



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL 212 OF 1993

JOSEPH KARIMI NGARI & 2 OTHERS V REPUBLIC

JUDGMENT

One of five accused charged with two counts of robbery contrary to section 296(1) of the Penal Code the trial magistrate acquitted the 3rd and 5th original accused due to finding them not guilty contrary to section 215 of the Penal Code.

He convicted the original accused 1, 2, & 4 with the two counts. All the three accused appealed but when it came to hearing their appeal they each insisted that they would wish to have their appeals heard separately.

The appellant herein is the original second accused. He appeals against both conviction and sentence. The main thrust of his appeal is that the identification and the lack of opportunity not granted to him by the trial magistrate to bring in alibi defence.

The state counsel left it to the court and gave no reasons as to whether he supported the appeal or not.

From the proceedings of the lower court the appellant was represented. He and other accused were given an opportunity to call their witnesses but they failed to appeal before the court.

When the case was closed both defence counsels were present and they did not raise any objection.

Was the appellant involved in the robbery" The complainant was attacked by eight men who forced their way into her house. They ordered her to take a meal. The lights were on. She distinctly recalls the 1st and 2nd accused as the ones who gave these orders. She spent a considerable time with them in the house.

After the robbery they left taking with them a vehicle.

The complainant came to know of the two accused when she identified them in two separate places. As to this current appellant it was at the laundry.

This court is satisfied that the appellant was part of the eight men gang which entered into the complainant's house.

The offence of robbery 296(1) Penal Code should not have been used but rather one of burglary and theft contrary to section 304(2) of the Penal Code, in both counts. The police should have charged the appellant with a separate count of theft of a motor vehicle contrary to section 278A of the Penal Code but

did not.

It must be noted that the police are so trigger happy to charge every person they arrest with the offence of robbery with violence.

Even magistrate like the current magistrates merely where stamps what the police brings to court as a charge without analysing in debt the actual offence committed.

To this extent the appeal would succeed on the conviction being one of burglary contrary to section 304(2) of the Penal Code, on both counts. This court would not make a finding on theft of a motor vehicle contrary to section 278(a) of the Penal Code.

The court will not interfere with the sentence. The appeal is hereby otherwise dismiss.

Dated and delivered at Nyeri this 22nd day of November, 1995

M.A. Ang'awa

JUDGE



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