



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

Criminal Appeal 359 of 2005

SAMUEL WAWERU MWANIKI..... APPELLANT

V E R S U S

REPUBLIC..... RESPONDENT

(From the original decision in Makadara Chief Magistrate's Criminal Case No. 24985 of 2001 – Mrs Gandani SRM)

J U D G M E N T

SAMUEL WAWERU MWANIKI, the appellant, was charged in the subordinate court with attempted robbery with violence contrary to Section 297 (2) of the Penal Code. The particulars of offence were that on 24th December, 2001 at Eastlands Health Centre Buru Buru Phase V in Nairobi Area, jointly with another not before court while armed with offensive weapon namely Toy Pistol attempted to rob one **BENSON WAHOME** at his clinic and immediately before or immediately after the time of such attempted robbery, threatened to use personal violence to the said **BENSON WAHOME**. After a full trial, he was convicted of the offence and sentenced to death. Being aggrieved by the decision of the learned magistrate, he has appealed to this court against both the conviction and sentence.

At the hearing of the appeal, Mr. Kanyi for the appellant submitted that the prosecution did not prove its case against the appellant beyond any reasonable doubt. Counsel firstly argued that the two key prosecution witnesses, P.W.1 and P.W.2 gave different venues for the commission of the offence. Secondly Counsel submitted that several items referred to in evidence, were not produced as exhibits, and no good reason was given for failure to do so. Also counsel contended, there was a discrepancy in the evidence of the two key witnesses, P.W.1 and P.W.2, as P.W.1 said that the appellant was tied with a telephone cable, while P.W.2 said that they tied him with a net curtain. These items were not produced as exhibits. The arresting officer did not mention these items in his evidence. Counsel contended that there was a contradiction about the side of the mouth where P.W.1 was injured. There was also a contradiction on whether members of the public went into the clinic. P.W.4 stated that members of the public went into the clinic, while other witnesses said that the members of the public did not enter the clinic, as they were afraid.

Counsel also submitted that crucial witnesses were not called to testify. These were the doctor who filled the P3 form as well as the members of the public who came to the scene.

Counsel also submitted that the defence of the appellant was not considered. Counsel submitted that the defence of the appellant that he had gone to the clinic to demand for his dues was believable, as the defence was sworn, and the appellant produced receipts for purchases, as well as a business card which

was given to him by the complainant. In Counsel's view, the trial court casually mentioned the defence and threw it aside.

Lastly, Counsel submitted, the trial was conducted by three magistrates, but the succeeding magistrates did not comply with the mandatory provisions of Section 200(3) of the Penal Code. Counsel urged us to allow the appeal.

The learned State Counsel Mrs. Gakobo, opposed the appeal and supported both the conviction and sentence. Counsel submitted that the prosecution adduced sufficient evidence to support the conviction. Counsel contended that the evidence on record was that the appellant, with another, went and demanded money from P.W.1. Though the locus of the offence in the charge sheet was different from the evidence, P.W.1 clearly stated that he was attacked at his clinic in Buru Buru phase 5. In any event, the venue of the offence was not in dispute as the appellant stated in his defence that he indeed went to the scene and met the complainant P.W.1. Counsel contended that the contradiction in the type of rope with which the appellant was tied, was curable under Section 382 of the Criminal Procedure Code (**Cap. 75**). On the P3 form, counsel submitted that the trial court, in fact, did not rely on the P3 form which was produced in the absence of the doctor. However, the magistrate convicted the appellant on the basis that there was sufficient evidence that the appellant and another committed the offence. Counsel, lastly, submitted that the defence of the appellant was considered and found not to be truthful.

In a short response, Mr. Kanyi submitted that the appellant was not found with any weapon, and there was no evidence that the appellant was accompanied by another person who ran away.

