



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 312 of 2008

TUMBENI OLE MOITALI.....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**, and was on the evidence convicted and sentenced to death. He has appealed to this court on three grounds, **firstly**, conviction on the identification of one witness, without corroboration was unsafe, **secondly**, that his defence was not taken into account; and **thirdly**, that the judgment did not comply with the requirements of **Section 169(1) of the Criminal Procedure Code, (Cap. 75, Laws of Kenya)**. These grounds were amended by the Amended Petition of Appeal which was handed over to us at the hearing of the appeal on 27th January 2010.

The Appellant relied on elaborate written submission in support thereof. The basic issue raised is really just one, whether the Appellant was identified by the complainant. To be able to answer that question, we advert to both the evidence of the prosecution witness as well as the Appellant's unsworn statement. It is true as the Appellant contends, the only evidence of identification is that of the complainant. **PW1, (Naanyu Ene Lesinka)**.

Her testimony is clear. The time was about mid-day. She lives in Langata, Nairobi. She sells motor bike parts but like most Nairobians, she has a rural home, Nairagie Enkare, a place also called **20 Acres Area**. Her rural home does not have an internal bathroom. The bathroom is outside, a distance from the main house. It was time to take a bath. She wrapped herself in a towel (*leso*), and carried water in a basin to her bathroom. Even before she reached her bathroom, a person, who later turned out to be the Appellant, emerged from behind her store and approached her. She pushed her to the ground and she fell, and exposed her nakedness. The person was carrying something which resembled a gun, and a club. He was pointing the "*gun*" at her and demanding money, while all the time kicking her until her right leg got swollen, and she developed nose bleeding, and a headache. Despite her pleading to the person to stop beating her, he continued doing so until her brother's wives heard her screaming and the children nearby started screaming. The person got scared and ran away. He was however pursued and caught by neighbours who marched him to the Nairagie Enkare Police Station where he was arrested and

the "gun" recovered from him.

PW1 testified that the incident took about 15 minutes. She had observed the person's facial features, it was broad daylight. She had seen the "gun" which she found at the station to be a children's toy gun greenish in colour. That person is the Appellant. She saw him two hours after the incident. PW1 went to the local clinic to attend to her wounds. The Appellant did not take anything from her. She had no money as she was heading to the bathroom.

PW2 a Clinical Officer testified that PW1 suffered multiple lacerations on the lower limbs and around the head. The clothes were blood-stained but dry. He assessed the degree of injury as harm.

PW3, the husband of PW1, testified that the Appellant stole nothing from PW1. PW4, the investigating officer corroborated the evidence of PW1 - the Appellant was arrested armed with a pistol, after a chase by members of the public. He produced the Ballistic Experts Report confirming that the "gun" was indeed a toy pistol.

When put on his defence, the Appellant in effect denied committing the offence. Instead he narrated how he was arrested at Nairagie Enkare when he alighted at Junction - while on his way to Narok. He refused to bribe the arresting officer, hence the charges against him. The Appellant denied the evidence of the prosecution in particular that of PW1. The Appellant's defence was essentially evasive as the learned trial magistrate found. He however himself suggested in cross-examination of PW1 that he had bought the toy gun at Nairagie Enkare. This led the trial magistrate to say - "*Liars need have goon memory.*"

The issue to us however is not merely whether the Appellant was recognized (*for he was so recognized by PW1, a single-witness*) but whether the Appellant committed the offence of attempted robbery. 'Attempt' is defined in **Section 388** of the **Penal Code** as follows:

388(1) "*When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is deemed to commit the offence.*"

(2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfillment of his intention is prevented by circumstances, independent of his will, or whether he desists of his own motion from the further prosecution of his intention.

(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence."

In **MWANDIKWA s/o MUTISYA v. R.** [1959] E. A. 18, Sir. Ronald Sinclair CJ and Rudd J) said at p. 19-

"Every part of this definition can be supported by decisions under the common law, but the second

paragraph (388(2) of this definition makes it clear that as a general rule the true test is not whether there was any further act on the part of the prisoner remaining to be done before the completion of the crime which was intended to be committed."

This was the test applied in the English case of **R. vs. Eagleton(1) (1855)**, Dears C.C. 515 and **R. vs. Robinson (2)**, [1915] 2 K.B. 342. According to the decision of Mwandikwa vs. R the true general principle can be gathered from the judgment delivered by Tucker in **R. vs. HOXHAM (4)**, 29 Cr. Appl. 37 where the court said -

"In Robinson (supra) the Lord Chief Justice (Lord Reading) quotes the well known statement by Baron Park in Eagleton, which is as follows: "The mere intention to commit a misdemeanor is not criminal. Some act is required, and we do not think all the acts towards committing a misdemeanor are indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are"

It is common ground that in many cases the difficulty arises in the application of that principle to the particular facts, and it is very often very difficult to distinguish between acts which are merely remotely leading towards the commission of an offence and those which are to be considered as attempts to commit it, being acts immediately connected with it... The very essence of the offence of larceny is the asportation and if the Appellant had done anything which could amount to take and carry away the refrigerator, he would of course have been guilty of the offence with which he was charged. But the fact he took no step whatever, connected either immediately or remotely with taking or carrying away this refrigerator."

