REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO.57 OF 2001

SAFARI KATANA …….. APPELLANT

VERSUS

REPUBLIC …….. RESPONDENT

**(From original conviction and sentence in Criminal Case No.1204 of 1999 of the Principal Magistrate's
Court at Malindi –J.M. Matu, PM)**

JUDGMENT

The appellant Safari Katana Kirao was charged with the offence of robbery contrary to section 296(1) of the Penal Code. The particulars was that on 12th September, 1999 at Chesale Beach area in Fundisa Location within Malindi District of the Coast Province, jointly with others not before court, he robbed Emmanuel Chivatsi of 1. a handbag (pandla make) 2. four kanga kikois 3. A pair of short trouser 4. A bra, 5. Two scarves 6. a pair of sunglasses 7. two small bags 8. An assortment of body creams 9. Medicine, 10. A gas lighter and 11. Cash KSh.8000 all valued at KShs.43,000/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Emmanuel Chivatsi. He pleaded not guilty, but after trial, he was found guilty, convicted and was sentenced to serve imprisonment term of 5 years. He was also ordered to receive 12 strokes of the cane and was put on three years supervision after completing the present term. He appealed against both conviction and sentence, maintaining in his grounds of appeal that the evidence on record was not in conformity with the charge; that the learned magistrate did not consider PW2's evidence which was to the effect that none was threatened or made to part with the alleged property; that there was no identification parade; that PW.1 who was the owner of the allegedly stolen property did not prove conclusively that the same properties were his property as he did not produce any documentary evidence to prove the same and that the sentence awarded was harsh and manifestly excessive in the circumstances of the case.

I have considered the appeal both against conviction and against sentence. PW1, her husband and the complainant Emmanuel Chivatsi were at Sechale Beach on 12.9.99 at about 1.30 p.m. They parked

their car and went to buy fish. Before they went to buy fish she saw accused seated on a fallen tree trunk. They left the complainant near the car and because of that, they did not lock the car. The accused was also seated nearby. After buying fish she then walked with her husband towards the car but before they could reach the car they saw the complainant and a young man waving at them.

The complainant PW.3 said in evidence that as PW.1 and her husband left for the beach, the accused and another man who was under a tree went and sat with two other young men under another nearby tree. After 15 minutes, the accused and those two other young men went to where complainant was and greeted the complainant and after greetings one of the young men ran to the car and took a bag from the car. The bag belonged to PW.1. When the complainant asked him why he was taking the bag they ordered the complainant to keep quiet. The three together with accused started running and complainant ran after them but each of them produced a knife and they threatened to kill him if he moved near them. He got afraid and retreated. He then went to PW.1 and told them what had happened. He was left guarding the car and that is why he became the complainant. PW.1 and PW.3 made a search for the accused. During the search they came to know his home and when his home was traced and he was found, some of the stolen items were found and the appellant was found wearing PW.1’s shorts underneath his trouser and he took police and PW.1 to a place where more stolen properties were recovered.

From the facts of this case, I am satisfied that the evidence adduced in the court below against the appellant was overwhelming. The appellant was arrested on the same day by a member of the public and was taken to the police station. He had PW1’s small mirror, a tube of cream and the appellant had PW.1’s short trouser which he was found wearing. Those were all stolen items and were found with the appellant that same day. He agreed in his defence that he had met Pw.1 that same day and he further agreed that the cream and mirror were found with him but he said he had been given the same by some other tourists. He also agreed that he was asked if he had seen who stole from the tourists and he agreed that he had seen three young men whom he knew and took the police to their homes and the stolen handbag was recovered and lastly he also agreed that his underpants were removed and taken as exhibit.

Under all those circumstances where the appellant was found with recently stolen properties and the same was stolen and he led police to the places where more properties were found, I do not find it necessary to hold identification parade. In law and under the doctrine of recent possession, the appellant was either the thief or a receiver. He never gave any satisfactory explanation as to how he came to have PW.1’s cream, mirror and shorts which he was found wearing. Without that satisfactory explanation, he was the thief and that conclusion could not be escaped in the circumstances of the case. His allegation that tourists gave him cream and mirror cannot stand. What about short trouser" I will not interfere with conviction. It is proper.

On the sentence, although no reasons were given for the sentence and mitigation was apparently not considered, all the same, giving it a fresh consideration as I must do, I still do agree that the sentence was proper and was not excessive. It will stand.

This appeal is dismissed both on conviction and sentence. Judgment accordingly.

Dated and delivered at Malindi this 10th Day of December, 2002.

J.W. ONYANGO OTIENO
JUDGE