REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

Criminal Appeal 122 of 2000

(From the Original Conviction and Sentence in Criminal Case No.470 of 1999 of the Senior Resident Magistrate's Court at Kangundo: C. D. Nyamweya Esq. on 5.4.2000)

PAUL CHEGE MWANGI .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

Coram: J. W. Mwera J.

Appellant not wishing to be present

Orinda State Counsel for Respondent

C.C. Muli

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J U D G E M E N T

The appellant accused No.2 in the lower court at Kangundo faced a charge under S.297(1) Penal Code in that on 29.7.99 at Kitwii sub location, Kanzalu Machakos with others not before the court they attempted to rob Simon Mutisya Sh.30,000/= and at that time used violence on the said Mutisya.

After five witnesses for the prosecution and the two accused's testimony the Learned Trial Magistrate delivered a judgement in which he found them guilty and ordered them to serve two and half years imprisonment, each to suffer 2 strokes of the cane and remain under police supervision for 5 years on discharge.

The appeal is to the effect that the case was not proved beyond a reasonable doubt and that the

Learned Trial Magistrate relied on hearsay evidence. That no identification parade was arranged and no investigation went into the case.

The Learned State Counsel appreciating that the alleged offence took place at night nonetheless observed that the complainant recognized his former employee outside the window the gang broke as they demanded to be given money. That the identification was satisfactory – in the moonlight. And that the sentence was even lenient.

The issue of identification was uppermost in the mind of the Learned Trial Magistrate since the offence took place at about 1 A.M. in a village. That the complainant recognized the appellant in the bright moonlight. The gang smashed his window, the complainant screamed and neighbours gathered. The appellant was apprehended on a nearby road by a local assistant chief among others. (see Simon Kyungu P.W.2) Asked where the appellant was going at that hour he said that he was visiting a girlfriend. That the appellant with his mate were strangers in the locality and their explanations did not just wash as to why they were here at 1 A.M. The lower court did not believe the defence of the appellant. The Learned Trial Magistrate piecing all testimony together was satisfied that the appellant with others did raid the complainant's home. They smashed a window demanding money from him. He screamed and they ran off; he had recognized his former timber cutter for 8 months outside the window and among the thugs – in the moonlight. They were arrested on a nearby road, in a strange locality and their explanation for being there did not convince anybody – even the lower court.

On all evidence the conviction was safe and it stands. Similarly the sentence was lawful and even lenient. It too stands.

In sum the entire appeal is dismissed.

Judgement accordingly.

Delivered on 26th March 2001.

J. W. MWERA

JUDGE