

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

APPELATE SIDE

CRIMINAL APPEAL NO. 477 OF 1999

**(From Original Conviction and Sentence in Criminal Case
No.2081 of 1998 of the Resident Magistrate's Court at Nanyuki)**

EUSTACE ITHENYA GATHONI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant now admits that he robbed the complainant as charged but has requested us to substitute the examination for robbery, contrary to section 296(1), P.C. The evidence was that the appellant, jointly with others not before the court, robbed the complainant on 31/10/99 of his bicycle. One crate, 2 jerricans, a calculator and cash Shs.102/-. The next day the appellant was arrested with the bicycle. We note that the appellant was charged on the alternative court of handling the said bicycle knowing it to be stolen contrary to section 322(2), P.C.

It is clear that the complainant was once hit on his back with a whip during the course of the robbery by one of the robbers. However, there is no medical evidence to show that he was injured as a result thereof. Having considered the evidence we are of the view that the Police using the discretion should have charged the appellant for robbery, contrary to section 296(1), P.C. instead of the capital robbery as the robbery was not of such a serious nature calling for the death sentence.

We find that the conviction is for the substitution as urged. The learned lady State Counsel M/S Ambasi does not object to the substitution either.

The appellant was a first offender and was in remand for nearly six months. There is no remission for robbery sentence.

ORDER

We substitute the conviction against the appellant for Robbery, contrary to section 296(1), P.C. and set aside the death sentence. We sentence the appellant to 3½ years imprisonment with effect from 21st April, 1999 plus two strokes.

Dated and delivered at Nairobi this 30th day of October, 2001.

G.P. MBITO

JUDGE

V.V. PATEL

JUDGE