REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
CORAM: KWACH, OMOLO & LAKHA, JJ.A.
CRIMINAL APPEAL NO. 78 OF 1995
BETWEEN

JACKSON MAITHA ..... APPELLANT
AND
REPUBLIC ..... RESPONDENT

(Appeal from a judgment of the High Court of Kenya at
Nairobi (Mbaluto & Oguk JJ) dated 5th March, 1992
in
H.C.CR.A. NO. 1560 OF 1988)
****

JUDGMENT OF THE COURT

On 24th November, 1988, ***Jackson Maitha Aldanieck*** , the appellant, was convicted on a charge of robbery with violence contrary to ***Section 296 (2) of the Penal Code*** . The Senior Resident Magistrate who had tried him then postponed the sentence to 28th November, 1988, and on the latter day, the appellant was sentenced to suffer death as is mandatorily required by the section under which he had been convicted. The appellant then appealed to the High Court, but on 5th March, 1992, that court (Mbaluto & Oguk, JJ.) dismissed his appeal against the conviction and sentence. The appellant now comes to this Court on a second appeal, and that being so, only matters of law fall for our consideration. In ground one of what he calls his "Petition of Appeal" the appellant complains thus:-

> *"That the learned appellate judges erred in law and in fact in not considering that the complainant/victims were not injured. Therefore the ingredients of robbery under Section 296 (2) of C.P.C. (sic) were not proved as required by law, wherefore the case should have been considered as a simple theft."*

That ground clearly raises a point of law worth our consideration. The particulars of the charge on which the appellant was tried and convicted were that:-

> *"On the 13th day of March, 19 88 at Dandora Phase II Nairobi, within the Nairobi Area, jointly with others not before the court, robbed STANLEY MURIITHI KIHUNGI of his one gas -cylinder, one record -player, one Sanyo Radio, one black coat, one umbrella, one pair of safari shoes, one wris t-watch make Oris and cash money K.Shs.140/=, all valued K.Shs.4,570/=* ***AND BEFORE THE TIME OF ROBBERY DID USE PERSONAL VIOLENCE TO THE SAID STANLEY MURIITHI KIHUNGI ."***

To answer the appellant's complaint in ground one of his memorandum of appeal, we must deal with the elements or ingredients of the offence of robbery under ***section 296 (2) of the Penal Code .*** That section is in these terms:-

> "If the offender is armed with any dangerous or offensive weapon or instrument, or is in company

with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person; he shall be sentenced to death."

It is clear from these provisions that the offence of robbery with violence under ***section 296 (2)*** can be committed in any of the following ways:-

(i)if the offender is armed with any dangerous or offensive weapon or instrument;

(ii)if the offender is in company of one or more person or persons;

and (iii)if at or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or uses any other personal violence to any person.

In this case, the prosecution alleged in the particulars of the charge that immediately before the robbery, the appellant and his confederates had used personal violence on the person of Stanley Muriithi Kihungi (P.W 1). The prosecution was entitled to make that averment but having done so, they had to prove beyond any reasonable doubt that the appellant in fact used personal violence against P.W. 1 or against any other person who was with P.W. 1. That would be the only way to bring the charge under the provisions of ***section 296 (2) of the Penal Code*** . The evidence that was put before the Magistrate was that the appellant was in the company of four other persons and, that they were armed either with axes or swords or "njoras" to use the Magistrate's word. Three persons were in P.W. 1's house during the attack; they were P.W. 1 himself, his wife Sophia Anyona (P.W. 2) and their house maid Abigael Aoro (P.W. 3). While the witnesses all said the appellant and his colleagues were armed and threatened them, none of them said P.W. 1 was in any way wounded, beaten, stricken or that any other form of violence was used on him. A threat to use violence is not the same thing as actually using violence. We have carefully read through the evidence of P.W. 1. Those who raided his house threatened him with death at various stages during the robbery and he pleaded with them not to kill him. They ordered him to do various things, eg. to produce money, to move from one room to the other and to lie flat on the floor. He complied with all the demands made on him and at no stage was it necessary to use personal violence against him. As for P.W. 2, the worst that happened to her was that a panga was placed around her neck and she was ordered to speak in Kikuyu language. She said she was not a Kikuyu herself and nothing more was done to her. P.W. 3 saw and witnessed the threats to cut P.W. 1 with a panga and at some stage, she saw the appellant raise a panga intending to cut P.W. 1. She screamed and was ordered to keep silent. P.W. 1 was not cut.

We are unable to agree with Mr Okumu, for the Republic, that all these threats to use violence are to be interpreted to mean or to amount to actual use of violence against P.W. 1 as was alleged in the particulars of the charge against the appellant. While we are satisfied, as were the two courts below, that the appellant was among the people who robbed the complainant and his family, we are not satisfied the prosecution proved a robbery under ***section 296 (2) of the Penal Code*** . The appellant should have been convicted of simple robbery under ***section 296 (1) of the Penal Code*** . That is an offence minor and cognate to one of robbery under section 296 (2) of the Penal Code .

Accordingly, we allow this appeal to the extent that we set aside the conviction for robbery under ***section 296 (2)*** and substitute it with a conviction under ***section 296 (1) of the Penal Code*** . We set aside the sentence of death and as the appellant has been in prison since 28th November, 1988 when he was sentenced by the Magistrate, we do not think it would be right for us to impose any further punishment on him. Accordingly we impose on him such sentence as will result in his immediate release from prison. However, an offence under ***section 296 (1) of the Penal Code*** carries with it mandatory corporal punishment. We order that before his release from prison, the appellant shall receive one stroke of the cane. Again, under ***section 344 A*** of the Criminal Procedure Code , an offence under ***section 296 (1) of the Penal Code*** carries with it an automatic order for police supervision for five years upon release from prison.

It appears from the charge sheet that the appellant is a citizen of Tanzania, and if that is so, we do not see that we can make the order for police supervision required by section 344 A of the Criminal P rocedure

Code . The appellant may have no place to stay in Kenya and that being so, we would recommend to the Minister in charge of immigration, pursuant to section 26 A of the Penal Code , that after receipt of the one stroke of the cane and upon his release from prison, the appellant be immediately removed to his country, namely Tanzania. Those shall be our orders on this appeal.

Dated and delivered at Nairobi this 26th day of May, 2000.

R. O. KWACH

JUDGE OF APPEAL

R. S. C. OMOLO

JUDGE OF APPEAL

A. A. LAKHA

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR