



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**APPELLATE SIDE**

**CRIMINAL APPEAL NO. 249 OF 2002**

(Being an appeal against Conviction and Sentence by the Senior  
Principal Magistrate's Court at Mombasa, in Criminal Case No. 263  
of 2003 – J.S. Mushelle)

PATRICK K. MWAURA ..... APPELLANT

- VERSUS -

REPUBLIC ..... RESPONDENT

**J U D G E M E N T**

The Complainant ASHA JUMA HAJI (PW1) was on the 26.1.02 at about 10.00 a.m. in the process of putting her shopping comprising of bicycle pumps and spanners into her vehicle along Digo Road, Mombasa when suddenly her bag which was also containing Kshs.114,000/= in cash was snatched. She fell down while shouting for help and members of the Public gave chase to the culprit who is the Appellant. He was arrested and the money recovered but not the bicycle pumps and spanners and escorted to Central Police Station where he was charged with the offence.

JAMES KINARO (PW2) had at the time just left a shop when he saw complainant come out of the same shop holding a bag and he saw some people trip her causing her to fall down and snatched the bag. Together with members of the public he gave chase and caught up with appellant and recovered the cash.

The Appellant was taken to Central Police Station where he was handed over to PC. Clement Mwangi on the same day at 12.30 p.m. together with the bag containing the money and he was charged with the offence of Robbery contrary to Section 296(1) of the Penal Code.

The complainant suffered injuries described by Dr. Lawrence Ngone who gave evidence as PW4 as bruises on left cheek, left knee and tenderness left palm. He said the injury was approximately 20 days in the P3 Form which he produced in evidence having examined her on the 15.2.02.

In his Appeal the appellant attacked the evidence on the ground that PW1 and PW2's evidence was inconsistent as PW1's evidence was that the bag contained bicycle pumps and spanners and Kshs.114,000/= yet only the money was recovered. It is however in evidence that the appellant was with another and on chasing them PW2 arrested the Appellant. He was arrested within the Town center but some distance from the scene. In his defence, the appellant admits having been caught in possession of the bag containing the money and therefore it would be of no consequence that the other items were never recovered. His other point in submission was that the charge sheet was defective in that he was charged with Robbery Contrary to Section 296(1) yet there was no violence. This from the evidence is true that what took place was stealing from a person Contrary to Section 279 (a) of the Penal Code and the Court has power to substitute the charge and convict on new charge as supported by evidence.

The State Counsel did concede the appeal on two grounds as submitted by the Appellant, that the evidence of PW2 and PW1 were at variance and that PW2 said the bag was snatched from complainant's son while PW1 said it was snatched from her. The court has read the hand written proceedings and it is clear this is a typing error as the hand written notes record PW2 as saying "they tripped PW1 she fell down" as opposed to the typed proceedings on page 3 bottom line which reads "They tripped PW1, son fell down". The other error which the State Counsel and Appellant referred to is found in the evidence of the Doctor is recorded in the typed proceedings as saying complainant's injury was 20 years old while the

handwritten notes and P3 Form clearly show it was 20 days. In the circumstances, no contradiction is to be noted in the said evidence. I have analysed the evidence as stated earlier and find there was evidence of Stealing Contrary to Section 279(a) of the Penal Code. The maximum sentence provided by law for this offence is 14 years imprisonment with Corporal punishment. The Appellant had been sentenced to serve 4 years imprisonment and 4 strokes of the cane plus 5 years of police supervision. The imprisonment Sentence and strokes were in the circumstances not excessive at the time of passing of the sentence but due to the recent Amendment to the Criminal Law which saw the Removal of Corporal punishment, Sentence on strokes is set aside.

The Conviction is therefore upheld for reasons given. On Sentence however I will reduce the Imprisonment Term on account of the Appellant being a first offender to one of 3 years imprisonment. The Appeal shall succeed to that extent only.

**Dated and Delivered at Mombasa this 28th day of August, 2003.**

**P.M. TUTUI**

**COMMISSIONER OF ASSIZE**