REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL NO. 301 OF 2009

(From original conviction and sentence in criminal case No. 778 of 2009 of the Principal Magistrate's Court at Nyahururu dated 8th October, 2009)

FRANCIS MBURU NJUGUNA…….....……
APPELLANT
VERSUS

REPUBLIC…….....…….....
…….RESPONDENT

JUDGMENT

The Appellant, Francis Mburu Njuguna 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, convicted and sentenced to the mandatory sentence of death prescribed by the law. Aggrieved with both his conviction and sentence, the Appellant has appealed to this court on five (5) grounds namely -

(1) That the trial magistrate erred and misdirected himself in holding that the Appellant attempted to rob the complainant.

(2) That the trial Magistrate erred in convicting the Appellant on the uncorroborated sole evidence of the complainant.

(3) That the trial Magistrate erred and convicted the Appellant on a defective charge sheet.

(4) That the conviction was against the weight of evidence.

(5) That the trial Magistrate failed to consider the evidence of the Appellant that he was the actual victim.

Both Mr. Kamanga learned counsel for the Appellant who appeared for the Appellant and Mr. Omutelema, Senior Principal State Counsel shared the view that there was no evidence to sustain the Appellant's conviction and sentence.

For the Appellant, Mr. Kamanga submitted that the evidence of PW1 *(the complainant)* was contradictory. In his evidence in chief, PW1 testified that he was accosted by one person.

In cross-examination by the Appellant, PW1 testified that the Appellant's two companions ran away when he screamed after being hit by the Appellant. Counsel submitted that besides the complainant, there was no eye-witness to the attack, and that the prosecution failed to call any member of the public who assisted in the arrest of the Appellant. PW2, the PW1's son, came later and that there was no evidence the Appellant was armed.

Counsel further submitted that there was variance between the evidence and the particulars of the charge. Whereas the charge provided that (the appellant and others not before the court were armed with

pangas *(machetes),* PW1 testified that he was hit with an 'iron bar'. In any event no evidence was led to the recovery of the panga, and it was unclear where it was recovered from. Counsel also submitted that there was no positive identification of the Appellant.

Counsel for the Appellant also submitted that the charge was defective. It did not include the vital ingredients that the Appellant and his accomplices were armed with dangerous or offensive weapons, and finally that the trial court did not consider the defence evidence.

On his part, Senior Principal State Counsel Mr. Omutelema, conceded to the appeal. His reasons were that the evidence tendered by the prosecution witnesses was at variance with the particulars of the charge. He agreed with the submission by counsel for the Appellant that whereas the charge referred to attack by more than one person, PW1's evidence was that he was attacked by the Appellant only.

Counsel also agreed with the submission by counsel for the Appellant that none of the arresting public was called to testify and further that the evidence of the panga found at the scene was not clarified, while PW1 said that he was hit with an iron bar.

It is both the statutory as well as the command of precedent that we, as the first appellate court, must examine and re-evaluate the evidence before the lower court not merely to establish whether it was adequate to convict or otherwise, an appellant, but rather in order to arrive at our own independent findings and therefore conclusions.

In this regard, the first place to commence our evaluation is the charge sheet. Did it reveal the offence of attempted robbery with violence contrary to Section 297(2) of the Penal Code? To answer that question we set out section 297(1) & (2) of the Penal Code.

"S. 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 to 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 uses any other personal violence to any person, he shall be sentenced to death."

For a charge of attempted robbery with violence contrary to Section 297(2) to stand the essential ingredients in that offence must not only be included in the charge sheet but must also be proved. Those ingredients are-

"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 uses any other personal violence to any person."

The charge sheet refers to ***"the appellant and others not before the court, armed with pangas."*** Although the charge sheet merely refers to a **"panga",** and does not used the words **"dangerous weapon",** a panga is both a tool, for peaceful use, cutting wood, trees, grass etc, it can also be used an offensive weapon, to cut and cause injury to an opponent, or merely a victim. The omission of he words **"dangerous or offensive"** weapon does not make the **"panga"** any less dangerous or offensive when employed as an offensive weapon. The omission of those words does not *per se* make the charge defective.

