REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MALINDI

Criminal Appeal 110 of 2006

TIMOTHY MURITHI RARIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G E M E N T

Timothy Murithi Raria had been charged jointly with three others for the offence of attempted robbery with violence contrary to section 297(2) Penal Code particulars being that on 12th November 2005 at Nyati View Point Bar and Restaurant, Mtwapa Township in Kilifi District of the Coast province, jointly with others not before the court being armed with dangerous weapons namely pistol, pangas, and arrows attempted to rob Christine Mueni Musingila of money and at or immediately before or immediately after the time of such attempted robbery with violence, threatened to use actual violence against her.

Some of his co-accuseds absconded before trial was concluded while the 4th one was acquitted under section 215 Criminal Procedure Code. Appellant was convicted on the charge and sentenced to death.

Christine Mueni (PW1) works at Nyati View Hotel as a waiter and told the court that on 12-11-05 while on duty at 9.00pm she heard dogs barking followed by a gun shot. She ran to the counter and activated the alarm then lay down for ten minutes. She got out when the manager came and realized police had also come. Outside the bar, they found two bows and arrows. She stated:-

"***I did not see the thugs. There were customers who were seated there, they are police officers."***

PW2 Ephraim Mwai Ngatia, the manager of Nyati View Point Hotel told the court that they had had a fund raising function during the day which ended at 9.00pm. There were officers from Kijipwa police station during the harambee. As he was going to the bar from the office, he heard a gunshot and saw a person standing at the counter. Others came from behind, then police begun chasing them and some ran towards PW2.

PW2 stated:

"***I saw them with the aid of security lights from the bar and office. As they ran towards me, I ran into an office, others ran to the gate, with the officers firing at them…I was later called the next day and told that some suspects had been arrested. Since I saw, I could identify the one I saw… the first accused was the one near the kitchen, the 2nd accused was the one who ran towards me at the office and 4th was between the kitchen and the office…"***

Appellant was the 2nd accused in the trial court.

On cross examination PW2's response to appellant was this:

"***I saw you on the night of the attack from a distance of about 8 metres…you are the one who came towards me as the police were shooting. The person at the kitchen was ordering people down. He had a pistol…"***

Christopher Gumboa Duni (PW3) a chef at the hotel confirmed the incident but did not see anyone – he only heard people shout " *lala chini"* and sounds of gun shots.

PW4 Fredrick Tsuma, the watchman at the hotel similarly heard a voice ordering people to lie down and he too lay down. He heard gun shots and the alarm going off. Shortly he saw KK guards and police officers and the face a mask and arrows around the hotel but he did not look at the intruders.

PW5 Pc Richard Situma of Mtwapa Police Station had been assigned with PC Raisi to patrol Nyati Bar and went there at about 8.00pm. the manager ordered for sodas for them and after about 15 minutes, a group of about ten people stormed the hotel armed with pangas and arrows. They ordered everyone to lie down and threatened to shoot.

PW5 had a pistol and fired at them.

PW5 stated:

"***In the group I managed to recognise about 5 people, two by name as Murithi and Kaleo. The others were people I could identify by face as people I see in Mtwapa. A day later I arrested Murithi and Kaleo in a matatu. On searching Murithi, I found him with a toy pistol."***

On cross-examination by first accused, PW3 told the court that he had got a tip off that the bar would be raided that evening and further that:

"***I sat at the counter; the group entered through the footage. There was ample lights at the bar…when you ordered people to lie down or you shoot them, I knew you were thugs…"***

An identification parade was conducted by PW6 Chief Inspector Soi of Kijipwa Police Station, it is not clear whether appellant was identified but appellant refused to sign the parade form.

IP Owino, the Deputy OCS Mtwapa Police Station (PW8) confirmed he had received a request from the manager of Nyati Bar to provide security as there was a function there, so two plain clothes officers were assigned there with pistols. At 9.00pm a call came that the place had been attacked and the people at the bar said they knew some of the members of the group, by appearance.

Appellant gave unsworn testimony and explained that on 12-11-05 he was at his brothers place having travelled from Meru to attend to a different case. On 14-11-05 at Majengo, police intercepted a motor vehicle in which he was travelling and all the men were ordered to lie down and taken to the police station, police searched his home but made no recovery. After a few days, a parade was conducted and he was identified.