The brief summary of the facts is as follows: P.W.1 **BENSON MUGO WAHOME**, the complainant, was at his clinic at Buru Buru Phase 5 on 24/12/2001 at about 5.30 pm. He was with a patient P.W.2 **RAPHAEL MUTAI MUTHAMA**. The two were together in the consultation room. The receptionist already had checked off as it was eve of Christmas. There was a knock at the consultation room, and P.W.1 told his patient, P.W.2, to go and wait at the reception. P.W.1 noticed that two men were at the reception. One entered the consultation room and said "**Mzee tuko kazi.**" He ordered P.W.1 to lie down and demanded some money. P.W.1 did not give the intruder the money and dived and held him, only for the man to call upon his colleague "**to bring the gun to finish**" P.W.1. The person in the reception came and gave the person (**appellant**), who was in the consultation room, a gun which P.W.1 noticed was a toy as it had black cellotape. After pointing the gun at P.W.1, the appellant gave back the gun to the other person to take care of P.W.2, and P.W.1 shouted that the gun was a toy. P.W.1 struggled with the appellant, while P.W.2 fought with the other man. The appellant picked a pair of scissors from the examination room and tried to stab P.W.1, but only managed to cut him on the palm as P.W.1 shielded himself. The people who heard the commotion came and arrested the appellant, while the other man managed to escape with the gun. The complainant, P.W.1, was later treated. The appellant was re-arrested by P.W.3, **Corporal PATRICK OKWARA**, who came to the scene, and was later charged with the offence. A pair of scissors was produced in court as an exhibit.

In his defence, the appellant gave sworn testimony. It was his defence that he was self employed in electrical installation. He stated that on 24/12/01 he went to the clinic of the complainant P.W.1, because the said P.W.1 owed him some Kshs.6000/- for repairs he had carried out on P.W.1's water heater at the clinic. The total cost was Kshs.8000/- and he had already been paid Kshs.2000/-. He asked for his payment which had been due for about 3 months, but P.W.1 laughed it off and told him to come in January. They argued, and P.W.1 called the other man at the reception to assist him in throwing the appellant out. They struggled and P.W.1 and P.W.2 beat him up and dragged him outside. Members of the public came due to the screams. Though P.W.1 said that the appellant had conned him, the members of the public insisted that P.W.1 should pay the appellant. He also stated that he had bought a miniature circuit breaker for the appellant, and produced a receipt for the same. He denied that he was **SAMUEL WAWERU MWANIKI**, and stated that his name was **SAMUEL WAWERU MANYEKI**. He stated that he had been introduced to the complainant, P.W.1, by a friend called **PATRICK**. He stated that he had known the complainant for 8 months and produced the complainant's business card. He denied stabbing the complainant with a pair of scissors.

Faced with this evidence, the learned magistrate found that the prosecution had proved its case against the appellant beyond any reasonable doubt, convicted and sentenced him.

This being a first appeal, we have to remind ourselves that we are duty bound to re-evaluate all the evidence on record and come to our own conclusions and inferences – see **OKENO -VS- REPUBLIC [1972] E.A. 32.**

The appellant complains that the trial was handled by different magistrates and succeeding magistrates did not comply with Section 200 (3) of the Criminal Procedure Code. This case was initially heard by **MRS JUMA PM**, and later by **MRS GANDANI SRM**. There were mentions before other magistrates, but who did not hear the case. It was Mrs **GANDANI** who took over the hearing of the case on 15/4/2004. We observe that **MRS GANDANI**, heard the case afresh, and the accused pleaded to the charge afresh before P.W.1 was called to testify.

Section 200 (3) of the Criminal Procedure Code (*Cap. 75*), which the appellant complains was not complied with, provides-

“200(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.”

In our view, where a trial begins *de novo*, there is no requirement that a court must inform an accused person on his right to recall witnesses. The mandatory requirement to inform the accused of his rights to recall witnesses only applies where the court is to proceed with the case from where it stopped. The failure of the magistrate, in our present case, to inform the appellant of his rights to recall witnesses, was not a contravention of Section 200(3) of the Criminal Procedure Code.

