

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 503 OF 2000
**(From Original Conviction and Sentence in Criminal Case No.1221 of 2000 of the Chief
Magistrate's Court at Mombasa – Grace Katasi, Ms. – R.M.)**

KIVENZI NZAU KITILI APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT OF THE COURT

Kivenzi Nzau Kitili was with another, charged with the offence of robbery with violence contrary to Section 296(1) of the Penal Code. They were tried in Mombasa Criminal Case No.1221 of 2000 and convicted and sentenced to five years imprisonment. They had been charged that on 1.4.2000 at Mathare Village in Changamwe in Mombasa they jointly robbed one Dickens Kiilu of his 10,200/- and threatened to use actual violence to him.

The facts of the case are as follows:

The Appellant and the complainant Dickens Kiilu, PW.1 in the lower court attended an harambee which was taking place in Akamba Bar in Changamwe on 31.3.2000. The fundraising took place in the night. At the end of the same the complainant, the Appellant and other people lingered back in the bar taking drinks. The complainant states that he did not drink more than one bottle of beer. At about 5 a.m. in the morning of 1.4.2000 the complainant left the bar for his home. The Appellant and his co-accused in the lower court also left the bar and followed the same route the Appellant had followed.

At a place called Mathare, behind Coast Bus Offices at Changamwe, PW.1 who was all the time aware that the Appellant and his friend were following from behind decided to wait for them so that they could walk all three together to avoid being attacked by muggers. The area was apparently notorious for mugging. PW.1 then claims that when they reached a dark spot, the Appellant and his co-accused turned against him by grabbing him by the right hand while the other accused grabbed him on the throat. They demanded that he gives them money. The witness could not talk and one of the attackers removed his 10,200/- from the trouser pocket. They then ran away. PW.1 screamed and Cosmos, a friend of his appeared at the scene. PW.1 reported that he had been robbed by some people. By the fact that they immediately began looking for the particular persons, he seemed to have clearly known them from before as earlier described. At BP Petrol Station nearby, they saw Kivenzi Nzau Kitili the Appellant whom they arrested and took to Changamwe Police Station. The other accused Stephen Munyoki Ndambuki could not be seen even at his house which was known to PW.1. He only re-appeared several days later after his wife was arrested and taken to Changamwe Police Station and he had to follow her there. None of the stolen money was found with Appellant on arrest or on the other co-accused when he was arrested several days later. The Appellant on arrest denied knowledge of the robbery.

The trial Resident Magistrate had no difficulty in finding that there was sufficient evidence on record to convict the accused. He noted that the Appellant in his court statement claimed that he was arrested from his place of work and not at the BP Petrol Station as testified by PW.1 and PW.2. The learned Magistrate carefully considered the issue of identification of the accused by the said witness. He found that it was in evidence that PW.1 and PW.2 knew the attackers before the said incident. PW.1 recognised the Appellant and his co-accused. They had been drinking together that night before they attacked him. They had caught up with him on the way after he saw them leave the bar after him. They indeed even had a conversation with him after he waited for them to join him so that they would all walk together for safety from muggers.

The Trial Magistrate had no doubt over this identification as the attackers were not strangers. He noted that the other accused person in company of the Appellant ran away from his house and could not be arrested until he was forced to follow after his wife who had been arrested several days later. The inference was that the said accused ran away from his house to escape being arrested and is material when considered with other evidence on the record.

Both accused denied the offence but the learned trial Resident Magistrate considered their defence but rejected it.

It is the opinion of this court that the trial Magistrate was right in convicting both the Appellant and his co-accused. I have considered all the evidence on record and have also concluded that the Appellant and his co-accused robbed PW.1 of his 10,200/- on the material day. I agree with the trial Magistrate that PW.1 properly recognized the attackers to be the Appellant and his co-accused. I hold that the learned trial Resident Magistrate properly handled the issue of identification by recognition and finally made a proper finding.

I confirm his judgment and reject the Appellant's appeal on conviction. The charge of robbery carries a maximum sentence of 14 years with corporal punishment not exceeding 28 strokes. The trial Resident Magistrate having listened to the mitigations which came from the two accused in his considered opinion, gave five years imprisonment. In pronouncing the sentence he did not take into account the provisions of Section 26(3)(ii) of the Penal Code which provides as follows:-

“Provided that - (i)

(ii Where the law concerned provides for imprisonment together with corporal punishment such person shall be sentenced to imprisonment and to corporal punishment.”

(The emphasis is mine). It is my considered opinion that since the charge of robbery contrary to Section 296(1) of the Penal Code provides that the offender is liable to imprisonment for fourteen years together with corporal punishment not exceeding twenty-eight strokes, (the emphasis is mine), the learned trial Resident Magistrate had no option but to mete out an additional punishment of corporal punishment. This court has the power to vary the sentence which as it stands now is not legal.

The order of this court therefore is to alter the sentence against the Appellant to read imprisonment for (6) six years together with four strokes of the cane. It is so ordered.

Dated and Delivered at Mombasa this 19th day of November, 2001.

D. A. ONYANCHA

J U D G E