



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 3 OF 2015

STEPHEN NJUGUNA NJERI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara Cr. Case No. 795 of 2013 delivered by Hon. E. K. Nyutu Ag. PM on 16th December, 2014).

JUDGMENT

Background

The appellant was charged with the offence of attempted robbery with violence contrary to Section 297(2) of the Penal Code. The particulars of the charge were that on 13th February, 2013 along Juja Road in Starehe District within Nairobi County, jointly with another not before the court attempted to rob Jane Wanja Mavuta of her bag valued at Kshs. 2,500/=, mobile phone make Nokia 6020 valued at Kshs. 6,500 and Kshs. 5,000 cash all valued at Kshs. 14,000/= and immediately after the time of such attempted robbery used (sic) actual violence on Jane Wanja Mavuta.

After the trial the appellant was found guilty as charged and was sentenced to death. He was not satisfied by the decision of the trial court and decided to lodge an appeal to this court.

His grounds of appeal are contained in his Amended Grounds of Appeal filed on 28th April, 2016. He has appealed on the grounds that the elements of attempted robbery with violence were not proved beyond a reasonable doubt, that he was not properly identified, that the trial magistrate did not give regard to the contradictions of the evidence of the prosecution's witnesses, that the judgment of the trial court did not contain points for determination as provided under Section 169 of the Criminal procedure Code and on the whole that the case was not proved beyond all reasonable doubt.

Submissions

The appellant relied on written submissions filed on 28th April, 2016. His submission expounded on the grounds of appeal that first and foremost, the ingredients of robbery with violence contrary to Section 297(2) of the Penal Code had not been sufficiently proven. Secondly, that the learned magistrate had erred in refusing, ignoring or failing to deal with the contradictions that arose from the evidence adduced by the prosecution. Thirdly, that the learned magistrate had failed to note that the Appellant had been denied a right to a fair trial as he was never supplied with witness statements to help him mount a

defence. Finally, he submitted that the offence had not been proved beyond reasonable doubt. He therefore, on these grounds, prayed that the conviction be quashed and the sentence be set aside. He relied, amongst other cases, on **Joseph Gitonga Kariuki vs Republic [2006] eKLR, Criminal Appeal No. 5 of 2005** (which he erroneously cited as **George Omondi vs Republic** instead of **David Odhiambo & George Omondi vs Republic [2005] eKLR**), **Juma vs Republic [2003] 2 EA 471**, **James Tiniga Omwenga [2014] eKLR (Criminal Appeal No. 59 of 2011, Nakuru)** and **Bsekitoleko vs Uganda [1967] EA 531**.

The Respondent was represented by Ms. Aluda who made oral submissions that the conviction was safe as all the ingredients of the offence of attempted robbery with violence were sufficiently proved. She thus asked the court to uphold the conviction and sentence.

Evidence

PW1, Jane Wanja Mavuta, testified that on the day in question at around 10.00 am she was on her way to a funeral in Juja in the company of her sister when she saw through her side mirror a man trying to open up the back side left door. She had placed her bag and phone on the back left side of the seat and as such, it appeared the man was trying to steal it but his ploy was futile since the door was locked. The man who had tried to open the back door moved towards the front but she acted swiftly and rolled up the windows. The man's plan having been thwarted quickly moved on to a car on the next lane. PW1 halfway rolled down her front window to try and warn her fellow motorists that the man was trying to rob them. She was signaling at the motorist on her left when her head was hit. She stated that the man tried to open her door but it failed as it was locked. The blow was so hard she blacked out and hit the steering wheel causing the car's horn to blow continuously and loudly. She was thereafter taken to Avenue Hospital where she received treatment before reporting the matter to the police. She was issued with a P3 form and instructed to have it filled. She further testified that she did not know the man before the events of that day but identified him as the man in the docks.

PW2, Rose Wawira Mavutu, testified that it was around 10.00 am and they were headed to a funeral in Ruiru with her sister, PW1, when around Pangani Girls High School, on Juja Road, they noticed a man lurking around their vehicle. Being weary she asked her sister to roll up the windows but before she could roll them up, the man appeared on the driver's side and hit PW1 in the face. He then proceeded to try and reach for the handbag located between the driver and passenger's seat. She screamed and members of public responding to the alarm raised came to her aid and arrested the man who was the appellant.

PW3, Police Corporal Samuel Kirimi of Pangani Police Station testified that on the day in question at around 11.10 am, the complainant in the company of members of the public brought the Appellant who they wanted charged with the offence of attempted robbery with violence. PW1 explained to him that while she and PW2 were stuck in traffic around Pangani Girls High School the appellant had hit her on the right side of her eye while trying to reach for a handbag inside the car. He was however not successful in getting the bag. He recorded the report and booked the appellant before issuing the complainant with a P3 form which he instructed her to get filled. He further stated that the man perpetrated the offence was not known to her prior to that date.

PW4, Dr. Joseph Maundu, a doctor at the Nairobi Area surgery testified that on 14th February, 2013, the complainant came to the clinic and told her she had been hit and assaulted by a person known to her. On examining and observing her, he noticed that her right eye was swollen as was the right side of her face. He approximated the age of the injury as 1 day and further noted that the wound was likely caused by a blunt object and consequently the degree of injury was harm. He noted that she had received prior treatment before seeing him. He filled the form and produced the same as evidence.

DW1, Stephen Njuguna Njeri, the appellant in his brief defence stated that on 13th February, 2013, he was busy doing his own things and did not commit the offence he was charged with. On cross examination, he expounded on the same saying that he had been arrested on Juja Road, by members of public who escorted him to Pangani Police Station. He did not see the complainant along Juja road but

she was there at the Police Station where she alleged that he wanted to steal from her. He was resolute that he was with his friends along Juja Road and the complainant had framed him in this case.