The second complaint of the appellant is that crucial witnesses, that is the members of the public who came to the scene, were not called to testify. Indeed, none of the members of the public who were said to have come to the scene was called to testify. However, in our view, those members of the public were not really crucial witnesses. They did not witness the struggle, or the attempted robbery. The only two people who witnessed the incident were P.W.1 and P.W.2, both of whom testified in court. We are of the view that of the testimonies, if P.W.1 and P.W.2 were believable, then there would be no real need to call the members of the public to testify. The appellant also complains that the doctor who filled the P3 form was not called to testify. However, the learned magistrate did not rely on the evidence of the P3 form. Therefore we dismiss the ground based on failure to call material witnesses.

The appellant also complains that the ropes and pieces of cloth with which he was said to have been tied, not produced as exhibits. Our view is that those were not crucial exhibits. They could not have proved or disproved the offence. Suffice it to say that there is evidence that the appellant was restrained at the scene, which he does not deny himself anyway.

The appellant also complains that the locus in quo mentioned in the charge sheet and that in the evidence were different. Therefore, the charge sheet is defective. We do not agree. The charge sheet mentions Eastland’s Health Centre Buru Buru Phase V. P.W.1, on the other hand, refers to Eastleigh Health Services in Buru Buru. That, in our view, could be a typographic or evidential error, which does not go to the root of the charge. The locus is clearly at Buru Buru. Secondly the appellant himself said in his defence that he went to the clinic of the complainant P.W.1, where a scuffle occurred. He was not prejudiced, nor was there a possibility that he did not know the locus in quo. We dismiss that ground.

The appellant was charged with attempted robbery with violence contrary to Section 297 (2) of the Penal Code, which provides:-

“297(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.”

The appellant admits that he was at the scene, but for a lawful purpose of demanding payment of his dues. He also admits that there was a scuffle because he was told by the complainant to come in January for his payment. Considering all the evidence on record, we find that the appellant was the aggressor. In our view, he assaulted the complainant, P.W.1, and attempted to get money or steal money from P.W.1. Other than the evidence of P.W.1 and P.W.2, no other supporting evidence about the second person who is alleged to have accompanied the appellant during the incident. None of the members of the public who came to the scene was called to testify as to whether or not they saw somebody run away. The evidence of the pistol, also, is that the pistol was a toy pistol. Therefore, it could not have been an offensive weapon. In our view, the evidence on record does not establish the offence under Section 297 (2) of the Penal Code. However, it establishes the lesser cognate offence under section 297 (1) of the Penal Code. We will quash the conviction under Section 297 (2) of the Penal Code and substitute therefore a conviction under Section 297 (1) of the Penal Code and mete out an appropriate sentence. The appellant complains that his defence was not considered. Indeed, the magistrate only highlighted what the appellant said in his defence. She did not make a finding on whether she believed or disbelieved the defence and given reasons for that decision. In terms of Section 169 (1) of the Criminal Procedure Code (**Cap. 75**), the magistrate should have done so. However, in our present case we consider that the defence of the appellant is not tenable. We are of the view that, even if his defence that he went to the clinic to claim his money was true, which we disbelieve, he still had a reason to assault the complainant because the alleged debt had not been paid for sometime, and he was told to come in January. On the whole, we think that the defence was an afterthought, as no question was put to P.W.1 on any outstanding debt, though questions were put about sale and repairs at the clinic of P.W.1. We dismiss the defence as untrue.

For the above reasons, we order as follows-

- 1. We quash the conviction of the appellant for the offence under Section 297 (2) of the Penal Code, and also quash the sentence of death.***
- 2. We substitute therefore a conviction for the offence of simple attempted robbery under Section 297 (1) of the Penal Code, and order that the appellant’s sentence will be that already served. Therefore he will now be discharged from prison, unless otherwise lawfully held.***

It is so ordered.

Dated and delivered at Nairobi this 11th day of June, 2008.

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J.B. OJWANG

JUDGE

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G.A. DULU

JUDGE

In the presence of-

Appellant in person

Mrs Gakobo for State

Huka/Mwangi Court Clerk