REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT MACHAKOS

CRIMINAL APPEAL 72 OF 2010

BONIFACE MUTUA MWANGI …….……APPELLANT

VERSUS

REPUBLIC …….RESPONDENT

(Being an from the original conviction and sentence in Kangundo Principal Magistrate's Court Criminal Case No. 536 of 2009 by Hon. C. Obulutsa, P.M on 4.5.2009)

JUDMENT

1. On **30/09/2009**, **Boniface Mutua Mwangi,** the Appellant herein ("Appellant") was presented before the Principal Magistrate at Kangundo and charged with two counts of the offence of attempted robbery with violence contrary to section **297(2)** of the **Penal Code.** He pleaded not guilty to the charge. The particulars of the two counts were that:

On the **20th** day of **September 2009,** at **Donyo Sabuk** Market, **Kyanzavi** location in **Kangundo District** within the Eastern Province, jointly with another not before court, attempted to rob **Simon Mwangi Njuguna** and immediately before the time of such attempt wounded the said **Simon Njuguna Mwangi.**

And that:

On the **20th** day of **September 2009,** at **Donyo Sabuk** market, **Kyanzavi** location in **Kangundo District** within the **Eastern Province**, jointly with another not before court, attempted to rob **Morris Karanja Njuguna** and immediately before the time of such attempt wounded the said **Morris Karanja Njuguna.**

2. He pleaded not guilty to both counts. After a trial in which six prosecution witnesses testified and the Appellant gave an unsworn statement, the Learned Principal Magistrate, **Mr. C. Obulutsa** convicted him on both counts and sentenced him to death. The Appellant was, naturally, aggrieved and proffered the present appeal. In both his written submissions and oral arguments before us, the Appellant has raised nine grounds of appeal. Some of these require no more than a cursory dismissal. Others can be grouped together. A separate ground arose at the hearing of the appeal – that of sufficiency of the charge sheet – and we will address it as well.

3. First, the Appellant complains that the Learned Magistrate erred by failing to realize that **section 389** of the **Criminal Procedure** Code conflicts with **section 297(1)** of the **Penal Code** and hence rendered the

Charge Sheet defective. We are unsure what the substance of this ground of appeal is: **section 389** of the **Criminal Procedure Code** deals with directions in the nature of *habeas corpus* while **section 297(1)** of the **Penal Code** codifies the offence of attempted robbery. The Appellant was actually charged under **section 279(2)** and we find no relevant connection between that section and **section 389** of the **Criminal Procedure Code**.

4. Still, charitably assuming that the Appellant, who was not represented by counsel before us, wanted to complain that the charge sheet was defective, we examined the same and put questions to the State Counsel about the sufficiency of the charge sheet. We asked **Mr. Mukofu** whether the charge sheet was sufficient given that it did not specify what the Appellant tried to steal. **Mr. Mukofu** argued that it was not; that from a proper reading of **section 297(2**) of the **Penal Code** under which the Appellant was charged, an attempt to steal anything suffices. The only two elements in the offence are, first an attempt to rob; and two, an intention to actuate the robbery. **Mr. Mukofu** argued before us that it is neither necessary nor possible to always describe with specificity the actual item the person charged with attempted robbery attempted to steal. All that is required, argued **Mr. Mukofu**, is the general intention to rob. For good measure, **Mr. Mukofu** added a policy flavor to his argument: it would add a dangerous subjective element to the offence of attempted robbery if the Court were to hold that it was necessary that the prosecution must specify the exact thing the accused person was attempting to steal. This is because, urged **Mr. Mukofu,** only the person attempting the robbery knows what he wants to steal.

5. We agree with **Mr. Mukofu** on this point. A charge sheet is sound and sufficient if it charges attempted robbery even if it does not specify the exact things the accused person was attempting to steal. As in robbery or theft, there is no requirement that the prosecution proves intent to steal the specific thing identified. Indeed, an accused person often has the intention of stealing whatever thing they find on the person or premises of their victims. It is no less theft or robbery if the accused does not know exactly what they intend to steal so long as it can be demonstrated that they had the intention to permanently deprive the owner of some property.

