask for leniency on the basis that his colleague took off with the loot. The appellant must carry the cross he earned through his participation in the dangerous venture called robbery. This ground has no merit.

As to ground 3, the appellant says the stones used during the robbery were not produced as part of the evidence. There is something to be said for this criticism of the prosecution case. It is better for weapons used in the commission of crime to be produced where they are available. Here they were not produced. This is undesirable. It should, however, be noted from the evidence of P.W.3, which was accepted along with other prosecution evidence, that the appellant and his companion were armed with "stones/bricks". It can be deduced from this description that the weapons used were sizeable. This has a bearing on the ill intentions of the appellant and his companion. The prosecution's omission to produce the stones/bricks is immaterial in this case.

Ground 2 states that nobody was hurt or any property damaged during the commission of the offence. It is true that no physical injury was reported but it is difficult to appreciate how credit for this could go to the appellant. He and his companion armed themselves with stones in the form of bricks. The two robbers threatened to put these weapons to use for killing P.W.1 who had just come from withdrawing money in the bank and P.W.2 who was driving him. The two witnesses decided to obey the command of the appellant and his colleague for them to vacate the vehicle they were in to save their lives. A third workmate of P.W.1 and P.W.2 who was driving closely behind detected what the appellant and his colleague were up to and he moved quickly to block the vehicle in front, thereby frustrating the plan of the appellant and his colleague to rob the front vehicle plus the money it was carrying, Simultaneously, P.W.2 raised the alarm and people came and foiled the robbery of the vehicle carrying the money. The appellant's colleague, however, managed to run out with the envelope holding the Kshs.764,000/= withdrawn from the Bank a little earlier. Some Kshs.11,135/= fell off from the envelope but the appellant's colleague took off with the bulk of the money. Through the robbery, the owner of the money was deprived of his money amounting to over Ksh.700,000/=. That is no mean loss but it does not appear to bother the appellant who seems to have been interested only in gathering where he never scattered. The threats of violence by the appellant and his companion could not have been a pleasant experience for P.W.1 and P.W.2. Innocent people do not deserve to be subjected to such anxiety, This ground also lacks merit.

Under ground 1, the appellant urged this Court to find the sentence passed on him of 5 years imprisonment with 4 strokes plus 5 years police supervision upon release to be very harsh and excessive. A look at the prosecution case reveals that the appellant was actually charged with capital robbery, contrary to section 296 (2) of the Penal Code. Capital robbery has various alternative ingredients. One ingredient is that the offender be armed with any dangerous or offensive weapon or instrument. One alternative ingredient is that the offender be in company with one or more person or persons. Even if the stones in the form of bricks with which the appellant and his companion were armed were deemed not to be dangerous weapons, they would at least be offensive, which puts the offence in the capital robbery category. The fact of the appellant having been in the company of the colleague who escaped with the money alternatively puts the offence also in the capital robbery category. The learned trial magistrate, however, convicted the appellant of simple robbery under section 296 (1) of the Penal Code. No reason was given.

The appellant should consider himself very lucky to have been convicted of the lesser offence of

simple robbery and sentenced as aforesaid. It is to be noted that the offence of robbery under section 296 (1) of the Penal Code carries up to 14 years imprisonment together with corporal punishment not exceeding 28 strokes. The appellant was awarded a prison sentence of 5 years with 4 strokes. I do not find the sentence harsh and excessive. With regard to the magistrate's order of 5 years police supervision upon the appellant's release, it should be recalled that under section 344 A (1) of the Criminal Procedure Code, such supervision is mandatory for anyone convicted of the offence of robbery under section 296 (1) of the Penal Code. This disposes of the appellant's complaint about police supervision.

I am of the view that grounds 1 – 5 of the appellant's petition of appeal are the only ones properly related to severity of sentence. It is now well established law that an appellate Court will interfere with the sentence passed by a trial Court if there has been application of wrong sentencing principles, or if there has been misdirection, or if the sentence is manifestly excessive or inadequate. I find that none of the appellant's five grounds of appeal is covered under the above criteria.

The appellant's appeal against severity of sentence has no merit and the same is hereby dismissed.

I now advert to ground 6. Under this ground, the appellant urged to be released from prison on account of his having been diagnosed as being HIV positive while undergoing imprisonment. This medical condition, even if it exists, had not been diagnosed at the time of prosecution, conviction and sentence. The appellant has sought to use such medical condition as a ground for early release from prison in order "to go and seek appropriate medical care outside." At the hearing of his appeal, the appellant asked this Court to order Kenyatta National Hospital to avail a report or certificate on his HIV status and an order to that effect was made and sent to Kenyatta National Hospital vide Principal Deputy Registrar's letter of 02.07.03. A report dated 22.07.03 has now been received. It states of him (his name is given therein as Patrick Macharia Waweru)) as follows:

> "***The above named male adult has been at Kenyatta National Hospital, having an ulcer in the genital area. He was referred to sexually transmitted clinic. HIV status was not ascertained at the time he was seen.***
>
> ***It is possible to have the patient reviewed, counseled and HIV done. Thanks."***

It emerges clearly from this report that the appellant was NOT diagnosed by Kenyatta National Hospital as being HIV positive. His categorical statement to that effect before this Court is, therefore, erroneous in so far as he intended to make HIV condition a ground for release from prison. This disposes of ground 6.

The net result of all the foregoing is that the appellant's appeal against sentence fails as does also his appeal to be released from prison on medical grounds. The appellant's appeal is hereby dismissed in its entirety. I am constrained to record the following obiter dicta: A number of applications and/or appeals have been made to the High Court by prisoners in the recent past for release on medical grounds it being alleged now and again that the prison administration does not, by and large, cater for the needs of ailing prisoners either at all or adequately. In this connection, attention is drawn to section 29 of the Prisons Act [Cap.90] which vests responsibility for the health of prisoners in medical officers for the various prisons. It is hoped that all practical steps will be taken by those concerned to ensure reasonable implementation of the provisions of the Prisons Act with regard to the health of prisoners.

Delivered at Nairobi this 28th day of July, 2003.

B.P. KUBO

JUDGE