The authors of **Archbold (Criminal Pleading Evidence and Practice) 14th Edn. Pg. 1534, para. 4104**, have submitted that the test adopted by Parke B cannot be regarded as entirely satisfactory and that the definition goes further than, according to modern authorities, appears to be necessary, and then say -

"It is submitted that the actus reus necessary to constitute an attempt is complete if the prisoner does an act which is a step towards the commission of the specific crime, which is immediately and not merely remotely connected with the commission of it, and the doing of which cannot reasonably be regarded as having any other purpose than the commission of the specific crime."

In the case of **R. vs. Hoxham** the offence alleged was an attempt to steal a refrigerator, all that was proved was that the prisoner agreed to sell a refrigerator that was not his and had received a cheque for the agreed amount but he made no attempt to take and carry away the refrigerator and there was nothing to show that he intended to carry the bargain which he had made.

In **R vs. Roberts (1855) Dears C.C. 539** (cited in **Mwandikwa vs. R- supra**), Wightman J said -

"Every case must be taken with its own particular circumstances."

In this case, PW1 testified that the Appellant was pointing a "gun" and demanded "money", and again "Accused did not take anything from me.

"I had no money as I was heading to my bathroom. In the house I had 10,000/= which I intended to give to my mother. My mother had sold 10 heads of cattle a week ago in the market."

What is the *actus reus* the overt act, which the Appellant committed towards the fulfillment of his intention to steal? The evidence is that he demanded money, he was told by PW1 that she had no money as she was heading towards the bathroom. There is no evidence that the Appellant knew there was Kshs 10,000/= in the house, or that the said sum were proceeds from the sale of goats in the market in the previous week. If the Appellant had said take me to the house - and PW1 complied, and the Appellant were then prevented from fulfilling his intention, the *actus reus* would have been present and complete. The Appellant would have committed the offence of attempted robbery contrary to Section 297(1) of the Penal Code. In the circumstances of this case however, the *actus reus* for the offence was not present.

However because it is immaterial both under Section 388(2) and (3) of the Penal Code whether the offender does all that is necessary on his part for completing the commission, or whether the complete fulfillment of his intention is prevented by circumstances independent of his will, or whether he insists of his own motion further prosecution of his intention, or by reason of circumstances known to the offender it is impossible to commit the offence, the Appellant had by pushing the complainant (PW1) to the ground, or whether she fell on ground to cover her nakedness (*she testified in cross-examination by the Appellant - "I only fell because you found me naked*), the Appellant had manifested his intention of stealing money or (*that is what he demanded*) but did not fulfill it to such an extent as to commit the offence (*under Section 297(2) of the Penal Code*) the law (Section 388(2) deem him to have attempted to commit the offence.

Section 389 of the **Penal Code** sets out the punishment for attempting to commit a felony or a misdemeanor and provides -

S. 389 - "Any person who attempts to commit a felony or a misdemeanor is guilty of an offence and is liable, if no other punishment is provided, to one-half of such punishment as may be provided for the offence attempted, but so that if the offence is one punishable by death or life imprisonment he shall not be liable to imprisonment for a term exceeding seven years, and may suffer corporal punishment if such is provided for as a mandatory or discretionary punishment for the offence attempted."

In this case the offence attempted was robbery with violence contrary to Section 297(2) of the Penal Code which is punishable by death. This offence was not proved to the required standard under that Section. There was however an attempt to commit the offence. Attempts to commit offences is punishable by imprisonment of seven years, with corporal punishment.

Corporal punishment has been abolished in our statutes. Section 297(2) does not provide for such punishment. In the event, we find and hold the Appellant guilty of attempt to commit a felony, robbery. The punishment for such attempt is a term of imprisonment not exceeding seven (7) years. In accordance with the discretion vested in this court by Section 354(3)(ii) of the Criminal Procedure Code, we quash the sentence of death imposed on the Appellant by the lower court and substitute therefore a term of imprisonment of seven years.

There shall be orders accordingly.

Dated delivered and signed at Nakuru this 12th day of March 2010

D. K. MARAGA

JUDGE

M. J. ANYARA EMUKULE

JUDGE