6. Indeed, we point out that it is often possible to commit the inchoate crime of attempting the substantive crime even though the facts are such that the commission of the substantive offence was impossible in the circumstances. One example given in text books is an instance where a person attempts to steal from a victim's pocket, and unknown to the person, the victim's pocket is empty. Even though physically impossible to actually commit the substantive offence itself in these circumstances, the accused person would still be guilty of attempted theft so long as the intention can be demonstrated. The result would be the same if the substantive offence cannot be committed because of inadequacy of means as in where an accused person tried to open a safe with a tool which is inadequate to the task yet with the intention of stealing the contents of the safe. See, for example, Michael J. Allen, *Textbook on Criminal Law*, 6th Edition, p. 288-289.

7. The American case of *Clark v State* (17 S.W. 145 (1888)), which is, admittedly, only of persuasive authority, had the following to say while holding a criminal defendant liable for attempted robbery even while there was, in actuality, nothing to rob:

It being an accepted truth that defendant deserves punishment by reason of his criminal intent, no one can seriously doubt that the protection of the public requires the punishment to be administered, equally whether in the unseen depths of the pocket, etc., what was supposed to exist was really present or not. The community suffers from the mere alarm of crime. Again: Where the thing intended (attempted) as a crime and what is done is a sort to create alarm, in other words, excite apprehension that the evil; intention will be carried out, the incipient act which the law of attempt takes cognizance of is in reason committed.

8. Our view, therefore, is that the nature of the crime of attempted robbery is such that it does not require that the prosecution identifies with specificity the exact property which the accused person intended to rob. It is enough if the intent to rob *any* property which is capable of being stolen can be indubitably shown. The Prosecution does not bear the burden of demonstrating *a specific intent* to steal a *specific thing* from the victim.

9. Second, the Appellant complains that **section 48** of the **Evidence Act** was not complied with. **Section 48** of the **Evidence Act** stipulates that the Court may receive the opinions of experts in evidence. The Appellant complains that **PW 5, Mbindyo Dominic** was not an expert and that therefore his opinion should not have been received. We will dismiss this ground on the reasoning that, first, objections as to evidence can only be raised on appeal where they were raised below. The objection that the evidence by PW5 was not admissible was not, therefore, properly preserved for appeal. In any event, we find the objection spurious. It is not clear to us why the Appellant makes the claim that PW5 was not a registered Clinical Officer. He testified that he was one and the Appellant had an opportunity to cross examine him but he did not ask any questions about his qualifications. There is nothing on record to warrant us to conclude that PW5's evidence was inadmissible.

10.Third, the Appellant complains that **section 14(3)** of the **Criminal Procedure Code** was not complied with because one cannot be hanged twice. Therefore, the Appellant complains, one death sentence should have been held in abeyance. We agree. However, we find this to be harmless error which did not affect the substantive rights of the Appellant. The proper course of action when an accused person is convicted of two charges which carry the death sentence is to condemn him to suffer death in the first conviction while holding in abeyance the second death sentence since one cannot suffer death twice. As we have already said, however, this is harmless error.

11.We will also summarily dismiss the complaint that the Learned Magistrate failed to comply with **section 169** of the **Criminal Procedure Code**. We have read the judgment in the case and we find that it has all the requisite contents demanded by the section and our jurisprudence.

12.The other grounds of appeal can really be lumped into one. They all question the sufficiency of the evidence adduced to sustain the conviction. In the first place, the Appellant complains that it was an error for the Learned Magistrate to place so much emphasis on the purported evidence of identification by recognition because that issue was irrelevant: by the Appellant's own account, the Appellant was known to the complainants in the case and the two had engaged in a duel on the material day. As we understand it, the Appellant's argument is that conducting an identification parade in the circumstances was a red-herring only meant to cover up the fact that the circumstances lead to the conclusion that the parties engaged in duel and not attempted robbery.

13.In the second place, the Appellant complains that the Prosecution's case is riddled with contradictions which should have led the Learned Magistrate to infer incredibility on the part of the prosecution witnesses. Lastly on this score, the Appellant argues that the Learned Magistrate failed to give due consideration to his defence which was given in an unsworn statement.

