



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO.313 OF 1999

MASUDI SALIM JUMA APPELLANT

VERSUS

REPUBLIC RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO.314 OF 1999

PATRICK IBWAKA APPELLANT

VERSUS

REPUBLIC RESPONDENT

**Being an Appeal from Original Conviction and Sentence in Criminal Case
No.1904 of 1999 of the Chief Magistrate's Court at Mombasa – G. Aburili, SPM.**

JUDGMENT

There are two appeals being H.C.C. Cr. A. No.313/99 Masudi Salim Juma v. R. and H.C.C.Cr.A. No.314/99 Patrick Ibwaka Shaba vs. R. The two appellants were jointly charged and tried in the subordinate court in Cr. Case No.1904/99. The appellant Masudi Salim Juma has withdrawn his appeal with leave of the court on 26/11/2001. The appeal number 314/99 proceeded to hearing and this judgment concerned only that appeal. The appellant was charged with an offence under Section 296(2) Penal Code that jointly with others armed with dangerous weapons namely, swords, robbed complainants and at or immediately before or immediately after the time of such robbery threatened to use actual violence.

The evidence of the complainants is that as they walked towards their home in Tiwi area three person came down a tree which was by the roadside. The complainants were husband and wife. The three men approached them and demanded money threatening death. The complainants surrendered everything they had including wrist watch and other items specified in the proceedings. The three men ran away. The complainants were not able to identify them because it was getting dark. Time was about 7.30 p.m. Later the wrist watch and other stolen items were recovered by witnesses and the appellant was arrested. The trial court found that the recovery of the items which were identified by the complainants connected the Appellant with the offence. We are of the view that the Trial Magistrate was right in believing the

evidence before him. In his defence the Appellant in a sworn statement said that he was in custody on 30/5/99 (30/6 in type) He had been arrested and put into police custody in Kwale. However the offence was committed on 24/5/99 at 7.30 p.m. Therefore, he has not explained where he was on 24/5/99.

On the evidence before him the Trial Magistrate found the appellant guilty and convicted him. However it is not clear what offence he convicted on. The facts disclose the offence of robbery as defined under Section 295 Penal Code. It is clear that the robbers did not use any actual violence but verbal threats. They did not use the sword which was carried by one robber. We find then that the offence committed was under Section 296(1). This is the offence that was proved. The trial magistrate seems to have come to this conclusion but he failed to record his opinion. Nevertheless he sentenced the appellant to a term of imprisonment and not to the mandatory sentence required under Section 296(2).

Regarding the grounds of appeal the Trial Magistrate did not rely on the evidence of PW.1. This witness said she was not able to identify the appellant but the appellant was found with stolen goods/property identified as the property of the complainants. There is no evidence of identification parade. See evidence of PW.8 – appellant had a watch which was stolen from PW.1. The trial Magistrate did not rely on dock identification. The manner in which the appellant was arrested is clearly stated by PW.8 NO.38772 Cp. Julius Mugambi who arrested the appellant. All exhibits were properly identified by the owners. PW.1 identified her watch which was also identified by PW.3 her co-worker at the clinic. In the circumstances the grounds of appeal must fail as the same have no merit.

We reduce the offence under Section 296(2) Penal Code to the lesser offence under section 296(1).

The sentence shall remain as set by the lower court. We do not see any ground for interfering . The appeal is therefore dismissed except as relates to the alteration of the offence.

Dated at Mombasa this Day of, 2002.

D. ONYANCHA
JUDGE

J. KHAMINWA
COMMISSIONER OF ASSIZE