REPUBLIC OF KENYA

IN HIGH COURT OF KENYA

AT NAIROBI

HIGH COURT CRIMINAL APPEAL NO. 63 OF 2017

KELVIN OMONDI OWINO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

(Being an appeal from the decision of; Honorable. B. Ochoi (PM),

delivered on 5th May, 2017, vide Criminal Case No. 3064 of 2012

in the Chief Magistrate's Court at Kibera)

1. The appellant was arrested on; 27th June, 2012 and arraigned before the Chief Magistrate's Court at Kibera on; 29th June, 2012. He was charged in three (3) counts, with the offences of; attempted robbery with violence contrary to; section 297(2) of the Penal Code. The particulars of each count, are as per the charge sheet. He pleaded not guilty to all three (3) counts and the case proceeded to full hearing. The prosecution called a total eight (8) witnesses. PW1 was Diana Nakoye Sifuna, who testified that, on 3rd March, 2012, she was in her house in the company of one, Charles Roberts Grieves, when she heard a knock on the door. It was about 8pm.

2. She went to answer the call and found two men. She inquired from them as what they wanted and they told her that, her visitor Charles, had asked them to see him to give them work. She declined to allow them into the house, as she held what they were saying to be a lie since that was not Charles's house.

3. As she tried to close the door, one of the men removed a pistol from his jacket which had been stuck in his trouser. A struggle ensued between her and the man and she heard gun shots and the man fell down. She got a chance to escape to the neighbor's house but the neighbor locked the door. She heard a second gunshot fired aimed at her but it missed her.

4. The two men then ran downstairs towards the watchman and shot him as they fled. Upon return to her house, she found Charles trying to scale the balcony rails to go to the 2nd floor. She offered to pull him up but he was too heavy. He fell to the ground floor and was seriously injured. He was rushed to Langata hospital but the nurses were on strike and he was taken to Nairobi West Hospital and admitted to the Intensive Care Unit (ICU), unfortunately he died. At the same time, the watchman; Wilson Ahona who was also injured was taken to Nairobi West Hospital for treatment and later transferred to; Kenyatta National Hospital.

5. In the meantime, the body of the deceased was taken to Lee Funeral Home to await post mortem and the scene visited, wherein, two expended cartridges and one damaged fired bullet were recovered and taken for forensic examination.

6. On 28th June 2012, the Investigating officer, received news that some robbers had been arrested in connection with robbery in South B. He organized for an identification to be conducted and Wilson Ahona was able to identify the appellant as one of the robbers and he was charged accordingly.

7. At the close of the prosecution's case the trial court ruled; the accused had a case to answer and he told the court that, on 27th June, 2012, he was at a car wash at Nairobi West, when two men approached him, hooting in from a motor vehicle. He sold to them ground nuts and they paid him with Kshs 1000. He went to look for change and heard a sound of gunshot and people started running in all directions.

8. He also ran. That one of the officers who ran after them accused him of being one of them. He did not understand what the officer was saying. Four of them were then arrested. He was taken to Nairobi West Police post and interrogated over a gun in his possession. He said

he had none. He was then taken to his house and a search conducted. Nothing was recovered therefrom. He was taken to Lang'ata Police Station, in the company of his girlfriend who was found in the house. An identification parade was then conducted and a person pointed him out. He was then charged accordingly.

9. At the close of the entire case, the appellant was found guilty on the 1st count and convicted thereon, and he was acquitted on counts (2) and (3). He was then sentenced to suffer death.

10. He is now aggrieved by the decision of the trial court and appeals against the same, by a Petition of appeal dated; 8th June 2017, on the following grounds here below reproduced verbatim: -

> *a) That, my conviction was manifestly unsafe in that the evidence relied upon the trial magistrate fell too short of the standard needed on cases of attempted robbery contrary to section 297(2) of the penal code;*
>
> *b) That, the burden of proof was not discharged as the law demands;*
>
> *c) That, the trial Magistrate failed in his duty, by failing to make adverse inference in view of the contradictions and discrepancies in evidence brought forward by the prosecutor;*

11. However, the appeal was opposed vide grounds of opposition dated, 9th November 2021, reproduced verbatim as here below: -

> *a) The Appeal is misconceived as the trial Magistrate acted within the law and there was no illegality in convicting and the sentence against the appellant was safe and proper;*
>
> *b) The conviction and sentence was sound in law as the Respondent proved its case beyond reasonable doubt;*
>
> *c) The applicants have not demonstrated existence of an arguable appeal with likelihood of success;*
>
> *d) The appeal lacks merit and should be dismissed in its entirety.*

12. I have considered the evidence adduced in total, on the offence of which the appellant was convicted. It is an offence of; attempted robbery with violence contrary to section 297 (2) of the Penal Code. The subject provisions states that: -

> *(2) 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 assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death"*

13. It suffices to not that, section 297(2) of the Penal Code cannot be read independent of; section 297(1) thereof, which states as follows:

> *(1) Any person who assaults any person with intent to steal anything, and, at or immediately before or immediately after the time of the assault, uses or threatens to use actual violence to any person or property in order to obtain the thing intended to be stolen, or to prevent or overcome resistance to its being stolen, is guilty of a felony and is liable to imprisonment for seven years.*

14. Therefore, the two sections must be considered together, but even more so, the offence herein is of; attempted robbery and once again the definition of robbery under section 295 of the Penal Code comes to play. The subject provisions states as follows: -

> *"Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery"*

15. The aforesaid provisions thus require that, for the offence of attempted robbery with violence to be established, it must be proved inter alia that the robber; -

> *a) Attempted to rob the victim;*
>
> *b) Was armed with a dangerous or offence weapon;*
>
> *c) Was in the company of one or more other person(s);*
>
> *d) Assaulted, wounded, beat or threatened to use violence against the victim, in order to steal or resist an attempt to thwart the act of stealing.*

16. I have evaluated the evidence adduced in the trial court afresh, as expected of the 1st appellant court, so as to arrive at its own conclusion as to whether, there was adequate evidence to sustain a conviction. I however, warn myself that, I did not benefit from the demeanor of the witnesses.

