

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL APPEAL NO. 639 OF 2003

FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NO. 5058 OF 2003 OF
THE CHIEF MAGISTRATE'S COURT AT KIBERA

BERNARD MISIGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant BERNARD MISIGO was charged with the offence of robbery with violence, contrary to section 296(2) of the Penal Code.

A perusal of the record of the proceedings before the trial court reveals that the following facts were read out to the appellant: "On 22.6.03 at Kibera Silanga, the complainant was attacked by 6 people who pushed and kicked him and ordered him to remove whatever he had. One of the 6 suspects forcibly removed a wallet from his pocket with an i/d card and cash 2,540/=. In the process of struggling with the 6 men the complainant suffered some injuries and he raised alarm and members of the public went to the scene and found the complainant being wrestled by 6 men.

On noting members of public the suspects ran away. The accused was arrested and escorted to Kenyatta Police Post in the company of the complainant where he was issued with a P3 form and the police surgeon examined the complainant and found that he had suffered some injuries on the left of his back with multiple injuries on his back and bleeding on the face. He assessed the degree of injury as harm and the accused was charged. The wallet and the money have not been recovered."

After the above cited facts were read out to the appellant, he responded by saying that the facts were correct. He was therefore convicted on his own plea of guilty. Thereafter, he said nothing in mitigation. The learned trial Magistrate held that the facts set out disclosed an offence under section 279(a) of the Penal Code, and convicted the appellant accordingly. In arriving at her decision to convict the appellant under section 279(a), as opposed to section 296(2) of the Penal code, the trial court stated that the appellant and his colleagues were not armed. In his Petition of Appeal, the appellant asked the court to be lenient on him, by imposing a non-custodial sentence or alternatively by reducing the sentence which had been imposed on him. The said sentence was imprisonment for 3 years, with 6 strokes of the cane. In his view, the sentence imposed was harsh and excessive.

The learned state counsel, Ms Okumu strongly opposed the appeal. She pointed out that under section 279(a) of the Penal Code, the maximum sentence was 14 years imprisonment. Therefore, in her considered opinion, the sentence of 3 years imprisonment was not excessive. However, the state counsel did readily concede that the sentence of corporal punishment could not stand.

I have given due consideration to this appeal. Although the appellant submitted that he committed the offence when confused, that would not be ground enough to warrant a reduction of the sentence.

I did set out the facts at the outset of this judgment. I did so because to my mind there was absolutely no justification in the decision by the trial court to convict the appellant for a lesser offence, of stealing from a person. As the appellant was in the company of five other persons when they robbed the complainant, that alone was sufficient to found conviction for robbery with violence. Secondly, the appellant and/or his colleagues visited actual violence on the complainant, occasioning him multiple

injuries to the back and bleeding on the face. When the appellant admitted that he and his colleagues had caused injury to the appellant, in the cause of robbing him, that was sufficient to sustain conviction for robbery with violence.

Therefore, as far as I am concerned, the appellant was extremely lucky to have been convicted for the lesser offence of stealing from a person.

Meanwhile, I have noted that the maximum sentence for the offence of stealing from the person is 14 years imprisonment. I therefore uphold the submissions by the learned state counsel, to the effect that the sentence imposed on the appellant was lenient. In my considered view, the said sentence was neither harsh nor excessive. I therefore decline to reduce or substitute the sentence of imprisonment.

However, as corporal punishment has now been outlawed in Kenya, I hereby direct that the appellant shall not be subjected to any strokes of the cane. Save for that, the appeal stands dismissed.

Dated at Nairobi this 20th day of September, 2004

FRED A. OCHIENG

JUDGE