

High Court, at Nairobi December 14, 1984

O'Kubasu J

Criminal Appeal no 722 & 738 of 1984

Criminal law - robbery - arrest of robbers immediately after the incident - whether the identification was cogent. The appellants were convicted of robbery contrary to section 296(1) of the Penal Code cap 63 and sentenced to 30 months' imprisonment plus corporal punishment, police supervision for 5 years after incarceration was also ordered. The complainant, an elderly man, was attacked by the 2 appellants at about 7.00 pm along Jogoo road. They were promptly arrested by members of the public and taken to the police station.

The appellants were identified by 2 witnesses and the complainant. Appellants appealed against conviction and sentence and in their appeals attacked the identification. There was a submission that since the money stolen (Kshs 5) was not recovered from any of the appellants there was no proof any money was stolen. Held:

1. The incident took place in the evening along Jogoo road in a place with street lights and the attackers were seen clearly.
2. In imposing a sentence the court considers among other things the attitude of the offender, the type of the offence, in seriousness, prevalence and the circumstances under which the offence was committed.

Appeal dismissed. Cases No cases referred to. Statutes Penal Code cap 63 section 296 (1) Advocates

K Murungi for Appellant (Original Accused No 1) AK Nyairo (state counsel) for Respondent December 14, 1984, O'Kubasu J delivered the following Judgment. The two appeals have been consolidated. The appellants were convicted of robbery contrary to section 296 (1) of the Penal Code and each sentenced to 30 months' imprisonment and corporal punishment plus police supervision for a period of five (5) years on expiry of prison sentence. Omolo Omondi Ooko (PW 1) was along Jogoo Road on February 11, 1984 at about 7 pm when he was confronted by two people who knocked him down and stole his Kshs 5. PW 1 recognized those who robbed him to be the two appellants Kimanzi Nzelu (PW 2) who witnessed PW 1 being robbed testified that he recognized the two appellants. The two appellants were arrested and then taken to the police station. Mairu Muthiga (PW 3) was one of those who witnessed this incident and he too identified the two appellants.

Mr Kiraitu for one of the appellants submitted that it was proved that Kshs 5 had been stolen since none of the appellants was found in possession of this money. Mr Kiraitu also referred to what he considered to be contradictions in the evidence of prosecution witnesses. I have considered the evidence on record and it is clear that the incident took place in the evening along Jogoo road where street lights were on. The complainant (PW 1) testified that he saw the two appellants properly. Then PW 2 and PW 3 testified that they saw the two appellants on top of PW 1 had been knocked to the ground.

I have considered the authorities cited by Mr Kiraitu but I find that this was a straightforward case in which the two appellants were caught in the act of committing the offence of robbery. They were clearly identified by three witnesses PW 1, PW 2 and PW 3 under favorable conditions. As regards the missing Kshs 5 I would only say that the two appellants had opportunity to throw it away before they were finally apprehended. Indeed one of the appellants ran far a distance before he was arrested. In my view the appellants' conviction was inevitable. They set upon an old man and molested him. The fact that only Kshs 5 was involved should not overshadow the fact that this was a robbery. The learned trial magistrate considered all the relevant circumstances of the case before choosing the sentence that he imposed on each appellant. The sentence cannot be described as manifestly excessive. The circumstances of the case justified *Kibothe v Republic*

the sentence imposed. In imposing sentence the court considers among other things the attitude of the offender type of the offence in question its seriousness prevalence and the circumstances under which the offence was committed. I am satisfied that the sentence imposed was appropriate. The upshot of the above is that these appeals are dismissed in their entirety. Order accordingly.