



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 49 OF 2017

DAVIS NGIGI MAINA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

SENTENCE RULING

The appellant herein **Davies Ngugi Maina** was charged with 'two counts', the offence of robbery with violence contrary to section 296(1) of the Penal Code and handling stolen property contrary to section 322(1) (2) of the Penal Code. He was *convicted of on his own plea of guilty and ordered to serve 14 years' imprisonment on count 1 and 3 years in count 2, sentences to run concurrently.*

He appealed against the conviction and sentence. Upon hearing the appeal, on 11th Day of April 2018 I made the following orders;

In the circumstances I find that the appeal must succeed in part.

1. The conviction for offence of robbery contrary to section 296(1) remains as the particulars as read out support the ingredients of the offence,
2. The conviction on the alternative charge of handling stolen goods contrary to section 322(1) as read with 322(2) cannot stand. It is quashed and the sentence set aside,
3. The sentence on the main charge is set aside.
4. I order for a pre-sentence report to be filed by the sub county Probation and After Care Services Officer Nyeri County within 14 days hereof.
5. *Mention on 7th May 2018 for sentencing.*
6. Order be extracted and served on the Nyeri Probation and After Care Services office.

This Ruling therefor follows the foregoing orders.

In his message in the Sentencing Guidelines (2016) the Hon. Chief Justice Willy Mutunga wrote

These guidelines recognise that sentencing is perhaps one of the most intricate aspects of the administration of trial justice. It acknowledges that sentencing impacts not just the individual offender but also the community, and indeed the entire justice system. They also seek to enhance the participation of the victim, and generally infuse restorative justice values in the sentencing process. Significantly, they champion the national value of inclusivity by promoting community involvement through use of non-custodial sentences in suitable cases.

(emphasis mine)

It is with this in mind that I requested for a pre -sentence report on the appellant herein upon finding that the trial magistrate had applied erroneous principles in sentencing the appellant herein.

The offence was serious but happened within a family setting. Who in his normal mind robs the only person who offered him refuge and shelter when he needed it most? We can say it is either a mad person or a criminal of the worst kind.

In determining the sentence, I call to mind the words of Mbogholi Msagah J, the Chairperson of the Task Force who said in the Foreword to the Guidelines:

Reaching a fair decision in sentencing is neither an easy nor straightforward process; several considerations come into play. While sentences are defined by law, the measure of what is an appropriate sentence in a given case is left to the discretion of judges and magistrates. As Justice McArdle is famously quoted saying, **“Anyone can try a case. That is as easy as falling off a log. The difficulty comes in knowing what to do with a man once he has been found guilty.”**

On the 21st May 2018 the probation officer Mukurweini sub county filed the pre -sentence report ref no. PS/MUK3/5/2018/7 dated 7th May 2018.

It confirms that the complainant herein is the appellant’s elderly paternal grandmother aged 81 years. The report also gives the appellant’s difficult back ground in which the officer states that after the death of his father in 1999, his mother relocated to Nairobi with her children where they ‘lived in deprivation until...rescued by a maternal uncle’ who took them to the maternal grandmother’s home but the appellant chose his paternal grandmother’s home.

He attended primary school, completed, was admitted to form 1 and dropped out after falling into bad company, became truant and alcoholic.

The report has laid great emphasis on the offender’s bad character, drug and substance abuse, and the rejection by the family except his mother. It has generalized the community-as being hostile to the appellant. It has made sweeping statements about a criminal life ‘prior to his arrest the inmate engaged in criminal acts such as stealing both in Nairobi and his home area’ without details or sources painting a bad character.

No uncle, or aunt or member of the community is indicated as having been interviewed, and the information appears attributable to no one in particular. There is no evidence that even the assistant chief or village elder or anyone else in the community was interviewed as there are no details.

It sees to hold his pleading guilty to the offence against him, which ought not to be the case. How does the court ensure substantive justice in a case such as this through an appropriate sentence?

Except to disrecommend a noncustodial sentence the report does not assist this court in addressing the causes of the of the appellant’s offending and the possible ways of ensuring that upon release the family issues which appear to be at the centre of his committing these offences are resolved and do not escalate further.

It is of course possible that the appellant would not be welcome in his grandmother’s home, but at the end of the day that is his home and at some point he will go back there. He is remorseful and perhaps a non -custodial sentence would have helped in restoring whatever broken ties there may be. He would still require the supervision of the Probation office that has found him unsuitable, and a hostile community environment.

This offender has chances to reform given the proper guidance and counselling as the cause of his offending appears to be alcohol and substance abuse. A reasonable stint in custody could assist with that if he could get post release supervision.

Be that as it may having taken inconsideration the fact that he is a first offender, the offence was committed within the family, the need for time for his grandmother to deal with the trauma, and for restoration of family ties to prevent re offending, I do think that **THREE YEARS IMPRISONMENT** to be served from the date of the first sentence would be suitable.

Hence on the count of robbery c/s 296(1) of the Penal Code, the sentence of 14 years’ imprisonment is substituted with the sentence of **THREE (3) years’ imprisonment.**

Dated, delivered, and signed in open court at Nyeri this 5th Day of June 2018

Mumbua T. Matheka

Judge

In the presence of:

Court Assistant: Atelu

Magoma for state

Appellant present