14.Considering these three arguments together, we have come to the view that it was unsafe for the Learned Magistrate to convict the Appellant on the evidence presented. We say so for two major reasons.

15.First, as the Appellant correctly points out, for a conviction to result where the crime charged is attempted robbery, the Prosecution must prove that there was an intention to commit the substantive offence of robbery. We are not persuaded that the Prosecution discharged the onerous burden of proving all the elements of attempted robbery to the requisite standard.

16.**Section 297** of the **Penal Code** spells out the offence of attempted robbery. It is in the following terms:

(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.

(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.

17.The Appellant was charged under **section 297(2).** The elements of the offence which the Prosecution must prove beyond reasonable doubt are:

a. An act which is more than merely preparatory to the commission of the offence of robbery;

b. Which must include an assault on another person;

c. With intent to steal;

d. In one of the following three circumstances;

i. Where the offender is armed with a dangerous or offensive weapon;

ii. Where the offender is in the company of one or more other persons; or

iii. Where the offender commits personal violence on the victim.

18.Needless to say, the Prosecution is obligated to prove each of the four elements beyond reasonable doubt. As a first appellate Court, our obligation goes beyond simply cross-checking the findings of the lower Court vis-à-vis the evidence on record. It is incumbent upon us to evaluate the evidence afresh and draw our own conclusions. As the predecessor to our Court of Appeal said in the defining case of *Okeno v Republic*:

An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v Republic* [1957] E.A. 386 and to the appellate Court's own decision on the evidence. The first appellate Court must itself weight conflicting evidence and draw its own conclusions. It is not the function of the 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 Court's findings should be supported. In doing so, it should make allowance for the fact that the trial Court had the advantage of hearing and seeing the witnesses.

19.Looking at the evidence on record, we are unsure that the Prosecution satisfied the high burden required to establish elements (a) and (c) of the offence of attempted robbery as enumerated above. We will begin with element (c). Intent is, perhaps, the most central element of the inchoate crime of attempt. Indeed, as was famously said in the English case of *R v. Whybrow* (1951) 35 Crim. App. Rep. 141, in an offence of attempt, the intent is the principal ingredient. Intent is the essence of the crime. Yet, in the instant case, we have hardly seen any evidence which would lead to the conclusion that the Appellant had the intention to commit the substantive offence of robbery. The Prosecution was required to show the state of mind required for the complete evidence. In our view, it failed to do so. Let us consider the evidence adduced by the Prosecution on this critical element.

20.**PW1, Simon Mwangi** testified that he met the Appellant together with another person by the name **Otieno.** He was acquaintances with both of them. Hence, he was not suspicious even though it was at night. We will set out below what this witness said about what happened thereafter:

Mutua [Appellant] asked my brother for cigarettes. I asked what was wrong. The two punched him [the brother, PW2] and I intervened. **Mutua** knocked me down. I fell on a stone and injured my left hand. We shouted for help and my brother ran into the plot. Our neighbours came out as two assailants ran away.

21. It is readily obvious from this account that one cannot reasonably infer intent to steal from this evidence. What this evidence clearly establishes is that there was a confrontation between the four men. If believed, the evidence would establish that the confrontation was started by the Appellant. Nothing on this record tells us that there was intent to steal.

22.What about the evidence of the other critical Prosecution witnesses? **PW2, Morris Karanja**, had this to say on this critical aspect:

On reaching the gate of our plot, we met **Mutua** and **Otieno**. They asked us to give them something. We did not think they wanted to steal. It was **Otieno** who was talking to me. They are familiar and I passed them. When I entered the gate, **Mutua** followed me. He put his hands in my pockets and hit me with his hand and then with an object. I felt blood trickle down. My brother intervened asking what he was doing. **Mutua** then knocked my brother down. We shouted for help and the two ran away as the neighbours started coming.

And PW3 testified thus:

On **20/09/09** at **9:00 pm**, I was at home reading. I heard some noise. A person was shouting "nisaidie!" I got out of the house and outside at the corridor, I saw people. It was dark then but when I opened the gate I was able to identify **Mutua** and one **Otieno.** They had held **Morris Karanja.** It was **Otieno** who was holding **Karanja** by the neck while **Mutua** was holding his pockets. They then ran away.

