



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**APPELLATE SIDE**

**CRIMINAL APPEAL NO. 219 OF 1998**

(From Original Conviction and Sentence in Criminal Case No. 812 of 1998 of the Resident Magistrate’s Court at Yatta, P. T. Nditika Esq. on 2.9.98)

**BERNARD MUSYOKI THYAKA :::::::::::::::::::: APPELLANT**

**VERSUS**

**REPUBLIC ::::::::::::::::::::; RESPONDENT**

Coram: J. W. Mwera J.

Appellant not wishing to be present

Mrs. Ntarangwi Senior State Counsel for Respondent  
C.C. Muli

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**J U D G E M E N T**

The appellant was accused 2 in the lower court at Yatta. On 27.8.98 he was charged with others for robbery C/S. 296(1) Penal Code. The charge sheet has 3 counts while the plea shows that the accused person only answered or pleaded to two counts.

Going by the certified lower court record the accused persons including the appellant pleaded to counts 1 and 2 which in essence alleged that on the night of 17th and 18th August 1998 at Matuu Market Machakos they robbed Nzoka Muthee and Mbaika Nzivo properties and used or threatened to use actual violence on the said complainants.

After the details of each charge were explained the appellant answered:

“It is true,”

on each count. Now this court has referred to cases from the superior Courts of Appeal in the past which said that an answer as this to a plea of not guilty is not sufficient. That the accused should answer in full to a charge and the court should as closely as possible record the words constituting the plea. However even if the lower court record showed clearly that the appellant pleaded guilty to the 1st and 2nd counts the Learned Resident Magistrate recorded that

“Accused 2 - convicted of his own plea on the 3 counts.”

Facts were reserved for 1.9.98. They were as per the record reproduced on 2.9.98. But it should be emphasised that the better course is to take the plea and the facts on the same day. May this be noted. So on this day facts were stated regarding all 3 counts in that when the houses of the complainants were raided on the material night neighbours woke up and chased the robbers. They ran into the bush and

“They left the set of TVs in the bush.”

The tracking villagers followed footmarks which led to the arrest of the appellant and his mates. It can be assumed that the chase took place that night so how the footmarks were followed to the appellant's arrest is not easy to discern. However on arrest he was taken to Matuu (Police Station?) and later charged.

The appellant is recorded to have admitted the facts and also mitigated. He got 7 years imprisonment on each count plus one stroke of the cane. The Learned Trial Magistrate did not look up the law to impose the mandatory police supervision for 5 years after release (see S.344A Criminal Procedure Code) but he ordered that the sentences ought to run consecutively. This last order meant that the appellant would serve 21 years in all on the 3 counts! First this was in error because the record of appeal shows that he pleaded guilty to 2 counts only, if that plea is accepted as proper. Second, the offences having allegedly taken place on the same night and at the same place there is no good reason to order consecutive sentences even if different complainants were involved. The better course in a case like this would have been and is to order concurrent sentences. Be that as it may.

The grounds of appeal alluded to the total sentence of 21 years terming it harsh and excessive. The appellant added that he was remorseful and he suffered from T.B. That he was aged 17 years.

A letter from the G.K Prison Kamiti Hospital without reference to the T.B. ailment, hopefully the appellant was suffering from none, put his age at 21 years at the time of the offence. It looks like the appellant was not being forthright on these two aspects.

The Learned State Counsel observed that the plea of guilty was not regularly taken as per S.307 Criminal Procedure Code and this has been referred to in this judgement . However she was of the view that the prison term was on the higher side. But that if the appeal be allowed a retrial should be ordered.

Having considered all the lower court record and this appeal in the light of what has been observed and remarked on, this court is inclined to term the plea of guilty as not being unequivocal and thus the conviction based on it quashed. The sentences are set aside and no retrial is ordered. Indeed – the appellant's co-accuseds were themselves acquitted after a trial.

In sum this appeal is allowed.

Judgement accordingly.

Delivered on 18th December 2000.

***J. W. MWERA***

***JUDGE***