



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL APPEAL NO. 51 OF 2016

JOSEPH BASHIR OKUMU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in criminal

case No.1791 of 2016 of the Chief Magistrate's Court

at Busia by Hon. G.N Wakahiu – Chief Magistrate)

JUDGMENT

1. The appellant, **JOSEPH BASHIR OKUMU**, was convicted of the offence of attempted robbery with violence contrary to section 297(2) of the Penal Code.

2. The particulars of the offence were that on the night of 11th July 2016 at **RED CROSS** area, **MAYENJE** sub location in **TESO** of **BUSIA** County, while armed with a knife, attempted to rob **WANDERA KENNETH OUMA** of a motor cycle registration number **KMDT 260T** valued at Kshs. 100,000/= and at or immediately before or after the time of such robbery, used actual violence to the said **WANDERA KENNETH OUMA**.

3. The appellant was sentenced to suffer death. He has appealed against both conviction and sentence.

4. The appellant was in person. He raised six grounds of appeal which I have summarized as follows:

- a) That the learned trial magistrate erred in law and in fact by basing the conviction on evidence that was not adduced.
- b) That the learned trial magistrate erred in law and in fact by relying on prosecution evidence which was full of contradictions.
- c) That the learned trial magistrate erred in law and in fact by convicting him without sufficient evidence.

5. The state opposed the appeal through Mr. Owiti, the learned counsel.

6. The facts of the prosecution case were briefly as follows:

On 11th July 2016, the complainant was approached by the appellant to take him on his motor cycle to St. Mary's in Kenya from the Busia-Uganda Customs office area. They agreed on the payment and they embarked on the journey. After they had reached their destination, the appellant asked him to wait for him so that they could return together. On their return journey, the appellant held him by the neck from behind. A struggle ensued and the appellant attempted to stab him. He raised an alarm. The appellant was arrested while fleeing.

7. In his defence, the appellant denied involvement in the offence. He contended that he was framed up in the offence after he had been robbed.

8. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of

9. I have perused the judgment of the learned trial magistrate. Nowhere did he factor the evidence of witnesses who were not called. The only reference I find is where he was analyzing the contention by the appellant that failure to call some two women and the chief was fatal to the prosecution case.

10. The effect of uncalled witnesses was explained in **BUKENYA vs UGANDA [1972] EA 549**, (Lutta Ag. Vice President) held:

The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.

The evidence called by the prosecution was overwhelming against the appellant. The conclusion by the learned trial magistrate was that the prosecution case was corroborative. Though it would have been important to call the chief, the failure to do so is not fatal. Having analyzed the entire evidence on record, I cannot reach any different conclusion from that of the learned trial magistrate.

11. Though the appellant has contended that the prosecution case was full of contradictions, my perusal of the record did not reveal any. This ground is baseless.

12. The evidence against the appellant was by **WANDERA KENNETH OUMA (PW1)**. He testified that on their return journey from St. Mary's the appellant held him from behind and a struggle ensued. This was after announcing that he wanted the motor cycle. Both fell down. When the appellant realized that he was being overpowered, he took out a knife and attempted to stab him with it. He raised an alarm and a watchman pursued the appellant on a bicycle. He was arrested and returned to the scene with a kitchen knife. He assumed that his motor cycle's key had fallen. The chief who was present enquired from the appellant if he had the key. The appellant denied having it. When the chief searched him, he recovered the key from him.

13. **MWADIE JAMES (PW2)** is the watchman who answered the alarm raised by the complainant. He testified that as they pursued the appellant, he found some two women who told him of a man who had emerged out of some maize plantation wearing a yellow jacket. When he was about to catch up with the appellant, he (appellant) dropped the knife he had. They arrested him and took him to the scene. When the chief searched him, he recovered the motor cycle's key.

14. The issue of mistaken identity did not arise. The complainant and the appellant were together from the Border to St. Mary's and to the spot where the attempted robbery occurred. He had ample time to recognize his attacker.

15. There was therefore overwhelming evidence against the appellant. The conviction was safe.

16. The sentence for the offence of attempted robbery is provided for under subsection 2 of section 297 of the Penal Code which provides as follows:

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.

The appellant was armed with a knife. This is an offensive weapon. The ingredients of section 297(2) of the Penal Code were therefore satisfied. The sentence imposed by the learned trial magistrate was the only available legal sentence for the offence.

17. From the foregoing analysis of the evidence on record, there is no justification in faulting the judgment of the learned trial magistrate. The appeal is bereft of any merits. I accordingly dismiss it.

DELIVERED and SIGNED at BUSIA this 19th day of April, 2018

KIARIE WAWERU KIARIE

JUDGE