REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO. 244 OF 2009

MICHAEL AYIEKO OMBUYA……APPELLANT

-VERSUS-

REPUBLIC……RESPONDENT

JUDGMENT

(From original conviction and sentence by the Senior Resident Magistrate's court at Homabay criminal case no.1070 of 2009 by C.A.S.Mutai (SRM)

The Appellant, **Michael Ayieko Ombuya** alias **Agwen** was charged before the Senior Resident magistrate's court at Homabay with the offence of Robbery with violence contrary to section 296(2) of the **Penal Code**. Particulars given were that the appellant on the 13th December, 2008 at Ogeng market of Ndhiwa District within Nyanza province jointly with another not before court while armed with dangerous or offensive weapons namely pangas and metal rods robbed **Godfrey Okinyi Nyongindi** Kshs. 1,350/=. The appellant was also charged with 2nd count of being in possession of Narcotic Drugs contrary to section 3(1) as read with section 2(a) of the **Narcotic** & **Psychotropic Substances Control Act .** The particulars being that on 9th April, 2009 along Sori- Rodi Kopanyi road of Ndhiwa District within Nyanza province, he was found in possession of Narcotic drugs (cannabis stativa) to wit two brooms. The appellant pleaded guilty to the 2nd count and he was convicted on his plea of guilty. He was thereafter sentenced to one year imprisonment. He however entered a plea of not guilty on the first count and he was tried.

The prosecution case was that on the 13th December, 2008 at about 6.00 p.m, the complainant, **Godfrey Okinyi Nyongindi** (PW1) was in his shop at Ogeng market when the appellant came and abused him between 6.00 p.m to 8.00p.m whilst armed with an iron bar and a panga. At about 8.00 p.m the appellant entered the shop and asked the complainant for cigarettes. The complainant was carrying in his hands Kshs. 1,350/= being the change for a customer. The appellant then forcefully snatched it from him and raised the panga threatening to cut him with it, if he dared to follow him over the money. When **Joel Onyango Angoro** (PWII)and **Jacob Obado Ochieng** (PWIV) intervened, the appellant fled from the scene. The complainant later made a report at the Ndhiwa police station. The report was received by P.C. **Titus Kimori** (PW V) who commenced investigations in the case. The complainant knew the appellant very well as they hailed from the same village. In the meantime the appellant disappeared from the scene until 9th April, 2009 when he was arrested by APC **Artum Ochieng** (PWIII). He was then charged with the offence.

Put on his defence, the appellant elected to give a sworn statement of defence and called no witnesses. He

stated that on 13th December, 2008 he was at home and never met the complainant. On the 8th April, 2009 he went to Rodi where he used to purchase bhang and after buying the same he was arrested by the Administration police. He was then taken to the Administration police camp and later charged with the offences .

Having carefully considered the evidence on record for both the prosecution and defence, the trial court was satisfied that the offence disclosed on the evidence on record was one of Attempted robbery with violence contrary to section 297(2) of the **Penal Code** as opposed to the initial charge. We are at loss on the facts and evidence of the case how the trial court would have convicted the appellant for the offence of Attempted robbery with violence. We do not see how the appellant could have been convicted for the said offence when the act he was involved in was complete as opposed to a mere attempt. If the trial court was satisfied that the appellant in the commission of the offence was armed with dangerous or offensive weapon, or was in the company of others, or visited violence on any person and that he stole Kshs. 1,350/- as was the case, then the offence committed was robbery with violence and not attempted robbery with violence. The trial court seemed to have proceeded on the basis that whilst stealing the Kshs. 1,350/= from the complainant, the appellant was armed with dangerous or offensive weapons namely pangas and metal. The trial court was also persuaded that whilst so armed he robbed the complainant Kshs. 1350/=. Accordingly, the ingredients of the offence of robbery with violence were met. In our view therefore, the learned magistrate erred in purporting to reduce the charge to one of attempted robbery with violence.

Upon conviction of the appellant for the offence of attempted robbery with violence, the appellant was sentenced to death as required by the law. He was aggrieved by the conviction and sentence, hence this appeal.

In his home drawn Petition of appeal, the appellant faulted the learned magistrate for his conviction and sentence on the grounds that the case was a frame up, the exhibits were recovered illegally and finally, the trial court acted unprocedurally in reducing the charge.

When the appeal came before us for hearing on 19th January, 2011, **Mr. Mutuku,** learned Senior Principal state counsel conceded to the same on the grounds that the evidence tendered was not sufficient for capital or attempted capital robbery charge. Instead the court should have convicted him for simple theft. The appellant had nothing to say in response.

Inspite of the concession made by **Mr. Mutuku**, this court, being the first appellate court, is under an obligation to reconsider the evidence that was adduced before the trial court as a whole, evaluate the same and reach its own conclusion, see **Okeno .v. Republic (1972) E.A.32**

The evidence of the complainant was that on 13th December, 2008 during day time he was in his shop selling groceries when the appellant confronted him and hauled abuses at him. This went on for a long time. Infact it was between 6 to 8.p.m. The appellant then left briefly and came back when the complainant was about to close the shop. This time around he was armed with a panga and stick. He entered the shop as the complainant was about to give change of Kshs. 1,350/= to a customer and snatched it. The incident was not witnessed by anybody inside the shop. PW2 and PW4 however saw the appellant come out of the shop. Indeed according to PW3, the appellant appeared drunk. The appellant had entered the shop and when he saw him next, he was running away. It was then that the complainant told them what the appellant had done to him.

After evaluating the evidence, the learned magistrate acquitted the appellant of the capital robbery charge but convicted him of attempted robbery with violence. Following the acquittal on the charge of robbery with violence we cannot see how the conviction of attempted robbery with violence can be sustained. There was nothing that the appellant attempted to do to advance the robbery but was foiled. There was nothing that the appellant did to advance the crime that was nibbed in the bud. There was no attempt at violence against the complainant. The appellant did not attempt to get the money and or any other item(s) from the complainant and was unable to, thereby making it a mere attempt. If anything the appellant successfully snatched Kshs. 1,350/= and ran away. That cannot be an attempt. An

offence had been successfully executed. However, that cannot be robbery with violence or even attempted robbery with violence.

The customer in the shop was not called as a witness. So that at the end of the day it was the word of the complainant as against the appellant. It is therefore difficult to tell whether indeed even the amount alleged to have been stolen was actually stolen by the appellant. What was so difficult in availing the customer whose change the appellant allegedly snatched. The evidence on record shows that there was a Civil case number 34 of 2007 in which the appellant had testified against the complainant. The possibility of a grudge between the complainant and appellant arising out of that case cannot be wholly ruled out. In the absence of the evidence of customer in the shop, the possibility of the case being a frame up as a result is much more real.

The upshot of the foregoing is that **Mr. Mutuku** was right in conceding to the appeal. Accordingly, the appeal is allowed, the conviction quashed and sentence imposed set aside. The appellant should be set at liberty forthwith unless otherwise lawfully held.

Judgment dated, **signed** and **delivered** at Kisii this 7th March, 2010.

ASIKE-MAKHANDIA
JUDGE

RUTH NEKOYE SITATI
JUDGE