



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANGA

HIGH COURT CRIMINAL APPEAL NO. 302 OF 2013

(Appeal from the Original Conviction and Sentence in Criminal Case No. 443 of 2009 dated 7th December 2010 in the Chief Magistrate's Court at Thika by Hon. B. W. Owino - SRM)

ATHANUS WAMBUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

HIGH COURT CRIMINAL APPEAL NO. 303 OF 2013

(Appeal from the Original Conviction and Sentence in Criminal Case No. 443 of 2009 dated 7th December 2010 in the Chief Magistrate's Court at Thika by Hon. B. W. Owino - SRM)

PATRICK MUTISO MUIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

The Appellants ATHANUS WAMBUA and PATRICK MUTISO MUIA were convicted by the Hon. SRM Owino for the offence of attempted robbery with violence contrary to Section 297(2) of the Penal Code. They were tried and upon conviction sentenced to suffer death.

They have both appealed to this Court against the said conviction and sentence. For the purposes of this Appeal we will refer to Athanus Wambua as 1st Appellant and Patrick Mutiso Muia as the 2nd Appellant.

At the hearing of the Appeal before this Bench, both the Appellants were present as was Mr. Naulikha for the State.

The learned State Counsel supported the conviction and sentence. The Prosecution case in the trial below was that the Appellants did on 19th January 2009 at Masinga Market within Machakos District of Eastern Province did while armed with metal bars and whips attempted to rob Daniel Kutili Kitiwi and Faith Monica Kitiwi. 6 witnesses were called for the prosecution including the victims of the attempted robbery who testified as PW1 and PW2 respectively. The two testified that the Appellants in the company of others attacked them as they rode home whereat they were thrown off the bicycle. They were set upon

with crude weapons and Monica PW2 lost her handbag and Daniel PW1 had to fend off the 2 attackers who were beating him. The witness fought the 1st Appellant and was successful in fending off the attack and managed to run to where his wife PW2 was and managed to hold onto one of the attackers named Musyoka and members of the public responded to the alarm raised and found him holding Musyoka who the public beat seriously. After Musyoka was interrogated by members of the public he revealed the names and identities of the attackers. He was taken to the nearby police post. The others escaped. PW2 was also categorical that she could identify some of the attackers including 1st Appellant Wambua and the 2nd Appellant whom she called Mutiso son of Muia. Unfortunately Musyoka died on way to hospital and never faced justice.

The 2 Appellants fled the village and headed to Nairobi from where they were traced and arrested. They were identified by the 2 victims.

They have attacked the conviction on the basis that they were framed and the evidence not sufficient to convict for the offence. They raised grounds on the identification and stated that they were residents of Nairobi where they lived and worked.

They stated that they were residents of Nairobi where they lived and worked, but did not call any neighbour or person who could positively identify them as residents of Nairobi. In the cross-examination of the prosecution witnesses, the Appellants did not elicit any answer that suggested there was malice or a grudge.

Regarding the identification parade, none was carried out as the Appellants were recognised by the victims. The victims had torches as did the attackers and they were seen. We find that the prevailing circumstances were conducive for positive identification.

The offence they were charged with is grave and carries the death sentence upon conviction. In the case of attempted robbery with violence, three main ingredients are necessary to prove the offence.

1. If the offender is armed with any dangerous or offensive weapon or instrument; or
2. Is in company with one or more other person or persons; or
3. If, at or immediately before or immediately after the time of the robbery, he wounds, beats or strikes or uses any other personal violence to any person.

PW2 testified that it was the 2nd Appellant who pushed her off the bicycle. She was able to identify both the Appellants and Musyoka. The prosecution testimony was consistent and was sufficient to base the conviction upon. The two Appellants attacked PW1 and PW2 with offensive weapons thus satisfying the ingredients for the offence of attempted robbery with violence.

Having carefully considered Grounds and Petition of Appeal we find that the learned trial Magistrate did not err either on the law or facts. The conviction was safe and the sentence lawful. We thus find no merit in the two Appeals and dismiss them in their entirety.

Dated, signed and delivered this 28th day of November 2013

Maureen Onyango

JUDGE

Nzioki wa Makau

JUDGE

