

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 141 of 2001

MOSES MURAGE GITHUI APPELLANT

Versus

REPUBLIC RESPONDENT

(Being an appeal from the judgment of M. R. GITONGA, Senior Resident Magistrate, in the Chief Magistrate's Criminal Case No. 4430 of 2001 at Nyeri)

JUDGMENT

The appellant was charged with ***attempted robbery with violence contrary to Section 297(2) of the Penal Code***. After trial he was convicted as charged and was sentenced to be detained under the president's pleasure because he was below the age of 18 years as stated by the learned trial magistrate. He was dissatisfied with the conviction and sentence and has accordingly brought this appeal. His co-accused was acquitted. The evidence against the appellant was that he attacked the complainant who was his employer with a knife. He also attacked a co-worker who responded to the cry of the complainant. Later on he disclosed to the complainant that he had been persuaded by his co-accused to kill the complainant steal her car and take it to the co-accused. The co-accused was said to have been a mechanic in that area. As we began to consider this appeal we noted that the learned trial magistrate had failed to record the language used during the trial. In the case of each and every witness for the prosecution and even in the case of the appellant and his co-accused there is no record of the language used.

Copy cr. Case no. 46 of 2006 as shown in red page 3 to page 7

The evidence adduced in the lower court was that the appellant attacked the complainant with a view to stealing a car. In this regard the prosecution relied on a statement under inquiry. In view of the change in the law such a statement would not now be admissible in evidence. With that in mind the prosecution's evidence would not be very weak and not able to sustain a conviction for the charge the appellant faced. The attack on the complainant was witnessed by the appellant's co-worker. There is some doubt we entertain whether the appellants co worker could still be in employment with the complainant. There was also evidence the appellant confided in other co workers and confirmed that his intention was to steal the motor vehicle. There is also doubt whether those co workers would be available if a retrial was ordered. On the whole bearing in mind the principles that should guide us in ordering a retrial and having considered the evidence of the lower court we find that we cannot order a retrial. In the end the appellant's appeal against conviction and sentence does succeed. We do hereby quash the appellant's conviction by the lower court and set aside his sentence. We order the appellant to be set free unless otherwise lawfully held.

DATED AND DELIVERED THIS 22ND DAY OF JULY 2008

MARY KASANGO

JUDGE