He told the court that PW5 and PW2 were not truthful and that he had been framed up by the police officers.

The learned trial magistrate noted in his judgment that PW1, PW3 and PW4 (who were at the scene) did not identify any of the attackers but PW5 saw and recognised appellant whom he mentioned by name in his recorded statement.

PW2 picked appellant at an identification parade and that appellant admitted this but pointed out that he

protested saying it was irregular as the witnesses were shown to them before the parade.

The court visited the scene of parade and noted that appellant's statements were without merit.

The learned trial magistrate was satisfied that appellant was positively identified as being one of the group that was at the bar, having been identified at the scene and at the identification parade.

Also that they were armed with crude offensive weapons among which arrows were recovered at the scene and produced in court. They were unable to steal anything.

The appellant was dissatisfied with this finding and appealed on the following amended grounds:

1. That the learned trial magistrate erred in law and fact by basing his conviction and sentence without considering that the charge sheet was incurably defective.

2. That the learned trial magistrate erred in law and fact by failing to consider the issue of first report which did not show his names or give a description.

3. That the learned trial magistrate failed to consider the circumstances prevailing at the scene were not conducive to positive identification as:

- The incident occurred at night

- The intensity of light was not disclosed

- It was sudden and terrifying

- The said robbers were armed with dangerous weapons which obviously caused fear to the victims

- That force standing orders concerning conduct of identification parade were not adhered to.

- There was contradiction in the prosecution case making it unsafe to rely on.

- He was kept in custody for 15 days thus violating his constitutional rights as provided under section 72 (3) (b) of the constitution.

- The learned trial magistrate failed to consider his defence and thus give him the benefit of doubt.

At the hearing of the appeal the appellant was represented by Mr. Magolo who submitted that the charge was defective as he was charged under section 297(2) Penal Code which refers only to the punishment whereas the offence is created by section 297(1) Penal Code and in so failing then the charge does not properly create an offence.

Mr. Ogoti for the State opposes the appeal and in response states that the charge is not defective as section 297(2) provides for the punishment where the attackers are armed with dangerous or offensive weapons. In any event he says if there is any irregularity on the charge as drawn it is curable under section 382 Criminal procedure Code.

Section 297(2) Penal Code Reads:

"***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 assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."***

Admittedly, Section 297(2) is the penalty section and that 297(1) creates the offence of attempted robbery

YET limited to a very definite situation not covered by section 297(2). So that ideally, it would be preferable to cite both sections, yet our my minds, there is no prejudice caused because the charge sheet was very specific as to the nature of the offence and so were the particulars. Our view is that indeed prosecution finds refuge in the provisions of section 382 Criminal Procedure Code which is to the effect that:

"***Subject to the provisions hereinbefore contained, no finding, sentence, or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on consent of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice."***

Really our view is that appellant suffered no prejudice and that the charge sheet referred to an existing offence which is recognised in the statutes and a mere citing of the punishment section alone does not warrant interfering with the trial court's findings and so that limb of the appeal holds no water.

Mr. Magolo also points out that the time the offence is alleged to have occurred was not specified in the charge sheet, and that left a span of 24 hours to fetch from and this deprived the appellant of opportunity to prepare his defence and he had to wait until hearing of the case to know the time Mr. Magolo submits that this is prejudicial to the defence especially because on that day appellant was at his brother's place in Meru and so he could have had a reasonable alibi and therefore the conviction was unsafe.

Mr. Ogoti made no comments on this issue. We confirm that the charge sheet makes no reference as to the time that the offence took place.

Rec. 137 Criminal Procedure Code provides the rules for framing of charges and information 137(a) (iii) states thus:-

"after the statement of the offence, the particulars shall be set out in ordinary language…nothing in this paragraph shall require more particulars to be given than those so required"

137(IV) f – gives the genera rule on description:

"…***shall be sufficient to describe a place, time, thing, ….in ordinary language so as to indicate with reasonable clearness the place, time, thing…."***

Is this a fatal omission warranting quashing of the conviction? Did the appellant suffer such prejudice by dint of this omission that the remedy lies only in an acquittal?

