



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 23 of 2006

VINCENT MUGWANJA WANGUI..... APPELLANT

-AND-

REPUBLIC.....RESPONDENT

*(An appeal from the Judgement of Resident Magistrate L. Wachira dated 25th July, *
2005 in Criminal Case No. 2084 of 2003 at Thika Law Courts)

JUDGEMENT

The appellant was charged with the offence of attempted robbery contrary to s.296(1) of the Penal Code (Cap. 63, Laws of Kenya). The particulars were that the appellant, on 12th January, 2003 at Makongeni Estate in Thika District, within Central Province, while acting jointly with others not before the Court, attempted to rob **James Kimondo** of money.

PW1, Police Force No. 24538 **P.C. James Kimondo**, testified that he was attending a birthday party at Makongeni aforesaid on the material date, departing at 3.00 a.m. when he passed through Citizen Bar, took several bottles of beer, and, as he was leaving, three young men who had been in the same bar, followed him. But PW1 walked on towards his home, some 500 metres away. Before he could reach his house, PW1 noticed that three men were running towards him. At this point, where security lights from the estate provided some sort of illumination, the three men ordered PW1 to stop moving. He could not, at the time, identify the intruders; in his words: "I was not able to identify them as the light was faint." PW1, who was armed with a Browning pistol, fired once into the air, to scare these attackers; and he fired a second round, as the attackers came closer – some five metres from him. This second round of gun-fire hit the appellant herein in the leg and he fell down. One of the intruders took off; and a second one also ran away. Members of the public came along, and arrested the injured intruder.

It was PW1's testimony that his attackers had been in the bar which he came from; they followed him downstairs, and later on caught up with him as he was approaching his house. The appellant herein had suffered a bullet wound in the thigh. PW1 called the Police Duty Office, and a motor vehicle was brought, which took the appellant herein to hospital. The appellant was not a person known to PW1. The intruders did not steal anything from PW1.

PW2, **Francis Mutonya Nyorota**, who works as a guard at Citizen Lodge, testified that when, on the material night, he opened the gate for PW1 to leave, three curious youths came to observe PW1 as he descended downstairs. PW2 testified that he had clearly seen the three young men, as there was sufficient electrical lighting within the building. After he locked the gate behind PW1, the three young men came and asked him to open for them too; but he asked them why they were leaving when their alcohol remained only partially drunk, on the table. Upon their insistence, PW2 opened for them, asking them not to return; and when he went upstairs, PW2 confirmed that the young men had left their drinks on the table

at the bar.

After a short while a guard, one **Kariuki**, came through the gate, and told PW2 that a Police officer had forced some two young men to lie down, about 100 metres away. PW2 went there; it was somewhat dark; but with the aid of **Kariuki's** torch, PW2 saw clearly that the two recumbent men were part of the group of three young men for whom he had opened the bar-gate, only a short while earlier. PW2 identified the appellant herein as one of the two young men.

On cross-examination, PW2 testified that the three young men for whom he had opened the gate, had come into the bar at 10.00 p.m., and had left at about 3.00 a.m. As the three youngsters sat drinking in the bar, they had taken active interest in any customer departing from the bar, and they would stand, and so position themselves as to closely observe such leaving patrons – indeed they had so conducted themselves about five times, that evening and morning. PW2 had warned PW1 as he left, about the apparent suspicious inclinations of the three young men.

PW3, **Makau Kariuki** who also works as a guard, was escorting some customers to Citizen Bar when he found two suspects kept lying down by PW1; one of them escaped; the other (appellant herein) was re-arrested by Police officers who soon drove in. PW3 had known the appellant herein before; he flashed his torch at the appellant, and saw him wearing a hat.

PW4, **Peter Mutiso Kimindu** had been at Citizen Bar on the material night. He left to go to sleep at 2.30a.m., and was awakened by PW3 who told him of the incident that had just taken place. PW4 said he knew the appellant herein, and had indeed seen him at Citizen Bar, with three other youngsters, taking alcohol.

PW5, Police Force No. 214798 Inspector of Police **Fredrick Biket** was previously the Officer-in-Charge of the Crime Office, at Thika Police Station. On 13th January, 2003 he received the report that one of his officers (PW1) had been confronted by three youngsters who wanted to rob him. PW5 took over the investigations from one **Cpl. Njuguna**, and noted that the appellant herein did not make any complaint that he had been shot by Police officers. After the appellant recovered, a charge was laid against him – for attempted robbery.

On cross-examination, PW5 said he had expected the appellant and his colleagues to come forward and record a complaint if they are the ones who had been wronged by PW1; but they had taken no such action; in PW5's words:

“They wanted to attack him, but before they attacked him, he shot them. It is common sense that if you're offended, you complain. He [PW1] reported an attempted robbery [involving] three robbers.”

The appellant herein, when put to his defence, chose to make a sworn statement. He testified that he had been in the company of just one other man, nicknamed “Prof.”; and they had gone to Citizen Bar at 10.00 p.m. on the material night. He said he (the appellant) was at the bar at the same time as PW1, and that the two had a disagreement over a girl who was also at the bar, at the time. He said: “We left and he followed us and when I looked, he shot at me. There was light where he shot me, about five metres from the road. He fled...after shooting me. I fell down and he beat me while I was down. I regained full consciousness in hospital. I and my friend did not attempt to rob PW1.”

