



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
APPELLATE SIDE

CRIMINAL APPEAL NO. 25 OF 2001

**(From Original Conviction and Sentence in Criminal Case No.1727 of
2000 of the Senior Principal Magistrate's Court at Machakos: P. C.
Tororey, Miss on 23.1.2001)**

10 MWINZI KITHIKI ::: APPELLANT

VERSUS

REPUBLIC ::: RESPONDENT

Coram: J. W. Mwera J.
Appellant not present
Orinda State Counsel for Respondent
C.C. Muli

J U D G E M E N T

20 The appellant was charged with two others under S.296(2) Penal Code in that on 1.7.2000 on Kenya Meat Commission – Kinanie Road; Athi River Machakos, with another not before court they jointly robbed John Kyalo of a bicycle and wristwatch and immediately before of after that robbery they threatened to use actual violence on Kyalo. That the robbers were armed with dangerous weapons – simis, and iron bars. The second charge also under S.296(2) Penal Code was that the lot similarly robbed one Alexander Nzomo his bicycle and wrist watch.

The accused persons were tried, convicted under S. 296(1) Penal Code and sentenced to serve 7 years imprisonment plus 3 strokes of the cane. Had the Learned Trial Magistrate been so careful as to look up her law she would have noted and imposed the mandatory 5-year police supervision on release. (see S.344A Criminal Procedure Code)

The appellant filed a petition claiming that the evidence before the lower court was not credible and sufficient to found a conviction on. That his defence was not properly considered and that he wished to attend the hearing of his appeal. The 10 appellant was notified to attend the hearing at his own costs; he did not do so and the hearing proceeded.

The Learned State Counsel supported the conviction on evidence before the Learned Trial Magistrate adding that although the 7 years imprisonment appeared to be on the higher side this court could look at it.

Going over the lower court record shows that the two offences were committed at 7 a.m. John Kyalo Wambua (P.W.1) was attacked by four boys including the appellant and robbed of his property. They began to ride off. On the way they met Alexander Nzomo (P.W.3) and again robbed him of his bicycle and wrist watch. But Mutua Nzuki (P.W.2) arrived there and noticed what was going on. His mates in the motor vehicle he was driving namely Alfred Lukose (P.W.4) and Isaiah Owimba (P.W.6) jumped from the motor vehicle chased and arrested the thugs including the appellant. They were handed over to P.C. Auko (P.W.5) at Athi River Police Station for rearresting a charges. He produced the exhibits.

The defence by the appellant that he was arrested for nothing and forced to look for some thieves did not make much sense to the Learned Trial Magistrate. She found that the arrest was in the process of committing the robbery on P.W.3 and that identification was not in issue. All took place in daylight. Both P.W.1 and 3 were robbed. Thus conviction on two counts called for sentences thereon separately. The Learned Trial Magistrate seemed to have awarded the sentence without stating so.

The sentence was lawful even if the appellant was a first offender. It is 10 therefore left undisturbed but it shall be on each of the two counts concurrently. The appellant shall also remain under police supervision for 5 years on release.

In sum the total sentence to be served is 7 years imprisonment plus six (6) strokes of the cane plus police supervision.

The appeal is dismissed.

Judgement accordingly.

20 Delivered on 17th July 2001

J. W. MWERA

JUDGE