Having taken into consideration the submissions and the evidence adduced, this court finds that the issues to be determined boil down to:

- i. **Whether the contradictions in the evidence adduced were detrimental to the prosecution's case.**
- ii. **Whether the charge was proved beyond reasonable doubt.**

The first question for determination is whether the appellant was properly identified as the person who accosted both PW 1 and 2 on the fateful morning. He was arrested after PW2 screamed for help after he struck PW1 on the head rendering her unconscious. Moments later after PW1 was treated, he was frog matched to Pangani Police Station after which investigations commenced. This was a case of arrest on the spot and I have doubt the appellant was the culprit.

The next question is whether the offence of attempted robbery as provided under Section 297(2) of the Penal Code was proved. The said provision reads 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 assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

From the above definition, for the offence of attempted robbery with violence to be proved, three key elements must be established, namely,-

- a. **That the offender is armed with any dangerous or offensive weapon or instrument, or**
- b. **That the offender is in company with one or more other person or persons, or**
- c. **If at or immediately before or immediately after the time of assault, the offender wounds, beats, strikes or uses any other personal violence to any person.**

The first two elements do not apply in the instant case. Suffice it to state is that proof of any of the elements stated above is sufficient to establish the offence of attempted robbery with violence. The third is to the effect that ***“, at or immediately before or immediately after the time of assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”*** A reading of this element demonstrates that it is hinged on the assailant wounding, beating, striking or using any other personal violence immediately before or after the assault. The court must then interrogate the assault on the complainant in the event occurring immediately before and after the assault. The evidence on record shows that PW1 saw the appellant approach her car from the left side as he seemed to have noticed her handbag which was on the left side of the back seat. He then attempted to open the back left door to steal it. Unfortunately for him, all the doors were locked and his intention was thwarted. PW1 in an attempt to alert other motorists of what was happening rolled down the window and started gesturing to other motorists that there was a thief lurking. Basically, these were the circumstances preceding the assault. Clearly as at this point, there was no wounding, striking, beating or use of personal violence before the assault. The court then asks the question, what happened immediately after the assault?

After the appellant unsuccessfully tried to open PW1's car, he moved away from it. The events after the assault are borne from the evidence of PW2. Her testimony was that the appellant tried to reach for the handbag that was between the passenger and the driver's seat and she screamed to alert members of the public so that they could apprehend him. Apparently, the appellant did not also wound, strike, beat or use any personal violence against her or the complainant after the assault. Ultimately, the second limb of the third element of the offence charged was also not established. In a nutshell, my finding is that the offence charged was not proved by the evidence on record.

However, it is very clear that the appellant committed an offence which offence was that he simply

attempted to rob PW1. This court is conferred by Section 179(1) of the Criminal Procedure Code to convict an accused person for a minor offence if the offence charged has not been proved by the evidence on record. The same reads as follows:

“When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.”

In my view, the offence demonstrated by the evidence is attempted robbery under Section 297 (1) of the Penal Code. I say so because from the evidence of PW1 and 2, it is clear that the appellant did in fact assault PW1 and thereafter tried to reach into the car and steal the handbag that was located between both the driver and the passenger’s seat. For avoidance of doubt, Section 297(1) provides thus:

“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.

The next issue raised by the appellant was that there were contradictions between the evidence of PW1 and 2 on one hand and that of PW3 on the other with respect to the time the offence was alleged to have been committed. According to him, the scene of the offence was at a stone throw distance from Pangani Police Station. It was described by PW2 as being near Pangani Girl’s Secondary School. He did not comprehend how if he was the culprit it took an entire one hour to frog march him from the scene to the Police Station. However, this is clearly explained by the evidence of PW1 who stated that after the assault she first went to the Avenue Hospital to seek treatment after which she reported the matter to Pangani Police Station. Her evidence was corroborated by PW3, the Investigating officer who confirmed that PW1 went to the Police Station after treatment.

On whether Section 169 of the Criminal Procedure code was complied with, that is to say that the judgment of the trial court did not contain points for determination, it is true that the learned trial magistrate did not outline the points for determination. However, in as much as the judgment was brief, the trial court in its wisdom considered the evidence of the prosecution witnesses. The learned magistrate however failed to properly direct her mind to the determination on whether all the elements of the offence charged had been proved. As a result, she entered a wrong finding to the effect that the offence of attempted robbery with violence had been proved.

Finally, is the issue of whether the appellant was supplied with prosecution witness statements before the trial commenced. A look at the proceedings shows that the appellant never raised a complaint that he had not been furnished with the witness statements either before or in the course of the proceedings. It is then safe to conclude that he had all the statements before the trial commenced. His ground of appeal in this respect has no merit.

On the whole, I find that the prosecution proved their case beyond all reasonable doubt against the appellant for the offence of attempted robbery contrary to Section 297(1) of the Penal Code for which I find him guilty and convict him accordingly.

On sentence, the said Section 297(1) of the Penal Code provides that the offender if found guilty is liable to imprisonment for seven years. I take into account that the Appellant was a first offender and notwithstanding that PW1 was injured, she did not lose anything. The appellant was convicted on 16th December, 2014 and has therefore served about two and a half years in jail. It is the view of the court that for the period he has served, he has learnt a lesson and is ready to live a gainful life free of robbing innocent motorists. I therefore find that the period served is sufficient punishment for him. I accordingly order that he be and is hereby set free unless otherwise lawfully held. It is so ordered

DATED and **DELIVERED** in Nairobi this **26th** day of **May, 2016**.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Appellant in person.*
2. *Miss Akuja for the Respondent.*