23.In our view, these testimonies, even if believed, as the Learned Magistrate did, do not establish the critical element of intent to steal. The one thing that comes closest to that is the claim made by PW2 that **Mutua** put his hands in his pockets. He apparently did this while hitting him presumably with his other hand. Nothing suggests that the intention was to steal. The same applies to the claim by PW3 that he saw the Appellant holding **Mutua's** pockets. It was not established by evidence what "holding" the pockets in this context meant and there was no suggestion on record that the Appellant had the intention to steal. No evidence as adduced or extrapolated to demonstrate that the Appellant put his hands in PW2's pockets with the intention of stealing the contents therein. Neither PW1 nor PW2 testified that they formed the view at the time that the intention of the Appellant was to steal. We simply cannot assume such a critical element of the crime devoid of evidence.

24.In any event, we are troubled by the apparent contradictions in the testimonies of the three Prosecution witnesses who were at the scene of the crime. Even while taking into consideration that the events of the fateful night occurred quickly and they must have been very traumatic for the victims, we think the contradictions are material enough to make the conviction unsafe. The following contradictions readily emerge from the record:

a. PW1 said the assailants asked PW2 for cigarettes; PW2 said the assailants asked to be given "something."

b. PW2 says he entered the gate of the Plot before any skirmish had begun; PW1 testified that he ran into the Plot after PW2 had already been punched and PW1 knocked down. On the other hand, PW3 testified that everyone was "outside" the gate.

c. PW 2 testified that the Appellant put his hands in PW2s pockets; PW1 gave no such testimony.

d. PW3 testified that when he came out, he saw the assailants holding PW2 down with the Appellant holding PW2's pockets; Neither PW1 nor PW2 gave any such evidence. Indeed, according to the evidence of both PW1 and PW2, PW2 was never knocked down. It was PW1 who was knocked down.

e. Both PW1 and PW2 testified that they shouted for help and neighbours came out; PW3 testified on cross examination that other people in the Plot had already slept so he is the only one that came out to help.

25.These contradictions cumulatively raise reasonable doubts as to the soundness of the Prosecution's theory that the **Appellant** and **Otieno** were attempting to rob PW1 and PW2. They are accentuated by a few oddities in the testimonies of Prosecution witnesses. For example, PW2 testified that the Appellant held his (PW2's) pocket while he was hitting him with an object. That seems implausible. If, in fact, the Appellant and his colleague was intent on robbing PW2 that appears to be a strange way to do

it. Similarly strange is the fact that PW1 and PW2 both suggest that the assailants started by attacking PW2 only. It is curious that they both use the word “intervened” to describe what PW1 did after the ostensible gratuitous attack by the assailants on PW2. “Intervention” is a curious word because it implies that there was an altercation between PW2 and the assailants. PW1, then, “intervened” to protect PW2 who is his brother. Seen this way, this seems to give significant wind to the Appellant’s theory that what we had here was, in fact, a duel between two sets of
people.

26. Finally, in our view, reasonable doubt is introduced by the sequence of events following the reporting of the alleged attempted robbery. The alleged crime occurred on **20/09/2009** at **9:00 pm**. PW1 and PW2 reported to the Police the same day. It is clear that they knew their attackers and so reported to the Police. It is curious, then, as the Appellant suggests, that the Police chose to conduct a fully-fledged identification parade in light of the uncontested recognition and acquaintance between the parties. The Police also describe the arrest of the Appellant in similarly oblique terms. PW6 says that “one day during a normal police swoop the accused was found in a house with several other men.” It is not clear how the Police specifically got to identify the Appellant in order to arrest him. Was he pointed out to them by the complainants? And what is a normal police swoop which so conveniently netted the person who had attempted an offence a week before? The unexplained coincidences here also raise substantial doubts about the Prosecution’s theory of the case.

27.For all the above reasons, we must allow the Appeal which we hereby do. We set aside both the judgment and conviction. We consequently set the Appellant at liberty forthwith unless he is otherwise lawfully held.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this day **19TH** day of **MARCH 2012**.

J.M. NGUGI **GEORGE DULU**

JUDGE **JUDGE**