



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

CRIMINAL APPEAL CASE NO.177 OF 2008

JOHN KAMAU TIMOTHY
NJUGUNA.....APPELLANT

VS

REPUBLIC.....RESPONDENT

(Arising from the Judgment of Senior Resident Magistrate Kangema, Vide Kangema S.R.M.'S Criminal Case. No. 96 'B' Of 2000)

JUDGMENT

John Kamau Timothy Njuguna, the Appellant herein, was tried on a charge of attempted robbery with violence contrary to section 297(2) of the Penal Code At the conclusion of the trial he was convicted for the offence of attempted robbery contrary to section 297(1) of the Penal Code and sentenced to serve ten (10) years imprisonment. He was dissatisfied hence this appeal.

On appeal, the appellant put forward the following grounds in his petition of appeal:

- 1. That the imposed sentence of 10 years imprisonment is harsh and excessive when it observed that the complainant's evidence lacked consistency on whether she was cut or not.***
- 2. That the imposed sentence of 10 years imprisonment is harsh and excessive since the prosecution's case is flawed with doubts and none was resolved on the part of the appellant.***
- 3. That the imposed sentence of 10 years imprisonment is harsh and excessive when its considered that intention wasn't adequately established.***
- 4. That the imposed sentence is harsh and excessive could this honourable court do again and reasonably consider my mitigation.***

A critical look at the grounds of appeal will reveal that the Appellant does not contest the conviction but has limited his attack on the sentence. Basically, the Appellant's complaint is that the sentence is harsh and excessive. Before delving deeper into the merits or otherwise of the appeal, let me state in brief the case that was before the trial court. The appellant was initially charged with the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code. Before the trial commenced, the court prosecutor successfully applied to have the charge substituted with that of attempted robbery with violence contrary to section 297(2) of the Penal Code. Six witnesses testified in support of the prosecution's case Benedita Nduta Gichure (P.W.1), the complainant in this appeal told the trial court that on 16th May 2007 at about 6.00 p.m. she arrived at Kanyenyaini from Nairobi, where she boarded the same matatu with the Appellant. She said the Appellant works in a farm adjacent to her house. In the same matatu was one Simon Gathungo (P.W.2). It is said the Appellant alighted before P.W.1. P.W.2 is said to have left after escorting P.W.1 to her gate. P.W.1 said she met the Appellant outside her house when she entered her gate. It was at 8.00 p.m. P.W.1 claimed the Appellant was armed with a panga. The Appellant is said to have threatened to kill P.W.1 unless she gave him some money and her mobile. The Appellant is alleged to have cut the complainant on the head. P.W.1 screamed and a struggle ensued. P.W.2 responded to P.W.1 distress call, went to scene where he found P.W.1 holding the Appellant. P.W.2 rescued P.W.1 by disarming and arresting the Appellant. The Appellant was taken to the area chief while P.W.1 was taken for treatment where she was issued with a P3 form. P.W.2 corroborated the evidence of P.W.1. P.W.2 said he arrested the Appellant, took him to the area chief. He was locked in the house of a Mr. Kimani but he escaped at night. He was later re-arrested at his employer's homestead. Paul Mwangi Gathogo (P.W.3) said he examined P.W.1 and found that she sustained injuries inflicted by a sharp object. P.W.3 classified the injury as harm. When the Appellant was placed on his defence, he gave an unsworn statement in which he denied committing the offence. He claimed that on 16th May 2007 he went to Kanyenyaini town where he boarded a matatu to meet his employer. He found him asleep hence he went to check for a place to spend the night. On the way, the Appellant claimed he met the complainant. He alleged that the complainant (P.W.1) grabbed him and a struggle ensued. The Appellant further alleged that the complainant screamed and members of public came and arrested him. It is apparent from the evidence tendered by both sides that the Appellant was placed at the scene of crime. The evidence further shows that the Appellant actually assaulted the complainant using a panga.

Having set out the case that was before the trial court, let me now consider the appeal. I have already stated that the appeal is only against sentence. The Appellant is of the view that the sentence of ten (10) years imprisonment is harsh and excessive. Mr. Makura, learned Senior State Counsel pointed out that the maximum sentence under s. 297(1) of the Penal Code is 7 years imprisonment. He conceded the appeal on the basis that the same was unlawful. I have perused the provisions of s. 297(1) of the Penal Code and it is clear that the maximum sentence prescribed therein is seven (7) years. The Appellant was sentenced to 10 years imprisonment. The sentence was therefore unlawful hence the same should be interfered with. The Appellant is a first offender hence such offenders should be treated with leniency. I think the appropriate sentence should be four (4) years imprisonment. In the end I allow the appeal as against sentence by setting aside the sentence of 10 years and substitute the same with a sentence of four (4) years imprisonment. The sentence to run from the date of sentence i.e. from 9th June 2008.

Dated and delivered this 8th day of July 2011.

J.K. SERGON

JUDGE

In open court in the presence of Miss Ngalyuka learned Senior State Counsel and the appellant in person.

J.K. SERGON

JUDGE