On cross-examination, the appellant said he did not know the woman he said had been the source of rivalry between him and PW1, on the material night; he said the woman “was a prostitute.” The appellant said the man who had accompanied him at the bar on the material night, had visited him while he was in hospital; and he also said that the said companion of his had been threatened with arrest, by PW1, if he dared record a statement. The appellant said his parents had gone to see him at the hospital, and he asked them to make a report to the Police; he did not, however, know if such a complaint had been recorded, and he was unaware if the same appeared in the Police Occurrence Book for the material date.

DW2, **Jidraff Thiong'o** testified that he had gone with the appellant to Citizen Bar at 11.00 p.m. on the

material night. He said an argument had arisen between the appellant and PW1 over a girl; and when the appellant and DW2 were leaving “after 11.00 p.m.”, PW1 came out, stopped them, and shot the appellant; DW2 fled, as he “was shocked.”

On cross-examination, DW2 said he and the appellant had entered the bar at 9.45 p.m. He testified that the lady said to have been the subject of disagreement between PW1 and the appellant, who was unknown to him (DW2), had quarrelled with PW1.

DW3, **George Maingi**, was a clinical officer working at Thika District Hospital. On 13th January, 2003 DW3 attended to the appellant at Thika General Hospital. The appellant had said that he had been shot by a person unknown to him; and he found the appellant to have a fracture of the upper part of the thigh, as well as bruises on the right knee-joint, and soft-tissue injuries around the face. Some of these injuries were probably the result of gun-shot; the point of entry was the anterior side of the thigh – and the exit was the posterior side. DW3 concluded that the appellant would have been facing PW1 at the time of the shooting.

The learned Principal Magistrates, **Ms. Rashid** who took all the foregoing evidence retired before the preparation of Judgement; and the Chief Magistrate then allocated the matter to Resident Magistrate **Ms. Wachira**, to determine whether to prepare and deliver judgement on the recorded evidence, or to hear the case *de novo*. On 27th July, 2004, **Ms. Wachira** gave the date when counsel would give submissions, which date was repeatedly postponed at the request of counsel, until 25th April, 2005.

In the submissions, learned counsel **Mr. Muturi Njoroge** urged that the charge was defective, as attempted robbery fell under s.297(1) of the Penal Code, and not s.296(1) of that statute. Counsel urged, moreover, that no evidence of attempted robbery had been given by the prosecution witnesses.

The prosecutor contested the claim that the shooting of the appellant arose from rival claims over an unknown prostitute, as, had it been otherwise, then the said prostitute would have been a most desirable witness for the defence. He submitted that the fact that the accused was shot as he faced PW1, corroborated PW1’s evidence: that the appellant and his party were following him, and had ordered him to stop moving any further. The prosecutor asked that the Court should take into account the conduct of the appellant and his mates on the material night, as testified to by PW2.

On the basis of the foregoing evidence and the submissions, the trial Court was “satisfied that the accused is guilty as charged” and convicted him accordingly. After taking the appellant’s statement in mitigation, and considering him as a first offender, the trial Court sentenced him to a four-year term of imprisonment.

In the grounds of appeal, the appellant stated as follows:

- (i) he is very remorseful;
- (ii) he is a first offender;
- (iii) the sentence is harsh and excessive;
- (iv) the Police had tortured him, forcing him to admit to acts he had not been involved in;
- (v) he should not have been convicted, because the prosecution evidence was not accompanied with exhibits;
- (vi) the evidence tendered by the prosecution fell short of the required standard of proof.

Learned counsel **Mrs. Kagiri** who represented the State conceded to the appeal on the basis that the trial process had not complied with the requirements of s.200(3) of the Criminal Procedure Code: the second Magistrate handling the matter should have informed the accused of his rights to recall all the witnesses. For this failure to inform the appellant of his rights, the trial process was defective, and was rendered a

nullity – counsel urged.

Considering that the appellant is already serving the third year of the four-year prison term, counsel urged that a fresh trial would be prejudicial to him, since usually a full-scale trial could take as much as a year to be concluded. The State would therefore, not ask for a fresh trial.

Learned counsel has raised a crucial technical point which must render the trial before the trial Court a nullity: the failure to comply with s.200(3) of the Criminal Procedure Code (Cap. 75, Laws of Kenya).

A retrial would not, in my view, be appropriate. Secondly, the appellant has already served a substantial part of the original sentence imposed. And thirdly, and most importantly, it is not apparent that such offence as may have been committed by the appellant on the material night, was indeed *attempted robbery*; for in such an offence, attempted *theft* is a vital ingredient, yet no evidence was given that those who accosted PW1 had had theft as their intent. A lesser charge may, in the circumstances, have been more appropriate.

Consequently, I will make orders as follows:

1. *The proceedings before the trial Court, and the Judgement dated 25th July, 2005 in Criminal Case No. 2084 of 2003 at Thika Law Courts, are hereby declared null and on that account, quashed.*

2. *The appellant herein shall be set at liberty forthwith, unless otherwise lawfully held.*

DATED and DELIVERED at Nairobi this 26th day of May, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Respondent: Mrs. Kagiri

Appellant in person