REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 224 OF 2010

(From original conviction and sentence in Criminal Case No. 315 of 2010 of the Senior Resident Magistrate\'s court

at Eldama Ravine - D. M. Machage (SRM))

STEPHEN YATICH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged with the offence of attempted robbery with violence contrary to Section 297(2) of the Penal Code *(Cap. 63, Laws of Kenya).* The appellant was on the evidence found guilty of the offence, convicted and was sentenced to the mandatory death sentence under that Section.

Being dissatisfied both with his conviction and sentence, the appellant has appealed to this court against both the conviction and the sentence. The grounds of appeal are set out in the Appellant\'s Petition of Appeal Ref. NAV/260/010/15 of 12th July 2010, and the Supplementary Petition of Appeal dated 27th October, 2010. These grounds are -

(1) that the learned trial magistrate erred in law and fact by convicting me while basing on the evidence of PW1 and PW2 and failing to consider that both were relatives who could have colluded and conspired to bring me behind gallows.

(2) that the learned trial magistrate erred in law and fact by allowing the substitution of the charges that I was initially charged with creating disturbance contrary to section 95(1)(b) of the Penal Code and later charged of robbery with violence contrary to section 206 of the Penal Code. This substitution

was highly objected to by the appellant who frantically applied for the production of the police occurrence book where the initial first record could have been extracted. This your Lordship was not forthcoming.

(3) that the learned trial magistrate erred in law and fact by convicting me basing on unsubstantiated evidence. That the complainant was able to identify me by the light of a lantern lamp as the stated time of attack was 1000 hrs. This, your lordship cannot be sufficient light for such identification.

(4) That the learned trial magistrate erred in law and fact by failing to consider my alibi in that I was not within the jurisdiction of the scene of crime.

(5) that the learned trial magistrate erred in law and fact by failing to consider that I was not found in possession of any weapon and the complainant were not assaulted during the act.

(6) that the learned trial magistrate erred in law and fact by convicting me on such a serious charge and failing to accord me adequate time to offer defence.

(7) that the Learned Magistrate erred in law and fact in wholly believing the prosecution case and failing to consider the Appellant\'s defence without giving any reasons.

(8) that the Learned Magistrate erred in law and fact in basing his conviction on the prosecution case that was not proved beyond reasonable doubt.

The Appeal was urged by Mr. Kipkoech, counsel for the appellant, while Mr. Omwega, learned State Counsel represented the State.

For the appellant, Mr. Koech argued that there was no evidence to establish the offence of attempted robbery with violence. Counsel submitted that the appellant was complaining of PW1 talking ill of him, and that is why the appellant was originally charged with the offence of creating disturbance, in a manner likely to cause a breach of the peace contrary to Section 95(1)(b) of the Penal Code.

Counsel submitted that it was after the evidence of PW1 that the prosecution substituted the charge of attempted robbery with violence. Counsel submitted that though Section 214 of the Criminal Procedure Code permits the substitution of charges, the charges were completely new and introduced elements of the offence.

Secondly, counsel submitted, that the record has fundamental errors, that to ensure a fair trial, the appellant was not given an opportunity under Section 211 of the Criminal Procedure Code to prefer an opinion, that the record is silent. This was a fundamental and not a procedural error.

Thirdly, counsel submitted, that the offence was allegedly committed on 25th March 2010, and yet no report was made until the next day on 26th March 2006, and even though there is no limitation of when to report an offence, what was the relationship of the appellant and the complainant that a report was made nearly a day after the alleged assault?

Fourthly, counsel questioned PW1\'s evidence that the appellant took merely 10 minutes in the kiosk, but did not steal any thing. What was he doing?

Fifthly, counsel submitted that the offence of attempted robbery was not established. The evidence of

PW2 shows that PW1 and PW2 knew the appellant, and he was unable to steal anything, he feared screams. PW1 testified that he asked for money, and pulled out a sword from his pocket. How deep were these pockets? There was no compliance with Section 211 of the Criminal Procedure Code, in relation to the substituted charge.

Counsel concluded that if there was any offence committed, it was not an offence of attempted robbery, and urged the court to reduce the offence to the original charge for breach of the peace.

On his part, Mr. Omwega for the State supported the conviction. He submitted that there was overwhelming evidence. The appellant pushed PW1 to the wall and removed a sword from his trousers. The appellant went to the kiosk, and demanded for money. The appeal should be dismissed.

In his short reply, Mr. Kipkoech for the appellant asked the court to reduce the charge under Section 179 of the Criminal Procedure Code.

Those were the respective counsel\'s arguments. The first point to note is that the offence of attempted robbery is established not by Section 297(2) but by Section 297(1) which says:

"297(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 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 used any other personal violence to any person, he shall be sentenced to death.

Section 77(8) of the repealed Constitution *(section 50(2) (1)) of the Constitution of Kenya 2010),* provides that - no person shall be convicted of a criminal offence unless that offence is defined and the penalty thereof is prescribed in a written law.

The appellant was charged with the offence of attempted robbery contrary to Section 297(2) of the Penal Code. Like its sister provision 296(2) of the Penal Code, there is no offence of attempted robbery with violence, established or defined by Section 297(2) or indeed any offence of robbery with violence established by Section 296(2). What Section 297(2) and 296(2) establish are the elements or ingredients which constitute grounds for enhancing punishment from either fourteen years *(under Section 296(1))* or seven years under Section 297(1).

Both Sections 297(2) and 296(2) of the Penal Code are punishment provisions very much like Section 203, of the offence of murder), and Section 204, *(punishment for murder).* We note that Item 8 of the Second Schedule to the Criminal Procedure has been suitably amended to refer to robbery with violence contrary to Section 296 of the Penal Code unlike in the past edition which referred to robbery with violence contrary to Section 296(2) of the Penal Code.

But again, we note in passing that Item I of Schedule 2 refers to murder contrary to Section 204 of the

Penal Code. This is wrong, this is the punishment provision. The offence is created by Section 203 of the Penal Code.

So back to this case - we note indeed the evidence is overwhelming. The appellant went to buy some bread from the kiosk, but he was on a survey. He went back armed with a sword hidden in his trousers and threatened PW1 and commanded PW1 ***"to give out everything"*** meaning no doubt all the day\'s collections. If PW1 had not screamed, he might have injured her as well as PW2.

There is however no offence under Section 297(2) of the Penal Code. To charge the appellant under that provision was a breach of Section 77(8) of the repealed Constitution, and was unconstitutional.

For those reasons, we quash the conviction, set aside the sentence but we will not set the Appellant free. We direct that the appellant be charged under the correct provisions of the law.

It was held in the case of **MWANGI vs. REPUBLIC [1983] KLR 522**, a retrial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible or potentially admissible evidence, a conviction might result. We think that there is admissible and potentially admissible evidence which might result in a conviction.

The appellant was arraigned before the lower court on 23rd March 2010. He was convicted on 5th July 2010. He has served sentence for only 9 months. In the circumstances we find that there will be no unreasonable delay in ordering a retrial.

We therefore order this case for retrial before another Magistrate, and direct that there be a mention before the Chief Magistrate Nakuru on 15th March, 2011 for appropriate orders.

There shall be orders accordingly.

Dated, delivered and signed in Nakuru this 11th day of March 2011

R. P. V. WENDOH

JUDGE

M. J. ANYARA EMUKULE

JUDGE