

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

Criminal Appeal 322 of 2003

(From Original Conviction and Sentence in Criminal Case No. 3143 of 2003 of the Chief Magistrate's Court at Mombasa L. Achode Principal Magistrate)

DERRICK OTIENO APPELLANT

- Versus -

REPUBLIC RESPONDENT

J U D G M E N T

The Appellant was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the charge were that on the 17th day of December 2002 at about 7.00 p.m., at Likoni Ferry area in Likoni location within Mombasa District of the Coast Province jointly with others not before court he robbed Vincent Simiyu cash Sh. 1,700/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Vincent Simiyu. He pleaded not guilty but after trial he was convicted and sentenced to death. He has appealed against both the conviction and sentence.

At the hearing of the Appeal the Assistant Deputy Public Prosecutor conceded the appeal on the ground that the testimony of the complainant was at variance with the particulars of the charge.

We have ourselves perused the lower court record and agree with the -Assistant Deputy Public Prosecutor that the evidence adduced before the trial magistrate did not prove the charge as laid. The particulars of the charge as stated above were that the Appellant with others not before the court robbed the complainant P.W.2 cash Sh. 1,700/=. The complainant's evidence, however, was that he was robbed of a torch, ID card and a voters card. He never made mention of having been robbed of cash of Sh. 1,700/= or any other sum.

The evidence adduced by the complainant, P.W.2 and the doctor, P.W.4, however, shows that the complaint, in the course of robbery suffered injuries to two fingers of his right hand. P.W.4, Dr. Lawrence Ngone, who completed the P.3 form assessed the injury as harm. That proved a lesser offence of assault causing actual bodily harm contrary to section 251 of the Penal Code. In the circumstances and in exercise of the powers conferred upon us by section 354 of the Criminal Procedure Code, we quash the conviction on the charge of robbery with violence contrary to section 296(2) of the Penal Code and substitute therefor one of assault contrary to section 251 of the Penal Code.

As to sentence we note that the Appellant has been incarcerated for now two years. We think he has been punished enough. We therefore sentence him to an imprisonment term that will end today. The Appellant shall therefore be set free forthwith unless otherwise lawfully held.

DATED and delivered this 16th day of December 2004.

J. KHAMINWA

JUDGE

D.K. MARAGA

JUDGE