REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL APPEAL NO 362 OF 1983

(From Original Conviction(s) and sentence(s) in Criminal Case No 296 of 1982 of the Resident Magistrate's Court at Kitui J K Mbugua Esq)

MONI MAKAU ……. APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

CORAM: TODD, J

Appellant absent, unrepresented and not wishing to be present C W Gatonye (Senior State Counsel) for Respondent

JUDGMENT

The appellant Moni Makau alias Joseph Makau Kienza was convicted after trial of robbery contrary to Section 296(1) of the Penal Code (cap 63) together with one Makau Mulei the appellant's co-accused when the appellant was sentenced to 2 years' imprisonment and 5 strokes of the cane and he was also ordered to be subject to police supervision for 5 years on his release from prison while his co-accused, an old man of about 65 years old and who was a first offender and of good family and recommended by the probation officer, was put on probation for 2 years. The appellant now appeals to this court. The appellant was also charged with being cruel to animals contrary to Section 3(1)(a) of the Prevention of Cruelty to Animals Act, but he was acquitted of this offence since the learned trial magistrate found the appellant had been charged under the wrong section.

As regards the robbery charge the complainant's cattle had apparently strayed into the appellant's land and caused damage for which the appellant impounded them and refused to release them to the complainant's wife, demanding compensation from the complainant.

The matter was reported to the police when the complainant came from Nairobi and upon the police approaching the appellant he ran away. This is not admitted by the appellant. Later in the evening, according to the complainant and one Mwangangi Mutemi (PW 6), the appellant and his father Makau Mulei ambushed the complainant who was walking home with Mwangangi and several others including one of the brothers of the appellant when the appellant fired 4 arrows at the complainant, the last one hitting him in the right upper leg causing him to fall down, after which Makau Mulei went and removed from the complainant's shirt pocket Kshs 850 in cash and a hand bag containing 2 shirts, 2 underwear, 2 pairs of socks and when the appellant and Makau Mulei ran away together they took the money, the handbag and contents away with them.

The appellant denied the offence charged and he called his brother Jonathan Nakuthu Makau who is also called Kachevi who said that on the day in question, September 18, 1982 he saw the complainant they entered the same vehicle with another person. The 3 of them alighted from this vehicle and it was dark. While they were going he heard the complainant scream saying he had been shot. He was with the complainant and Mutinda Mutuota. He did not recognize the person who had shot the complainant. He knows Mwangangi Mutemi (PW 60) but he was not there, but he works for the complainant. He reported to the appellant at about 9.15 pm that night.

Upon a consideration of the evidence the trial magistrate believed the prosecution witnesses but not the evidence of the appellant or his witness or indeed the statutory statement of Makau Mulei and convicted the appellant of the offence robbery as charged. Making my own assessment of the recorded word I have no doubt that the appellant was properly and rightly convicted of the offence of robbery as charged and so his appeal against conviction is dismissed.

As regards sentence I think the appellant was leniently dealt with in view of the fact that he shot at the complainant with arrows until he hit him and then with Makau Mulai removed from the complainant the Kshs 850 from his pocket and took away his handbag and contents. However as was said in the case of R v Mohamed Ali Jamal [1948] 15 EACE 126:

“An appellate court should not interfere with the discretion exercised by a trial judge or a magistrate to sentence except in such cases, where it appears that in assessing sentence the judge has acted or has imposed a sentence which is either patently inadequate or manifestly excessive.”

The appellant’s appeal against sentence is also dismissed.

Dated and delivered at Nairobi this 22nd day of December, 1983.

J H S TODD

JUDGE