

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APP 61 OF 2000

GEORGE IWA MARIANO ::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

REPUBLIC ::::::::::::::::::::::::::::::::::: RESPONDENT

J U D G E M E N T

20 The appellant along with another were charged under S. 296(2) Penal Code in the lower court at Kajiado in that these two with others not before court jointly and armed with dangerous weapons i.e. a pistol they robbed David Mutua Githiga of a motor vehicle plus several other items valued at over Sh.251,000/= and during or after the robbery they threatened to use actual violence on this Githiga on 16.1.99 at Kitengela Trading Centre Kajiado. After trial the appellant was convicted under S. 296 (1) Penal Code and given 36 months imprisonment, 1 stroke of the cane and five years police supervision on release with effect from 3.5.2000. He appealed claiming that the complainant, a neighbour was prompted by a grudge and animosity to lay his complaint due to bad relationship between the two; that he was not positively identified since the alleged offence took place at night and that the sentence was harsh in the circumstances. The Learned State Counsel supported the conviction and sentence. On its own reviewing of the lower court file this court is satisfied that the 10 Learned Trial Magistrate who properly and carefully focused on the night in issue came to a proper and right conclusion that he indeed took part in the robbery against the complainant (P.W.1).

When P.W.1's residence was raided that night he got up to confront the thugs. He hit his torch and shone on the appellant. He recognized him. His wife Victoria (P.W.2) who had followed P.W.1 closely behind too recognized the appellant, George, in that torch light. They were ordered to go back to sleep. Apparently they were ordered to sleep. They were robbed. That was evidence strong and cogent to base on a conviction. The sentence was even lenient considering that the appellant was in company of other thugs when they raided P.W.1's house and robbed him. He ought to have been dealt with under S. 296(2) Penal Code (see JOHN NDUNGU VS. R. CR.A 115/95 MBA (CA)). But that the State did not cross appeal on this point, the appellant will serve the sentence meted out. Judgement accordingly.

Delivered on 18th June 2001.

J. W. MWERA

JUDGE