

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO 67 OF 1987

MWATHA.....APPELLANT

VERSUS

REPUBLIC.....DEFENDANT

JUDGMENT

June 26, 1987 Torgbor J delivered the following Judgment.

The 4 appellants were at first charged with robbery under section 296 (2) of the Penal Code. The charge it appears was subsequently amended and brought under section 296 (1) ie simple robbery. The particulars are that on July 25, 1985 the 4 appellants robbed Loise Gideon of her motor car and cash in the sum of Kshs 250.

The principal state advocate does not support the convictions and sentences because the robbery took place at night and the only opportunity the identifying witnesses had for observing the robbers was through the torch lights used by the robbers which did not produce enough light. Moreover the identifying witness PW 6, PW 7, PW 8 and PW 9 did not give any description of the suspects when they recorded their respective statements at the police station. There is very serious doubt therefore as to whether they were in a position subsequently to give positive identification of the appellants. A further irregularity is that the 4th appellant was identified in a parade conducted after trial had commenced.

His counsel complains that he might have suffered prejudice as a result and it is a complaint I am in sympathy with.

In all I am not satisfied that the identifying witnesses had sufficient opportunity to observe their robbers as the witnesses were closetted in a toilet, and there was a inadequate light to assist the process of identification.

In this appeal the 3rd appellant admitted that he stated before the trial court (p 16) that he wished to plead guilty but the trial magistrate ordered a full trial involving him. It appears that his admission was before the charge was amended and the record does not show that he admitted the offence after the amendment. I would give him the benefit of the doubt and observe that he is very lucky indeed.

In the event the convictions of all four appellants are quashed and the sentences set aside. Unless they are otherwise lawfully held they are to be released forthwith.

Order accordingly.

June 26, 1987

TORGBOR

JUDGE