



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

Criminal Appeal 482 of 2005

MORRIS MUTETIAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in Criminal Case No. 2331 of 2004 of the Chief Magistrate's Court at Kibera by MS. Muchira – S.R.M.)

JUDGEMENT

The appellant was charged before the subordinate court with attempted robbery contrary to section 297(2) of the Penal Code, that on 19th day of March, 2004 at Olololua village in Ngong in Kajiado District of Rift Valley Province jointly with others not before court while armed with dangerous weapons namely, *pangas* and axes attempted to rob Humphrey Mbatia Njenga of his motor vehicle registration number KAC 488Z make mazda pick-up valued at Kshs.300,000/= and immediately before or immediately after the attempt of such robbery threatened to use actual violence to the said Humphrey Mbatia Njenga.

The prosecution called 4 witnesses in support of their case. The first one was Stephen Thuo Njenga a taxi driver who lives in Ngong area. His evidence is as follows: That on 19th March, 2004 at about 9.30 p.m. as he was coming from Jomo Kenyatta International Airport and heading towards his home he received a call from Joseph Nganga Mwaniki, (PW4) that on the way home a section of the road had stones and other items erected on it. The information was that since he was driving a small vehicle he should be careful. He was also to call his brother Mbatia Njenga to be careful in approaching the road along Ole Poros road. He then called his brother so that they could meet at a shopping centre called Jerico so that they could plan the way to approach the dangerous area which was mounted with stones and boulders. PW1 also informed PW3 and others who use the road to be also careful. They all agreed to meet at the shopping centre so that they could leave their small cars and use one pick-up. They also informed the neighbours to approach from the other side since they have encountered numerous cases of mugging and robbery at that particular area.

After meeting at the shopping centre they all entered a motor vehicle pick-up belonging to PW3 and headed to the area that was allegedly mounted with road blocks by robbers. Upon reaching near the area they saw big boulders along the stream which passes through the bridge. They stopped and waited to see if anyone would approach them and/or would attack them. They also informed PW3 who was driving the motor vehicle to engage reverse gear in case they encounter danger from the attackers. Immediately three men approached from the riverside of the road. It is alleged that one of them had a very strong torch which was directed to the driver of the pick up. PW1 said he heard a loud bang that broke the driver's

window. PW1 then alighted from the vehicle, screaming and shouting at the person who had attacked them. He says he noticed three men running away and he saw them with the help of the light from the pick-up. It was then that the neighbours who had laid an ambush and in the process the appellant was arrested. Upon arrest the appellant was seriously beaten by the members of the public who answered the call of PW1, PW3 and others who may have encountered thuggery around that area. It is alleged the appellant was armed with a *panga* which he used to attack PW1 and PW3. It is alleged that the appellant was later handed over to police from Ngong police station.

PW2 PC Joseph Kirui who was attached to Ngong Police Station at the material date stated that at about 10p.m. he received information that some people had placed stones to block the road and commit robbery along Olololua area. He went to the scene with other police officers and found the appellant had been arrested by the members of the public. He also got information that the appellant was among the people who blocked the road with stones and that he was caught as he was attempting to rob PW3. He then took the appellant to Ngong dispensary and later transferred him to Kenyatta National Hospital where the appellant was admitted for treatment.

PW3 is the complainant in this case and he says that on the material night as he was driving to his home in Ngong he was alerted by his wife through his mobile phone that one of his neighbours Joseph Nganga had been robbed at the river bridge. And that stones had been placed on the road to make it impassable for persons using that road. He was then called by PW1 who gave him the same information. He says that together with PW1 together with others, they decided to converge and meet at the shopping centre. It was then that a decision was made that they all use his pick up. And on reaching the bridge they found stones blocking the river as have earlier been communicated to them. He then stopped his motor vehicle and engaged a reverse gear. Suddenly the attackers emerged from the bushes and one of them hit the driver's window with a *panga*. He says PW1 and others jumped out of the car and decided to confront the attackers. The attackers then ran away. However one of them was arrested being the appellant. It was the evidence of PW3 that people had mobilized themselves as the robbers had troubled them and that is how they decided to approach the area from two fronts. In his evidence the appellant was arrested as he was trying to run away from the scene and armed with a *panga* and Somali sword. And on being cross examined by the appellant's advocate Mr. Khamati the witness had this to say;

"It was in the night. He came from the side of my car held a torch which was on. He was torching on us. When he ran away, he was never lost from our sight and the other ambushers".

PW4 Joseph Nganga Mwaniki was the one who found big boulders on the road path and who alerted PW1, PW3 and the members of the public.

On his part the appellant gave un-sworn testimony and stated that as he was heading home he was confronted by a group of people who shouted that he was one of the thieves. They attacked him beating him seriously with pangas and *rungus*. He says he lost consciousness which he regained at Kenyatta hospital and that he has nothing to do with the offence that is alleged against him.

