



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**(Coram: Odunga, J)**

**CRIMINAL REVISION NO 33 OF 2019**

**MICHANAL IMBALI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. **Michanal Imbai alias Anesco** (the applicant herein), **Joseph Njoroge Ndichu** and **Vincent Odhambo Alias Vini** were charged before the Chief Magistrate, Mavoko in CM's Court Criminal Case No. 629 of 2016 charged with four counts of robbery with violence contrary to section 296(2) of the **Penal Code**. Particulars in count I were that on the night of 14<sup>th</sup> and 15<sup>th</sup> April 2016 at Syokimau Estate in Athi River Sub County, Machakos County, jointly with others not before court, while armed with offensive weapons namely pistols robbed **Henry Raballa** of cash Kshs. 8, 000, certificate of appointment, one Co-operative Bank ATM card, NHIF card, two mobile phones; Blackberry valued at Kshs. 70, 000 and Nokia valued at Kshs. 2, 000, cash Kshs. 9, 000, laptop model Lenovo valued at Kshs. 70, 000 all valued at Kshs. 159, 000 and at the time of such robbery used actual violence against **Henry Raballa**.

2. Particulars in count II were that on the night of 14<sup>th</sup> and 15<sup>th</sup> April 2016 at Syokimau Estate in Athi River Sub County, Machakos County, jointly with others not before court, while armed with offensive weapons namely pistols robbed **Ruth Njeri Muiruri** of three mobile phones namely Nokia Lumia 1320, Samsung Duos, ITEL 1409, cash Kshs. 450 and a handbag valued at Kshs, 15, 000 and at the time of such robbery threatened to use actual violence against **Ruth Njeri Muiruri**.

3. Particulars in count III were that on the night of 14<sup>th</sup> and 15<sup>th</sup> April 2016 at Syokimau Estate in Athi River Sub County, Machakos County, jointly with others not before court, while armed with offensive weapons namely pistols robbed **Jackline Amira** of three mobile phones namely Sony Experia, HTC M8 and a wrist watch make Titan worth Kshs. 35, 000, cash Kshs. 9, 000 and one handbag and at the time of such robbery threatened to use actual violence against **Jackline Amira**.

4. Particulars in count IV were that on the night of 14<sup>th</sup> and 15<sup>th</sup> April 2016 at Syokimau Estate in Athi River Sub County, Machakos County, jointly with others not before court, while armed with offensive weapons namely pistols robbed **Muchai Morris Ndegwa** of a mobile phone namely ITEL 1407 valued at Kshs. 6, 000 and at the time of such robbery threatened to use actual violence against **Muchai Morris Ndegwa**.

5. They faced an alternative charge of handling stolen goods contrary to section 322 (1) (2) of the **Penal Code**. The particulars were that on the night of 14<sup>th</sup> and 15<sup>th</sup> April 2016 at Syokimau Estate in Athi River Sub-county within Machakos County otherwise than in the course of stealing, dishonestly retained one mobile phone make Nokia IMEI [Particulars Withheld] knowing or having reason to believe to be stolen property.

6. In count V they were charged with being in possession of a firearm without a firearm certificate contrary to section 4(1) as read with section 4(2) (a) and 4(3)(a) of the **Firearm Act**. The particulars were that on the night of 6<sup>th</sup> and 7<sup>th</sup> August 2016 at Kabiria in Kawangware within Nairobi County, they were found in possession of a firearm make Ceska Serial Number 14B62786 without a firearm certificate.

7. In count VI they were charged with being in possession of ammunition without a firearm certificate contrary to section 4(1) as read with section 4(2)(a) and 4(3)(a) of the **Firearm Act**. Particulars were that on the night of 6<sup>th</sup> and 7<sup>th</sup> August 2016 at Kabiria in Kawangware within Nairobi County, they were found in possession of eleven rounds of ammunition without a firearm certificate.

8. After he hearing, the 1<sup>st</sup> and 2<sup>nd</sup> accused persons were convicted in the four counts of robbery with violence while the 3<sup>rd</sup> accused was acquitted thereof. The 1<sup>st</sup> accused was also convicted in counts five and six while the other accused persons were acquitted therefrom.

9. In Criminal Appeal No. 112 of 2019 which was filed by **Joseph Njoroge Ndichu**, this Court confirmed the findings of the trial court in respect of Counts I and III but reversed the findings in respect of Counts II and IV. However, as Counts V and VI were not the subject of the said appeal, the said appellant having been acquitted thereof, this Court did not deal with the same.

10. In **Marando vs. The Republic [1980] KLR 114, Madan, Law and Potter, JJA** held that:

**“The appeal against sentence causes us much concern. When two or more people are convicted of the same offence, it is wrong in principle to impose different sentences except for good reason. For instance, one may have a bad record, but that is not the case here. The appellant is a first offender. The judge gave no reason for sentencing the appellant to four years, and his co-accused to one day’s imprisonment. The only difference we can see between the two cases is that it was the appellant who raised the hue and cry against the deceased. We do not think that he did so maliciously, but rather out of misplaced and misguided zeal. It was a foolish and unnecessary act on his part, but probably well intentioned, as he freely went to report what had happened to the police. In the words of Hilbery, J in R vs. Ball (1951) 35 Cr App Rep 164, 165:**

**‘The differentiation in treatment is justified if the court, in considering the public interest, has regard to the differences in the characters and antecedents of the two convicted men and discriminates between them because of those differences.’**

**We see no justification for the disparity in the sentences in this case. If the sentence passed on the appellant is allowed to stand, he will suffer a justifiable feeling that he has been a victim of injustice.”**

11. Since the evidence in support of Counts II and IV was the same for all the accused persons and having been discredited, there is no basis why the applicant herein should continue serving the said sentences. Having allowed the appeal against the conviction of the appellant on counts II and IV, the Court set aside the sentence of the appellant in Counts I and III and substituted therefor a sentence of 15 years each which sentences were to run concurrently from 7<sup>th</sup> August, 2016.

12. In similar fashion I set aside the sentence of the Applicant herein in Counts I and III and substituted therefor a sentence of 15 years each which sentences will run concurrently from 7<sup>th</sup> August, 2016. The sentences in respect of Counts V and VI of 7 years to remain. For avoidance of doubt as was found by the trial court all the sentences are to run concurrently.

13. It is so ordered.

**Judgement read, signed and delivered in open court at Machakos this 5<sup>th</sup> day of March, 2021.**

**G V ODUNGA**

**JUDGE**

**In the presence of:**

**The Applicant Online**

**Mr Ngetich for the Respondent**

**CA Geoffrey**