

REPUBLIC OF KENYA

Court of Appeal, at Mombasa

Criminal Appeal No. 142 of 1989

Katana v Republic

On February 21, 1990, Hancox CJ, Nyarangi & Kwach JJA delivered the following

Judgment.

The appellant was convicted of a series of 3 offences in the last month of 1987 and in 1988, in somewhat strange circumstances.

The first of this trio of crimes was robbery of the passengers in an omnibus which was conveying them between Malindi and Kilifi on 20th December. There can be little doubt that the appellant, then the 3rd defendant, was member of the group of 7 youths who set out to intimidate the conductor and the other passengers with the object of avoiding payment of the lawful fare. The incident developed into a robbery when the 2nd accused drew a knife after one of their number had been seized by the conductor.

Mr Metho, Principal State Counsel, submitted that it was doubtful if the common intention to avoid payment of the fare persisted outside the bus.

We would prefer to rest our decision upon the lack of any satisfactory identification of this appellant as having been outside the omnibus at the relevant time that is to say when the co-accused drew the knife and the passengers' belongings were removed from the luggage compartment.

The nearest evidence was that of the girl, Kafidha Katana, who did not turn hostile, but who said first that they found the three accused inside the bus, and then that they had alighted by then meaning when they heard the first shouts from the passengers regarding their missing luggage. That is far from satisfying the standard of proof required in a criminal case of showing that the appellant either aided and abetted or was present, in the sense of actually committing, this offence. We would, therefore, respectfully disagree with the learned 1st appellate judge when he said that the conduct of the appellant showed that he aided and abetted the asportation of the luggage, and we would allow the appeal on that charge.

Even were that not so, however, when the appeal first came on for hearing we drew Mr Metho's attention to the law regarding breach of probation, in which it is clearly stated that before a court can deal with the breach of a probation order, it must put the earlier conviction and the order to the accused and secure his answer thereto. No semblance of this procedure was followed in the instant case when the trial magistrate (who was, we note, the same in all three cases) dealt with the appellant in the burglary and stealing charge on the 23rd August, 1988 purported to revoke the probation order of 23rd June and awarded the appellant three years' imprisonment and 2 strokes corporal punishment.

Mr Metho invited us to restore the probation order, but even if we had jurisdiction to do so, which we have noted it would be quite inappropriate to either.

- (a) order the initial period of probation to run concurrently with the other terms of imprisonment; or

(b) that it should follow thereon.

For we have examined the evidence on the second and third offences, namely the burglary and stealing on the 22nd March, 1988 (in which the appellant was the sole accused) and the stealing from the person of two tourists approaching the Kilifi ferry on the 7th August, 1988. In both those cases, we have considered all the appellant's grounds of appeal in his two memoranda and in the supplementary sheet handed in on 22nd January, 1990. The appellant was properly convicted on both those offences and then sentences of 2 years imprisonment concurrently and 2 strokes corporal punishment and of 2 year's imprisonment on non-aggravated theft (as varied by the High Court) are not for us on a second appeal.

In conclusion we express surprise that a probation order should even have been considered as appropriate for the robbery charge – had it been proved. In the result, the appellant will serve a total of 4 ½ years' imprisonment and suffer 2 strokes' corporal punishment plus the additional strokes imposed by the judge when restoring the conviction on the third offence to theft from the person contrary to section 279(a) of the Penal Code. Save as indicated above, the appeals are dismissed.