This appeal was argued before us by Mr. Ondieki for the appellant and Mr. Makura on behalf of the State. Mr. Makura learned counsel for the State conceded this appeal on the grounds that the ingredients of the offence of attempted robbery with violence has not been proved to the required standards. In his view there is no evidence of assault with intention to steal. Secondly that the appellant was armed with dangerous or offensive weapon. Thirdly that there is no evidence to show that the appellant was in the company of others and lastly that he had used the violence.

The first point that was canvassed by Mr. Ondieki that the appellant was denied the right to representation hence his rights under Section 77 2(d) of the Constitution was violated. In support of that contention he referred us to the proceedings of 11th April 2005 where the trial court proceeded in the absence of the appellant's advocate. Mr. Ondieki advocate contended that the failure of the trial court to proceed without the appellant's advocate led to a miscarriage of justice. We have considered that ground to determine whether it is a basis to allow the appellant's appeal. We agree that a party has a Constitutional right to representation and in particular to be represented by an advocate of his own choice. However,

that right is not subservient to the general principle that matters must be determined within the shortest time possible and without causing unnecessary delay in the administration of justice. In this case the appellant was not denied the right to representation but the trial court proceeded in the absence of the appellant's advocate after indulging the appellant. It is noted by trial court that the appellant's advocate was not in court and that he had not sent any word to court and to his client as to his whereabouts. The trial court proceeded and the appellant was given the opportunity to cross examine the witness which he did to his satisfaction. Again on 21st June, 2005 the appellant's advocate was absent but the court indulged him until midday. When Mr. Khamati advocate appeared before court he did not apologize for his absence for 11th April 2005 and for his lateness of that day. In any case he did not make an application to recall PW2 for purposes of cross examination. We therefore think the circumstances narrated and as evidenced by the record do not show that there was any miscarriage of justice. We think that ground that the appellant's constitutional right was violated has no merit and we refuse to entertain it.

The second ground that was canvassed before us by Mr. Ondieki is that the charge facing the appellant was defective because the evidence of PW1 and PW3 were at variance with material particulars stated in the charge sheet. We have meticulously considered the way the charge is framed and the evidence in support and having done so we think that contention is baseless.

The third ground that was raised by Mr. Ondieki advocate concerns about language that was used during the proceedings and that the appellant did not follow and/or understand the language of the court. The appellant did not plead guilty to the charge on the first day when he was taken to court and subsequently when proceedings were conducted he was represented by an advocate save for 11th April, 2005.

Although the trial court did not indicate the language in its proceedings we think no prejudice was occasioned to the appellant from that omission. We have noted that on 11th April, 2005 when the appellant was unrepresented he extensively and clearly cross examined PW2. Having gone through the court proceedings to determine whether any prejudice resulted from the omission by the trial court, we have come to the conclusion that the error is not so fundamental to vitiate the whole proceedings. In our opinion that ground is nothing but an attempt to look for an escape route.

On the substance, Mr. Ondieki advocate submitted that the appellant was not properly identified and that the prosecution has not discounted the possibility of error. We agree that the incident happened during the night and in such circumstances the prosecution is required to eliminate any possibility of error. The question that arises in light of submissions by Mr. Ondieki and in reliance of the evidence on record is whether the appellant was properly identified as one of the attackers who was arrested trying to run away from the scene of crime on the material night. We have thoroughly evaluated all the evidence on record since this is a first appeal and we are required as a matter of law to assess and evaluate the evidence afresh. The appellant was charged with attempted robbery on PW3 who narrated how he was attacked while driving the subject motor vehicle. The evidence of PW3 is that he was in the company of PW1 and others when the appellant hit the door of his motor vehicle with a *panga* shattering the window. He also says that he had seen the appellant with the help of the light from the motor vehicle and that he was arrested immediately a few meters from the scene. His evidence was corroborated by PW1 who also said that he clearly saw the appellant and at no time did they lose sight of the appellant. Here is a case where the two crucial witnesses PW1 and PW3 were not shaken during the cross examination mounted by the appellant's advocate. In our view their evidence is reliable and placed the appellant at the scene as one of the attackers who attempted to rob PW3. The totality of PW1 and PW3's evidence is that the appellant was kept on sight from the start until the time he was arrested as he was running away from the members of the public who mounted a counter-attack against him and his co-attackers. In particular the evidence of PW3 and PW1 is that at no time did they get out of the sight of the appellant who was arrested in very uncompromising circumstances.

We have examined the circumstances surrounding the arrest of the appellant and we are satisfied that he was chased and arrested after his attempt to commit robbery against PW3 failed. We think there is no deficit in the evidence of PW1 and PW3 and that the conviction of the appellant is based on reliable and water tight evidence. In conclusion we are in no doubt that the offence charged was proved beyond

reasonable doubt and the conviction was safe. We therefore see no reason to disturb a conviction which is based on sound and reliable evidence. Accordingly the appeal has no merit and is dismissed in its entirety.

Dated, signed and delivered at Nairobi this 15th day of October, 2008.

J. B. OJWANG

M. WARSAME

JUDGE

JUDGE