REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 303 of 2006 & 312 of 2006

OMAR OTIENO KASHALA .....……..…..... 1ST APPELLANT

GEORGE OUMA OBENI ..... 2ND APPELLANT

- AND -

REPUBLIC …….....……..……RESPONDENT

(An appeal from the judgment of Senior Resident Magistrate Ms. Karani dated 16th

June, 2006 in Criminal Case No. 9116 of 2004 at Makadara Law Courts)

JUDGEMENT

Omar Otieno Kashala and ***George Ouma Obeni,*** the appellants herein, were charged with attempted robbery with violence contrary to s. 297 (2) of the Penal Code (Cap. 63, Laws of Kenya). The particulars were that the two jointly and while armed with a dangerous weapon, namely a knife, on 12th April, 2004 attempted to rob ***Isaac Makanga Ndanu***, and at or immediately before or immediately after the time of such attempted robbery, threatened or used actual violence upon the said ***Isaac Makanga Ndanu.***

The prosecution case was that on the material date, at about *10.00 pm*, the complainant, who worked at Kayole, had gone out to buy milk and soda, when two men ordered him to stop and take out the contents of his pocket. At that very moment, fortunately, Police officers on patrol arrived, and the intruders fled; but they were found in their hide-out. PW1 testified that the appellants herein, who were the intruders, dropped the money they had grabbed, and ran away when they saw the Police. It was the complainant's testimony that there was electric lighting around, and he had been able to see the two attackers very well. The complainant testified, during cross-examination, that the 1st appellant herein had begun strangling him while 2nd appellant herein was busy searching him; and that he (the complainant) was still standing at the *locus in quo*, at the time the two assailants were arrested.

Police Constable Erastus Wambugu (PW2) whose evidence was corroborated by that of ***Police Constable Johnstone*** (PW3), testified that both PW2 and PW3 were on patrol between 10.00 am and 10.30 am, in the company of one ***Insp. Sichage***, along Spre Road in Kayole, when they saw three people who appeared to be involved in a commotion. When the Police Officers stopped their motor vehicle close by, two of the said three people started running away; and the remaining person (PW1) informed the Police officers that he was being *robbed*. These officers gave chase, and arrested the appellants herein, and when they conducted a search, they found on the appellants herein a pen-knife. As 1st appellant had hidden in the bush, it is 2nd appellant who was arrested first, followed by 1st appellant. The Police officers immediately took the appellants to the complainant where he stood, and the complainant identified them.

It was the position of all the prosecution witnesses that although the appellants had *attempted to rob* the complainant, they did not succeed in executing the robbery.

Police Constable Johnstone (PW3) stated on cross-examination that he had nothad any difference with 1st appellant, or that the arrest of the appellants had been made as an outcome of a vendetta.

PW3 further testified that throughout the chase of the appellants at the material time, he and his colleagues from the Police did not lose sight of the suspects; and that the area around the *locus in quo* was illuminated by lighting from a bar.

The appellants gave unsworn testimony ? and said they knew nothing of the attempted robbery in question. The 1st appellant said he was elsewhere at the material time, and then had come into conflict with PW3 over a social matter unrelated to attempted robbery.

The trial Magistrate was impressed with the demeamour of the prosecution witnesses, as showing candour; and she found their evidence "consistent and well corroborated". Of the whole prosecution case, the learned Magistrate remarked:

"I am satisfied that on the material night the complainant was accosted by two persons who attempted to rob him. I say this as the complainant especially was very earnest in his testimony. He was not known to the accused persons and, [in] my ... opinion, had absolutely no reason to fabricate the case against the accused persons. I note [that] in their defence the accused persons alleged that PW2 and PW3 had vendettas against them .... Yet none [of them] had an allegation of a vendetta between PW1 and them."

On the whole picture emerging from the evidence, the learned Magistrate thus held:

"... I am satisfied the prosecution put forth a formidable case which was not shaken in any [manner] whatsoever by the accused persons in their defence and submissions ....

"The accused resorted to mud-slinging and [tarnishing] the character of the prosecution witnesses who testified against them, and I simply find their defences [incredible]. Further and most importantly, the demeanour of the two accused persons did not impress me as [that of] truthful persons."

The trial Court found both accused guilty as charged; convicted them; treated them as first offenders; took their mitigation statements into account; but sentenced them to death, as provided by law.

In their identical petitions of appeal, the appellants contended that: they had not been properly identified as suspects; the prosecution evidence was of dubious character; the ingredients of the offence of attempted robbery had not been shown in the evidence; the defence case was rejected unjustifiably.

The appellants appeared before the Court with written submissions, and with attached "Amended ... Grounds of Appeal"; and in this attached document, they stated that the charges laid against them had not been adequately proved.

In the oral submissions, 1st appellant urged that contrary to the terms of the charge-sheet, there had been no proof that a knife was found in his possession when he was arrested. This appellant contended that the complainant had not been a truthful witness, because he had not specified the amount of his money which had been stolen at the *locus in quo*. He contended that it had not been proved there was enough light that illuminated him, during the night incident.

Learned counsel ***Mr. Makura*** did not contest the two appeals; on the basis that the evidence did not support a charge of attempted robbery. Since the complainant had testified that his money, Kshs.500/= was robbed from him by the appellants, a case of *attempted robbery* was not here being made; and the prosecution had not bothered to seek an amendment to the charge-sheet; consequently, the appellants "did not have a chance to prepare their defence properly; it prejudiced them in their defence".

Mr. Makura noted that the prosecution evidence had certain discrepancies which ought to have been resolved in favour of the appellants, but were not so resolved: according to both PW1 and PW2, what was recovered from the appellants after they were arrested was Kshs.100/=; but it had been alleged that a larger amount had been stolen; and in the judgment it was found that only an attempted robbery had taken place, and no actual theft. Secondly, the judgment suggests that the appellants should have established certain alibi claims by way of evidence; and learned counsel urged that this would have amounted to a shifting of the burden of proof towards the appellants, quite contrary to law.

We have carefully considered all the evidence, as well as the manner in which the trial Court assessed the same. It is clear to us that no positive evidence was laid before the Court regarding the allegedly *stolen*, money, for which the appellants were said to stand to blame. Yet such evidence was important, for it would indicate whether this was a case of *robbery with violence* (s. 296 (2) of the Penal Code) or a case of *attempted robbery with violence* (s. 297 (2)). So long as this point remained unclear, the charge as laid under s. 297 (2) of the Penal Code was, in our opinion, misdirected. A charge of such a nature deprives the accused person of the opportunity to prepare a suitable defence; and in this way it offends against trial rights provided for under s. 77 of the Constitution.

Singling out the foregoing point as the main defect in the prosecution case, we find that we must declare the conviction to have been *unsafe*, and it cannot be sustained. We set aside the conviction of both appellants, and quash the sentences of death which had been imposed by the trial Court. We allow the appeal, and direct that both appellants shall be set at liberty forthwith, unless they are otherwise lawfully held.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 10th day of February, 2009.

J. B. OJWANG G. A. DULU

JUDGE JUDGE

Coram: Ojwang & Dulu, JJ.

Court clerk: Huka & Erick

For the Respondent: Mr. Makura

Appellants in person