



REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL NO.5 OF 2010

(Appeal arising from Original SRM's at Kimilili case no.938 of 2009)

RAPHAEL KWEMOI JOHN.....APPELLANT

~VRS~

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant Raphael Kwemoi John was convicted by Senior Resident Magistrate Kimilili of the offence of robbery with violence contrary to section 296 (2) and sentenced to death. He appealed against both conviction and sentence.

In his grounds of appeal, the Appellant claims that he was convicted on uncorroborated and contradictory evidence. It was further stated that the defence of the Appellant was not considered and that the sentence imposed was excessive in the circumstances.

The state conceded to the appeal. Mrs. Leting submitted that at no time during the incident did the complainant see his attackers. The accused was arrested in a maize plantation armed with a knife and there was no evidence to connect him with the offence.

PW1's evidence was that he was inside his house on 24/06/2009 around 8.00 p.m when he noticed someone pushing the door from outside. He armed himself with a panga and a spotlight. The witness opened the door and saw someone with a spotlight at a distance and another one behind the door. PW1 closed the door quickly and returned to the house. The witness alerted his neighbours who came to his home. The neighbours were briefed of what had happened. They went searching for the suspects. The Appellant was found hiding in a maize plantation. The witness says in conclusion:

“ I did not recognize the person who pushed the door ..”. PW2 and PW3 went to the scene after the incident. They hunted for the suspects and arrested the Appellant in a maize plantation.

In his judgment, the magistrate did not deal with the issue of identification. A conclusion was made by the court:

“The accused having gone to the home of the complainant armed with a knife had not gone there for peace or peaceful purpose but to rob the complainant.”

The distance from the house of the complainant and the place of arrest was not given. The word ***“nearby”*** maize plantation is vague and does not help the court to determine whether the Appellant was one of the people who went to the complainant's compound. Even assuming that the Appellant was arrested with a knife near the complainant's house, he ought to have been charged with another offence but not attempted robbery. In an offence of attempted robbery, the overt act must be proved, that is, the

act of trying to rob the complainant. There was no evidence to prove any overt act in this case. The complainant and the men outside his house never came into contact and the suspects never entered the house. There was no violence used on PW1. How then can it be said that there was attempted robbery with violence? The complainant did not identify his assailants.

In the absence of identification and without an overt act, the offence of attempted robbery with violence cannot be proved. It is our finding that the magistrate was wrong in convicting the Appellant with the offence while there was no evidence to sustain a conviction.

We therefore allow the appeal. The conviction is hereby set aside and sentence quashed. The Appellant is hereby set at liberty unless otherwise lawfully held.

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D. A. ONYANCHA
JUDGE

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F. N. MUCHEMI
JUDGE

Judgment dated and delivered on the 18th day of May 2011 in the presence of the appellant in the open court and Mr Ogoti state counsel .

F. N. MUCHEMI
JUDGE