REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
APPELLATE SIDE
CRIMINAL APPEAL NO. 142 OF 2000

(From Original Conviction and Sentence in Criminal Case No. 2168 of 1999 of the Senior Principal Magistrate's Court at Machakos: P.C. Tororey Miss, on 19.9.2000)

CHARLES KYALO NZUKI :::::::::::::::::::::::::::::::::::: 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

20 The appellant, accused 1 in the lower court was charged with two others under S. 296 (2) Penal Code in that on 25.6.99 at night between Sultan Hamud and Emali Location in Makueni jointly with another not before court being armed with dangerous weapons namely pangas, simis, and rungus they robbed Joseph Munyao of cash Sh.1500/= plus some items all valued Sh.33,800/= these items included a jack and a hammer. That immediately before of after the robbery the thugs used actual violence on Munyao.

An alternative charge under S.322(2) Penal Code which was clearly defective for being vague (see SALIMIA OWUOR & ANOTHER VS. R. CR.A. 68/99 C.A unreported) stated that on 3.7.99 – about a week after the robbery the appellant with another were handling a jack and a hammer which were stolen. The other charge did not concern the appellant.

After trial the Learned Trial Magistrate found the appellant with the 2nd accused (not appealing) guilty of robbery under S.296(1) Penal Code and gave him 14 years imprisonment plus 7 strokes. Had the Learned Trial Magistrate looked up her 10 law before finalising with this sentence. She could have found that under S.344(A) Criminal Procedure Procedure Code she was obliged to impose the mandatory 5 – year police supervision on release.

In the petition of appeal it was stated that the evidence by the prosecution was not sufficient and credible to prove the case beyond a reasonable doubt, that the appellant took part in the robbery.The appellant who desired to be present at the trial of his appeal was advised to do so at his own expense. He did not appear and the trial proceeded. The Learned State Counsel supported the conviction on the basis that when the appellant was arrested not too long after the robbery, having the jack and 20 hammer – the items that were stolen during the robbery he had no reasonable explanation of so having them save to concluded as the Learned Trial Magistrate did that he participated in the robbery. And than the sentence was lawful the offence was committed along the highway.

This court agrees with the Learned Trial Magistrate that the appellant participated in the robbery. On 3.2.99 APCPL. Muteti (P.W.2) and APC Chelasi (P.W.5) got information that some people were selling in Emali town. It was suspected to be stolen. The 2 went to a certain spot and some got the appellant (and co-accused 2) within the jack. They took it and were told to go and bring his brother on whose behalf they claimed they were selling the jack for. They did not return. On 10.7.99 again the same officers got word

that a hammer was now on sale. Going to check, they found the same people the appellant and the co-accused (No.2) selling the hammer. Because the duo were not trustworthy and credible about the ownership of 10 these two tools P.W.2 and 5 handed them to the police. Later Munyao (P.W.1 complainant) was able to identify the two items as what was stolen from him in the robbery of 25.6.99.In the circumstances the Learned Trial Magistrate was right to how that the appellant took part in the robbery. The defence that the tools were planted on the appellant for failing to bribe P.W.2 (Cpl. Muteti) was incredible and the Learned Trial Magistrate found so. This court agrees.

The sentence was lawful in that S. 296(1) Penal Code provides for the full 14 years the Learned Trial Magistrate handed down. But it is a principle in sentencing that save where aggravating circumstances warrant a trial court should not award a 20 full term. That gives the appellate court in case enhancing the sentence features. Accordingly the lower court sentence is set aside and substituted with one of seven (7) years plus four (4) strokes of the cane. The appellant shall be subject to 5 years police supervision on his release. And for the sake of fairness may the same terms apply to his mate (the 2nd accused). They participated in what is notoriously being called highway robberies. This sentence should be seen in that light.

Indeed the Learned Trial Magistrate ought to have found the appellant with his mates guilty under S. 296(2) Penal Code as charged. They attacked P.W.1 with his turnboy as a gang; they were armed; they hit P.W.1 and stole money from him. All these are ingredients under S. 296(2) Penal Code (see JOHN NDUNGU V. R. CR.A.115/95 MBA C.A. unreported). They should consider themselves lucky that the state did not appeal on account of convicting under S. 296(2) Penal Code. Save for the variation in the sentence the appeal is dismissed.. 10

Judgement accordingly.

Delivered on 4th June 2001.

J. W. MWERA

JUDGE