17. This legal duty of the 1st appellant court was well stated in the case of; ***Okeno vs. Republic (1972) EA 32,*** **as follows: -**

"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala V. R [1957] E.A. 570. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that, the trial court has had the advantage of hearing and seeing the witnesses".

18. Pursuant to the aforesaid, and in particular the elements of the offence herein, I find that, there is no dispute that, the persons who allegedly went to the complainant's house were armed. The complainant testified that, one of them lifted the jacket and removed a pistol that had been tucked in his trousers.

19. In the same vein, PW 2 Mr Antony Makori, testified that, the guard who was injured was their employee, at Gyto Security Company. That, he was shot in the arm and taken to Nairobi west hospital, then transferred to Kenyatta National Hospital. This evidence was corroborated by the evidence of (PW3), Richard Buti.

20. Additionally, (PW5) Abubakar Muhindi confirmed that, the guard, Wilson Ahoma, was shot and he took him to Nairobi West Hospital. Further, (PW6) No. 42209 Sergeant George Wamumbi, attached to Regional CID Mombasa, and who was attached to Langata Police Station, at the time of the offence, testified that, he attended to the scene, and found a bullet head at the door of the house. Finally, (PW4) No. 23170, Chief Inspector Alex Chirchir, from DCI Headquarters, Ballistic and Firearms Examiner, testified he received two expended cartridges, and one damaged fired bullet, recovered from the scene for examination and prepared a report, dated; 29th March 2012. It is therefore clear from all the aforesaid, that, the assailants were armed with dangerous weapons.

21. The next issue to consider, is the number of assailants. According to the evidence of (PW1) Diana, the attackers were two in number. Indeed, all the other witnesses testified that, the watchman informed them that, the attackers were two. I therefore find, indeed the attackers were more than one.

22. The other issue to consider is; whether the robbers attempted to steal from the complainant. The trial Magistrate found that, the appellant was one of the robbers and had attempted to steal from the complainant (PW1) Diana. In that regard, the learned trial Magistrate thus stated:

> *"As to whether the attackers intended to steal, a presumption of intent to steal was established by the fact that, the two entered the complainant's house and lied that, the white man who had entered had asked them to go (sic) for some work"*

23. However, and with utmost due respect, I find that, there is no evidence that, the two attackers entered the complainant's house. Infact, according to her evidence, she stated that:

> *"When I asked what it was, one of them said that the white man who had come in, had asked them to come because he wanted to talk to them, or give them work. I realised it was a lie because, that was not Charles's house. I told them it was the wrong house, and I started to shut the door. He checked the door number, and then lifted the jacket and removed a pistol that had been tucked in his trousers. I got hold of him and we struggled. I heard a gunshot and he fell. I got a chance and ran away to a neighbour's door, but the neighbour locked the door. The neighbour is called Baba Faith. The guy got up and fired a second shot towards me, but he missed. They started running down the staircase and met the watchman. I was not there but I heard he shot the watchman and ran away."*

24. It is clear from the extract above that, the attackers did not enter the complainant's house. In that case, presumption alluded to by the trial court, does not arise and neither is it supported by evidence. The intention of the attackers thus remained unknown. It could have been anything, including either theft, or even to kill. It is not clear. It cannot therefore, be safely concluded that, they attempted to steal.

25. That brings me to the particulars of the charge. The particulars of each charge, do not make reference to any item that was alleged being stolen. The element of theft was thus not established. In that case, I find that, the evidence did not support the charge attempted robbery. In my considered opinion, the most that the appellant could have been charged with, is in relation to the complainant, Diana, was attempted murder, contrary to section 220 of the Penal Code.

26. The provision of that section states as follows:

> ***Any person who—***
>
> *a)* ***Attempts unlawfully to cause the death of another; or***
>
> *b)* ***with intent unlawfully to cause the death of another does any act, or omits to do any act which it is his duty to do, such act or omission being of such a nature as to be likely to endanger human life, is guilty of a felony and is liable to imprisonment for life***.

27. As, it relates to the watchman, Wilson Ahona. the charge of grievous harm, contrary to section 234 of the Penal Code, would suffice. This provision states as follows:

> ***Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.***

28. I find that, the prosecution's case collapsed at the time the drafter of the charge preferred wrong charges. Infact, the learned trial Magistrate concurred that, there was no attempted robbery in relation to the 2nd and 3rd complainant, and acquitted the appellant on both of the counts.

29. I further find this particular case to be extremely sad, by virtue of the fact that, both the prosecution and the trial court could not read in between the lines and consider the proper charges. The Office of the Director of Public Prosecutions, should consider vetting the charges preferred against the accused, in the light of the evidence available, before arraigning the suspects in court. It's unfortunate when victims of crime do not receive justice, due to technicalities as herein.

30. The law is clear that, a person cannot be convicted of a more serious offence than he is charged with. In that case, the court is left with no alternative but quash the conviction herein, and set aside the sentence imposed, which I hereby do. I order that; the appellant be set free forthwith unless otherwise lawfully held.

It is so ordered.

DATED, DELIVERED VIRTUALLY AND SIGNED ON THIS 14TH DAY OF JANUARY 2022.

GRACE L. NZIOKA

JUDGE

IN THE PRESENCE OF;

APPELLANT PRESENT IN PERSON

MS AKUNJA FOR THE RESPONDENT

EDWIN OMBUNA – COURT ASSISTANT