



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 820 OF 2001

From Original Conviction(s) and Sentence(s) in Criminal case No. 2774 of 1999 of The Chief Magistrate's Court at Nairobi CR.A Mutoka(Mrs

BERNARD ATSANGO KASIAN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 822 OF 2001

(From original conviction and sentence in criminal case No. 2774 of 1999 of the Chief Magistrate's Court at Nairobi (R.A. Mutoka (Mrs)

JULIUS LUNDU KIAI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APEPAL NO. 823 OF 2001

(From original conviction and sentence in criminal case no. 2774 of 1999 of the Chief Magistrate's Court at Nairobi (R.A. Mutoka (Mrs).

SIMON KIPTUM CHUMO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The four appellants were originally charged with the offence of Robbery with violence contrary to section 296(2) of the Penal Code but after a full trial, all were convicted of the offence of Robbery contrary to section 296(1) of the Penal Code and each sentenced to serve three years imprisonment with hard labour and to receive two strokes of the cane.

Being aggrieved by the said conviction and sentence they each lodged an appeal. In their respective petitions of appeals, the appellants have variously raised the issues of uncorroborated evidence reliance on retracted statements under inquiry, lack of positive identification and the conduct of the parade alleged to be flawed.

As the first appellate court, I have gone through the record and made an independent evaluation thereof as required of me. The learned trial magistrate correctly set out the entire evidence adduced before her, examined the same in relation to each of the appellants and then jointly against all of them. There was with respect, direct evidence against the original first and second accused Simon Kiptum Chimo and Francis Mako Kinyanja that came from the complainant pw1. They were with him from the town center where he was forced into a motor vehicle. They drove with him for some time to the outskirts of the city where they took the money and abandoned him. All this time they talked to him it was daytime and they had not disguised themselves. The identification parades that followed confirmed their respective identities and their respective defences did not in any way diminish the strength of the prosecution case.

It is true that it is Francis Mako Kinyanja who mentioned the rest of the appellants. That is accomplice evidence. However, the statements of the appellants which were admitted in evidence after a trial within a trial completely negated their innocence and confirmed their participation in the crime. It was a neatly knit plan whereby a workmate of the complainant pw1 was recruited to give information of the banking of the proceeds from the deacons shop. The said workmate, Julius Lundu Kiai the original 3rd accused "sold" his colleague and betrayed his employer. The original fourth accused Bernard Atsango Khariani played a crucial role as evidence shows from a vantage point near the Stanley hotel where pointed out pw1 to his coaccused.

The said statements, though retracted, were detailed and gave graphic information that could only have come from the makers, I have no doubt in my mind that the appellants jointly committed the offence upon which they were convicted. The conviction was safe.

On sentence, I note that the appellants had been in custody since their arrest to the date of conviction. From the date of conviction to date they have served prison terms. The total period adds to about three years. And so, notwithstanding the seriousness of the offence and considering that the trial took long mainly due to delayed prosecution, the period of incarceration is sufficient in the circumstances.

Accordingly, the appeal against sentence hereby succeeds. The prison term is hereby reduced to the period already served by the appellant appellants. However corporal punishment shall remain.

I direct that, each of the appellants shall be released unless otherwise lawfully held. On their release, each shall be subject to police supervision for a period of five years.

Orders accordingly.

Dated and delivered at Nairobi this 2nd day of October, 2002

MBOGHOLI MSAGHA

JUDGE