IN THE COURT OF APPEAL

AT NAKURU

(Coram: Gachuhi, Cockar & Tunoi JJ A)

CRIMINAL APPEAL NO. 11 OF 1994

BETWEEN

WYCLIFF SHIUKA WAHOME.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nakuru (Mr Justice D M Rimita) dated 19th November 1993,

in

HCCRA No 269 of 1991)

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JUDGMENT

The appellant together with one James Kariuki Mwati (A1) (hereafter referred to as J K Mwati) and one Joseph Mureithi Mburu (A3) was charged with offence of robbery contrary to section 296 (1) of the Penal Code J K Mwati (A1) and the appellant both pleaded guilty to the offence, admitted the facts as stated by the prosecutor, and were thereafter convicted on plea. After listening to their pleas in mitigation the trial magistrate sentenced each of them to a period of 10 years' imprisonment with corporal punishment of 10 strokes of the cane on 18th February, 1991. J K Mwati appealed to the High Court against the sentence and the appellant appealed to the High Court against conviction and sentence.

For some reason which is not clear from the files of the two lower courts, the two appeals were not heard together. Tanui, J heard the appeal filed by J K Mwati (A1) and on 18th October, 1991, set aside the sentence passed by the magistrate and substituted it with a sentence of 4 years' imprisonment with 5 strokes of the cane.

The appeal filed by the appellant was heard by Rimita, J on 19th November, 1993, who on the same day dismissed the appeal against both conviction and sentence. Thus the sentence of 10 years' imprisonment with 10 strokes remained unchanged in the case of the appellant. In his grounds of appeal to the Court of Appeal against sentence the appellant referred to the afore-described reduction of prison sentence and the corporal punishment in the case of his co-accused.

Section 361(1) (b) of the Criminal Procedure Code has prescribed that on a second appeal the Court of

Appeal shall not hear an appeal against a lawful sentence except where the same has been enhanced by the High Court. However, the Court of Appeal has interfered with a sentence where it is satisfied that there is an error in principle involved in the imposition of the sentence. The position here now is that whereas J K Mwati (A1) is sentenced to 4 years imprisonment and 5 strokes, the appellant, charged with same offence and convicted on the same facts by the same magistrate will serve a sentence of 10 years' imprisonment and 10 strokes. Such an inordinate disparity in the two sentences is a grave anomaly as well as is evidence of an error in principle in the imposition of sentences. We have been informed that in the appellant's case, Rimita, J had not been made aware of the result of the other appeal. We are certain that if he had been made aware of Tanui's decision, his own decision on the sentence would have thereby been affected very much in favour of the appellant. In the result, we allow the appeal against the sentence which we now set aside and substitute it with a sentence of 4 years' imprisonment with 5 strokes with effect from the date the trial magistrate imposed his sentence. We would also observe here that to avoid such anomalies in future, it would be of great benefit if the registries concerned and the Attorney General's office ensure that appeals filed by all the co-accused are heard together at the same time by the same 1st appellate judge(s).

Dated and Delivered at Nakuru this 25th day of February 1994.

J.M.GACHUHI

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JUDGE OF APPEAL

A.M.COCKAR

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JUDGE OF APPEAL

P.K.TUNOI

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JUDGE OF APPEAL

I certify that this is a true copy of

the original.

DEPUTY REGISTRAR