Our considered view is this:

Every case must be considered on its own merit and to use the omission of time alone to secure an acquittal we think this must be weighed in the context of evidence available and whether it caused any prejudice to the appellant. Our view is that there was no prejudice caused and appellant was able to prepare his defence adequately.

Mr. Magolo also takes up issue with the aspect of identification saying there was no attempt to demonstrate the nature and intensity of the lighting system at the scene, or how the appellant was placed with regard to the identifying witness P. C. Tsuma and that despite PW5 claiming that he saw and recognised appellant at the scene, his purported recognition was only made after the arrest when recording his statement otherwise he never mentioned to his fellow police officer nor did he record it in the OB.

To this, Mr. Ogoti submits that, it is not only PW5 who identified the appellant, there is evidence that appellant is the one who ran towards PW2 and that there was electricity light.

Mr. Ogoti states that PW2 testified that the appellant ran towards him under sufficient light and conditions were favourable for identification as PW2 saw appellant from a distance of about 8 metres.

The case of **Charles Maitany V R (1986) KLR pg** examined the question of conditions affecting identification at night and states this:

It is at least essential to ascertain the nature of the light available, what sort of light, its size and its position relative to the suspect…..”Yet this position must be viewed in its time context, which is that the court in Mantanyi`s case was laying out a careful text on the evidence of a single witness.

So were the existing conditions favourable so as to enable PW2 and PW5 to positively identify one of the attackers as the appellant. PW2 in his evidence in chief stated:

“***I saw them with the aid of the security lights from the bar and office…as they ran towards me I ran into an office”***

The truth is that none of the witnesses described the kind of light that was available or its intensity. Of course at the mention of security lights, one is immediately catapulted into thinking and assuming that pW2 could only be referring to electricity lights, after all a candle or a lantern could not act as security lights. Pw2`s evidence is bolstered by that of Pw 5 who said there was sufficient light in the bar – what is more appellant was someone known to Pw 5. We are persuaded that appellant was seen inside the bar, but what was his intention? Did he demonstrate an intention or attempt to rob Christine Mueni.

Mr. Magolo has now drawn to our attention the fact that although the appellants is said to have attempted to rob Christine, there is no evidence to support such a claim. He argues that the evidence is simply that a group, of young men walked in and shouted “*laleni chini”* and police replied with fire – so that the only order they gave was simply to lie down and there is no evidence of any demand for money from anyone let alone Christine Mueni. Mr. Magolo argues that robbery must be accompanied by stealing but here, the intent of the attackers remain unknown. He also contend that the complainant did not say she had any money and he poses this question – who says young men walking in the night and who order a lady to lie down would only want money? It is his submission that the intention remains speculative.

However, Mr. Ogoti argues that this was organised crime as police had already got a tip off that the bar would be raided that evening and PW5 plus other police officers went there to prevent the crime. He submits that although PW1 was targeted, she did not know she was the target nor did she even have an opportunity to know what was going on. However, police station were ready for any eventuality and that is why the attempt was thwarted.

Mr. Magolo’s argument is that there can only be an attempt if the intention is known and that allegations that information had been given without availing the informer to testify does not establish the intention, so that the mission remains unknown.

The Penal Code in its interpretation section does not define what the word attempt means. However in ordinary language, to attempt means to take steps towards achieving an act or goal.

In this instance what would be the act or goal? According to section 297(1) it is the intent to steal and in the present case specifically an intent to steal money from PW1. We confirm that from the evidence the only command was to lie down, there was no demand for money. Of course we do not suppose that a group of young men armed with crude offensive weapons such as bows and arrows and masks and ordering everyone to lie down, would be on some goodwill mission or some Halloween pranks.

Yet it is not for the court to pursue the intention, it was for the prosecution to establish the motive. May be their intention was to rob the patrons, on the bar manager and not necessarily PW1 who was completely oblivious as to why the group was there in the first place.

We find that it was improper for the learned trial magistrate to make presumptions and therefore the

conviction was not safe.

We therefore allow the appeal on one ground;

(a) The intention to steal has not been proved.

The conviction is therefore quashed and sentence set aside.

Appellant shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this day of 11th day of March 2009 at Malindi.

H. A. Omondi **L Njagi**

JUDGE **JUDGE**