The evidence of PW1 was that he was hit by an **"iron bar"** not **"cut"** by a panga. However PWIV, Cecilia Wanjiku, a Clinical Officer who treated him testified that ***"upon examination he had a hit wound on the left side of the scalp… and the probable weapon used was a sharp object"*** and that the degree of injury was **"harm".**

When an assailant confronts you, and you are an old man of 70 years, and you are hesitant in your response and you are suddenly hit on the back or side of your scalp, with some metal object, does it alter the injury you have suffered if you testify that in court that you were hit with some metal object such an iron bar, or **"a panga?".** A **"panga"** too is both a metal object, and a flat iron bar. From examination of the resultant wound only an expert in the description of wounds/or injuries inflicted would be able to say with a degree of accuracy, the type of object which caused the injury. In this case, PWIV, the Clinical Officer opined that a sharp object was the probable cause of the cut on the left side scalp.

We do not therefore think the lack of description of the **"panga"** as a dangerous weapon caused

the Appellant any prejudice. We reject the submission that the charge sheet was defective.

The next and final question is whether there was evidence to convict the Appellant with the offence of attempted robbery with violence.

Both the Appellant's and State Counsel submitted there was no evidence of an eye-witness. We are somewhat surprised by this submission.

The old Edition of Archbold on Criminal Law and Evidence made reference to situations- *"where a person is found stabbed to death in a house, and the only person charged with the murder of that person is the person who was seen emerging out of the house holding a bloodied sword."*

In this case, the Appellant attacked PW1, his victim who immediately screams at the top of his vocals. These screams attract attention. A crowd gathers, the Appellant is in turn attacked and is subjected to what is referred to as **"instant or mob justice".** In a few minutes he is reduced to a position where he is unable to talk or help himself, according to the evidence of both PW1, PW2 and PW4, Corporal Omar - **"…. You were not in a shape to talk .."**

Can we say there was no eye witness to the attack on PW1 when the Appellant is lying at the scene together with his victim? It is the evidence of a single witness. Section 143 of the Evidence Act *(Cap. 80, Laws of Kenya)* provides that no number of witnesses is required to prove a fact.

In the often quoted case of **ABDALLA BIN WENDO vs. REPUBLIC [1953] 20 EACA 166 at p. 168,** the court said -

"Subject to certain exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen need for testing with the greatest care, the evidence respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification although based on testimony of a single witness, can safely be accepted as free from the possibility of error."

In this case, PW2 and PW4 found both PW1 and the Appellant at the scene of the attack. Both are bleeding, PW1 from a cut inflicted by no other than the Appellant, and the Appellant from injuries inflicted by the rescuers of PW1.

The Appellant, both in cross examination of PW1 and PW2, suggested that they had a grudge against him, but this was clearly denied by both witnesses. In any event there was no evidence that it was PW2 who inflicted a beating upon the Appellant but members of the public, who fearing prosecution on their own part usually melt away once the Police arrive at the scene.

The fact that no one of such crowds comes forward does not defeat the evidence of PW1, PW2 or PW4.

Although PW1 suffered a cut to his scalp, and says it was occasioned by an iron bar, there is no doubt in our mind that there was attempted robbery by the Appellant upon PW1. PW1 only states that it was the Appellant whom he met, and only referred to two others in cross-examination and that those two ran away. That indeed was a contradiction. This does not however take away one vital ingredient for the offence of attempted robbery, the use of violence upon the victim, PW1 at and immediately before the assault. The offence of attempted robbery with violence is thus reduced to one merely of attempted robbery.

In our view therefore, there is evidence to find the Appellant guilty of the offence of attempted robbery merely, and not attempted robbery with violence.

We therefore quash the conviction of the Appellant with the offence of attempted robbery with violence, set aside the sentence of death imposed upon the Appellant. In lieu thereof, and in exercise of the discretion vested in this court by Section 179(1) of the Criminal Procedure Code, we find the Appellant guilty of the offence of attempted robbery contrary to Section 297(1) of the Penal Code, and sentence the Appellant to seven years imprisonment to run from the date of judgment in the lower court.

There shall be orders accordingly.

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

M. J. ANYARA EMUKULE
JUDGE

W. OUKO

JUDGE