REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 223 OF 2008 AND 222 OF 2008

BERNARD KARIUKI NYAGA……..……..……1ST PPELLANT

DENNIS MARUIRA NJAGI…..……..2ND APPELLANT

MORRIS MUTHONI MIRITI…….3RD APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

(From Original Criminal Case No.40 of 2007 Chuka; P.Ngare – SRM)

JUDGEMENT

The appellants were charged before Chuka Senior Principal Magistrate's court with two counts of offences. The first count was attempted robbery with violence Contrary to Section 297 (2) of the Penal Code. The second count was being in possession of a firearm without a Firearms Certificate. The appellants were convicted in both counts. They were sentenced to death in the first count, and in the second count no sentence was passed, and correctly so.

They were aggrieved by the convictions and filed their respective appeals, which we have consolidated having arisen from the same proceedings.

The prosecution called six witnesses. The facts of the case are that the complainant in count 1 was closing down his business at 7.40 p.m when a young man appeared and asked for cigarettes. The complainant did not have any. A second young man appeared and also ordered same item. Then a third one appeared. The other two were still present. The third one pulled out a RIFLE from his pocket where upon the complainant quickly closed the door of his shop and raised the alarm. The three men disappeared.

The appellants were apprehended same night by PW4 and PW6, Police Officers on patrol duties to whom the complainant reported. One day later, PW4 and 6 took the 1st appellant to his house and after a search, a rifle was recovered at the fence of his home.

The first appellant denied the offence. He also denied having been with the co-appellants on the fateful day and claimed to have met with them shortly before their arrest.

2nd appellant also denied the charges. He said he was going to Marima, after unsuccessfully searching for odd jobs the whole day, when he met Police Officer who arrested him. The 3rd appellant also denied the charges.

We have subjected the evidence adduced by the prosecution and defence to a fresh analysis as expected of a first appellate court. In the case of **OKENO V. REPUBLIC [1972] EA 32**. the role of a first appellate Court is given as follows:

"**An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [**Pandya vs. Republic (1957) EA 336] **and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion** (Shantilal M. Ruwala v. Republic [1957] EA 570.) **It is not the function of a 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 findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)"**

The appellants raised similar grounds of appeal. They challenged the evidence of visual identification by the complainant arguing that the circumstances of identification were not safe; the appellants challenged the manner in which the identification parades were conducted, and finally they challenged the basis of the convictions entered against them on grounds that the charges as framed were defective as the things attempted to be stolen from the complainant were not disclosed.

The state conceded to the appeals. Mr. Musau for the State urged that since the appellants merely asked for cigarettes but made no attempt to steal anything, the conviction for the first count was improper. In regard to the second count of possession of a firearm, Mr. Musau urged that since the firearm was recovered at a fence in 1st appellant's house, there was no evidence to prove the three appellants had exclusive control or access to the fence.

We shall first deal with the first count against the appellants. The charge and the particulars were framed as follows:-

"Attempted robbery contrary to Section 297(2) of the Penal Code

On the 7th day of January 2007 at old Mirima Market in Muthambi Location in Meru South District within Eastern province being armed with dangerous weapons namely a gun, pangas and torches jointly, attempted to rob SERAPHIN MURITHI NABEA and immediately before the attempted robbery, threatened to use actual violence to the said SERAPHIN MURITHI NABEA. "

The ingredients for the offence of Attempted Robbery are clearly set out under Section 297 (2) of the Penal Code which provides as follows:
"297 (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."

The charge of attempted robbery should contain any one of the following particulars:
"1. That immediately before or immediately after the assault the person charged used or threatened to use violence,

2. That the offender was armed with a dangerous or offensive weapon,

3. That the person charged was in company with another or others."

In addition to those particulars the charge should indicate that the person charged assaulted either the person from whom attempt to rob was made or another, with an intent to steal.

Assault is a key component of the charge of attempted robbery. The charge as framed in count 1 was totally defective as the particulars contained in the charge did not satisfy the requirements of S. 297(2) of the Penal Code. The charge was materially defective and needed to be amended before a conviction could be entered. No application was made to amend the charge in Count 1. Consequently having failed to amend it, the charge is incurably defective. Secondly and equally important the complainant's evidence did not show that he was assaulted and further that any action was taken by his attackers out of which it can be concluded that the attackers had formed the necessary intent to steal from him. Even the evidence adduced in support of this charge was not sufficient to sustain a conviction. The conviction entered in that respect was unsafe and cannot stand.

In regard to count 2 the prosecution's evidence was that the rifle was recovered from a fence in 1st appellant's compound. It was recovered one day after the 1st appellant had been arrested. In order to prove the charge of possession, the prosecution needed to show that the appellants were in actual personal possession of the rifle at the time it was recovered. Alternatively the prosecution needed to adduce evidence to establish that the appellants knowingly had the rifle in the actual possession or custody of another person or in a certain place. In further alternative the prosecution needed to establish that the appellants had the rifle in a place for the use or benefit of themselves or of any other person.

PW4 and 6 who recovered the rifle said they found it in a fence in 1st appellant's home. The evidence of PW3 clearly rules out the possibility of the 2nd and 3rd appellant belonging to that home as he said the two had been brought home by the 1st appellant and that they had stayed there for 2 weeks just before their arrest.

The evidence of PW4 and 6 demonstrates another fact. Their evidence was that they arrested the three appellants together on the 7th January, soon after they received the complaint from PW2. The appellants were immediately taken into custody. Since the three were arrested soon after the alleged attempted robbery against PW2, the prosecution needed to adduce evidence to show that they still had an opportunity to hide whatever weapons they had while at PW2's shop just before the arrest. The evidence of PW2 was that he was confronted at his shop at 7.40 pm. The evidence of PW4 and PW6 was the complainant reported to them at 7 pm. and 7.30 pm. respectively the same night. The evidence of the of the 3 witnesses PW2, 4 and 6 was inconsistent. More importantly, it shows that the appellants, if they were the ones who confronted PW2, had no opportunity to hide anything.

The prosecution has not established on the required standard that the appellants hid the rifle at the fence where it was recovered, or that they had knowledge that the rifle was at the fence or that they had control over it for use or benefit of either themselves or others. Having failed to establish these facts, the prosecution cannot be said to have proved the second charge beyond any reasonable doubt.

Having carefully considered the appellants appeals, we find that the same have merit and should be allowed. Consequently we quash the convictions entered against the appellants in both counts, and set aside their sentences.

The result is that the appellants appeals are allowed. They should be set at liberty unless they are otherwise lawfully held.

Dated, Signed and Delivered at Meru this 31st day of March 2011

LESIIT, J.

JUDGE

KASANGO, J.
JUDGE