



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CRIMINAL APPEAL NO.21 OF 2018

MOSES AYIEKO ADEL alias ODIENY.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence in Oyugis PM's Court Criminal Case No.86 of 2017 - Hon. J.S. Wesonga, SRM, dated 26th February, 2018)

JUDGMENT

[1] The appellant, **MOSES AYIEKO ADEL alias ODIENYI**, appeared before Senior Resident Magistrate at Oyugis, charged with attempted robbery with violence, contrary to **Section 297 (2)** of the **Penal Code**, in that on the 1st January 2017, at Ombek trading centre in Rachuonyo South, Homa Bay County, jointly with others not before court while armed with dangerous weapons namely pangas and runqus, assaulted **KENNEDY OCHIENG OUMA**, with intent to steal his money and immediately before the attempt he used a rungu to hit the said **KENNEDY OCHIENG OUMA**.

[2] After trial, the appellant was convicted and sentenced to fifteen (15) years imprisonment in terms of the recent decision of the Supreme Court of Kenya (SCOK) regarding the death sentence in the case of **FRANCIS KARIOKO MURUATETU & ANOTHER –VS- REPUBLIC [2017] e KLR**.

Being dissatisfied with the conviction and sentence, the appellant preferred this appeal on ground stated in his petition of appeal filed herein on 12th April 2018.

He appeared in person at the hearing of the appeal and relied fully on his written submissions in support of his case.

[3] The learned prosecution counsel, **MR. OLUOCH**, appeared for the State/Respondent and opposed the appeal by submitting that the appellant was previously known to PW1 and PW2 and that he and others were in PW1's bar when they locked the doors and ordered the patrons to place down their money and phones and lie down on the floor. That, PW1 luckily wrestled the appellant on the ground causing himself injury. That, the action by the appellant pointed to an attempted robbery.

[4] The learned prosecution counsel, further submitted that the alleged grudge between the appellant and PW1 was never established as PW1 had never purchased any land from the appellant. That, the appellant's conviction was proper.

On sentence, the learned prosecution counsel, submitted that **Section 389** of the **Penal Code** provides for a sentence of not more than seven (7) years for an attempt to commit an offence. This is therefore in contradiction with **Section 297** of the **Penal Code** but in view of **Article 50 (2) (P)** of the **Constitution**, the appellant ought to have been given seven (7) years.

[5] The duty of this court as a first appellate court is to re-consider the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (see **Okeno –vs- Republic (1972) EA 32**).

In that regard, this court has considered the evidence adduced against the appellant by the complainant, **KENNEDY OCHIENG OUMA** (PW1), a bar patron, **SAMSON OCHIENG OKWOYO** (PW2), the Investigation Officer, **SERGEANT RICHARD MACHASIO** (PW3) and a Clinical Officer, **MARTIN OUMA OUSO** (PW4).

Also considered, was the appellant's evidence in defence. He denied the offence and implied that he was maliciously implicated by the complainant.

[6] From the evidence, it was not disputed by the appellant that he was at the material bar on the material date. He, however, indicated that he was there at the invitation of the complainant who is his neighbor but who later demanded for payment from him (appellant) of the drinks

he took. He indicated that he would pay the sum of Kshs.1,200/= at a later stage but on 20th February 2017, he was arrested by the police at the instigation of the complainant. He was later charged with the present offence.

[7] The evidence by the complainant (PW1) however, indicated that the appellant and one **Shadrack** entered his bar while in possession of a machete (panga) and a Masai rungu (club). The appellant then proceeded to a back door and ordered everyone to put their phones and money on the table and lie down. It was at that juncture that the complainant overpowered and pinned him down. His accomplice ran away. Thereafter, people threw stones at the bar and boke its window and demanded his release. He was then released.

[8] The complainant indicated that he was injured and treated at the local hospital. A clinical officer (PW4) filled and signed the necessary P3 form (**P. Exhibit 3 (a)**).

The bar patron (PW2) confirmed that the appellant and another entered the bar armed with a panga and rungu and that they ordered the bar patrons to handover their phones and money and lie on the floor before the appellant was overcome by the complainant causing his accomplice to flee. He (appellant) was released after a crowd of people threw stones aimed at the bar's roof and windows.

[9] It is clear from the evidence by the complainant and **Samson** (PW2) that an episode occurred at the complainant's bar on the material date involving the appellant and the complainant. This led to the complainant being assaulted and occasioned bodily harm as indicated in the P3 form (**P. Exhibit 3 (a)**).

It is however, doubtful whether there was an attempted robbery against the complainant or any other person in the bar. The evidence that the appellant entered the bar with one **Shadrack** while armed with a panga and rungu is insufficient, considering that there were many patrons in the bar but only the complainant and PW2 testified in court and alleged an attempted robbery by the appellant.

[10] PW2 was in the company of his friends from Kisumu yet none of them was called to testify and lend credence to the allegations of attempted robbery made against the complainant by the appellant and PW2. The two indicated that the appellant was apprehended while in the act of committing the offence but his accomplice escaped. If that were the case, the alleged offensive weapons i.e. the Masai rungu (**P. Exhibit1**) and the panga ought to have been recovered and both produced in court instead of the rungu alone.

[11] It is instructive to note that the rungu was never recovered by the police but was rather handed to them by the complainant in circumstances which were not explained. It is also doubtful whether a mere traditional Masai rungu can be classified as a dangerous weapon.

From the foregoing, it is obvious that the prosecution failed to establish the material ingredients of the offence of attempted robbery under **Section 297 (2)** of the **Penal Code**.

[12] It therefore failed to prove the occurrence of the offence. The appellant was therefore unsafely convicted for an offence which was unproved. He instead should have been convicted for assault causing bodily harm as established by the medical evidence.

[13] Accordingly, the conviction of the appellant for attempted robbery under **Section 297 (2)** is hereby quashed and substituted for a conviction for assault causing actual bodily harm, contrary to **Section 251** of the **Penal Code**.

The resultant effect on the variation in conviction is the reduction of the sentence of fifteen (15) years imprisonment to four (4) years imprisonment for the offence of assault causing bodily harm, contrary to **Section 251** of the **Penal Code**.

It is only to that extent that this appeal succeeds.

J.R. KARANJAH

JUDGE

26.07.2018

[Delivered and signed this 26th day of July, 2018.]