REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 124 of 2005

MARTIN NDEGWA MAINGI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Appeal from original Conviction and Sentence in the Senior Resident Magistrate's Court at Nanyuki in Criminal Case No. 1798 of 2004 dated 13th May 2005 by R. N. Muriuki – SRM)

J U D G M E N T

The appellant, **Martin Ndegwa Maingi** and one **Ann Mumbi Macharia** were jointly charged with the offence of Attempted Robbery with violence contrary to section 297 (2) of the Penal Code. The two denied the charge and were tried by the Senior Resident magistrate's Court at Nanyuki, **R. N. Muriuki**, presiding.

The prosecution case was that on 15th December 2004, PW1 **APC Willy Cheruiyot** of the D.O's Office, Laikipia was going to his place of work at the D.O's residence. He was armed. On reaching Daiga Millers, he was suddenly confronted by about five people who ordered him to lie down. One of them removed a knife. However PW1 managed to overpower them using a gun in his possession. He ordered the gang to lie down instead. On seeing the gun those people started running away although one of them complied and lay down. Another one who was a woman was however unable to run and PW1 arrested her. The appellant was the one who lay on the ground and his co-accused was the woman arrested by PW1 as she could not run. He recovered a knife from the appellant. PW1 then telephoned the D.O. who in turn got in touch with Nanyuki Police Station. PW2, **P.C. Salim Ali** was despatched to the scene where he found PW1 with the appellant and his co-accused. PW2 re-arrested the appellant and the co-accused and later preferred the charge.

The appellant and the co-accused denied the charge. The appellant in his unsworn statement testified that he was at his workplace when the co-accused whom he claimed was his wife came. On their way home they passed via a friend's house who had been bereaved. Thereafter at about 8 p.m. they proceeded home. On the way they came across a motor vehicle on the road that had stopped with its lights on. Some people emerged therefrom and asked them whether they had met with anybody and when they said they had not, they were arrested and taken to the police station. They were subsequently charged with the offence they knew nothing abut.

Having carefully listened to the case and evaluated the evidence on record, the learned trial magistrate found for the prosecution, convicted the appellant and the co-accused. Upon conviction they were sentenced to death which is the only lawful sentence for the offence. The appellant subsequently filed this appeal before court. It is not clear to us whether the appellant's co-accused filed an appeal. The appellant however informed us after this appeal had been heard that he was certain that his co-accused had filed the appeal. Had this information been availed to us before the commencement of the hearing of this appeal we would have declined to hear this appeal until the other appeal presumably filed by the wife if at all, was availed so that they could be consolidated and heard together, considering that they arose from the same trial. This is the only way to avoid embarrassment where this court differently constituted

may hear the appeal filed by the co-accused and come to a different decision from one we are likely to make in the instant appeal. In a bid to overcome such an impediment, we directed for what it is worth, that the registry do trace and avail, the appellant's accused's record of appeal if at all on the date this judgment shall be delivered so that we can give appropriate orders and or directions on the same.

The appellant has faulted his conviction by the learned magistrate on seven grounds. However since the state conceded to he appeal, it may no longer serve any useful purpose to consider them.

At the hearing of the appeal, **Mr. Orinda**, Principal State Counsel conceded to the appeal on the grounds that the facts that emerged in the evidence did not support the substance of the charge.

To our mind the offence of attempted robbery with violence contrary to section 297 (2) has all the hallmarks of robbery with violence contrary to section 296 (2) of the Penal Code save that it is nibbed in the bud. For one reason or another the robber finds it difficult to carry through with the mission. Accordingly for the prosecution to prove the offence of attempted robbery with violence, the prosecution must lead evidence that show that the process of theft had been initiated by the culprit accompanied with violence. Indeed assault is a prime ingredient of the offence of attempted robbery with violence. That in the process of violently stealing from the complainant, the robber was stopped in his tracks before he completed his mission. How do the above propositions apply to the circumstances of this case?

The particulars of the charge facing the appellant were that "**On the right of 15th of December 2004 at 9.30 p.m. at Daiga Millers area in Nanyuki, Laikipia District within Rift Valley Province, jointly with others not before court attempted to rob No. 218845 APC Willy K. Cheruiyot and at, or immediately after such attempted robbery threatened to use actual violence to the said No. 218845 APC Willy K. Cheruiyot ....."** These being the particulars of the charge one would have expected that the prosecution would lead evidence to show that by word and deed the appellant and his co-accused had intention to violently steal from the complainant. That indeed they had initiated the process. No such evidence was forthcoming though. The evidence that there is, is that the complainant was on his way to his place of work at D.O's residence when suddenly he was confronted by the appellant, the co-accused and other three people. The five people ordered him to lie down instead. One of the people produced something which he later noticed was a knife. Since he had a gun, the complainant ordered the people to lie down. When they saw the gun they began running away. However the appellant and co-accused were not so lucky. They were arrested at the scene.

On the basis of this Evidence, can it really be said that the offence of attempted robbery with violence was disclosed. We do not think so. The would be assailants did not in any way manifest any intention to steal from the complainant. The complainant himself did not say that he had in his possession anything capable of being stolen. The charge sheet itself is silent on what was to be stolen. The five people who confronted the complainant may have been on a totally different mission other than to rob the complainant. They may have been on a mission merely to assault the complainant for some other reason and not necessary to rob. They may have been upto merely scaring him out of his wits for their own personal egos and aggrandisement and not necessarily to rob him. Yes, one of them may have had a knife but the said knife was never put to any use. In fact it was a penknife. A penknife can never pass for a dangerous and or offensive weapon or instrument. For some people a penknife is part of their routine regalia.

In view of the foregoing, we are satisfied that the appellant ought not to have been convicted for the offence charged. The evidence adduced did not support the charge preferred or indeed any other charge known to law. **Mr. Orinda** was therefore right in conceding to the appeal on that basis.

In the premises we allow the appeal, quash the conviction and set aside the sentence of death imposed on the appellant. The appellant is to be set free forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 22nd day of May 2008

MARY KASANGO

JUDGE

M. S. A. MAKHANDIA

JUDGE