REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 239 of 2005

MICHAEL ATANGO LOTI *alias* SIMBA…… APPELLANT

VERSUS

REPUBLIC ……...…….RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. of 1643 of 2000 of the

Chief Magistrate's Court at Nairobi – Ms M.W. Muigai – SRM)

JUDGMENT

MICHAEL ATANGA LOTI was charged before the subordinate court with the offence of attempted robbery with violence contrary to Section 297(2) of the Penal Code. The particulars of the offence were -

"On the 23rd **day of May 2000 along Langata road in Nairobi within the Nairobi Area Province jointly with others not before court while armed with dangerous weapons namely Russian machine pistol and hand grenade attempted to rob ROSEMARY WANJIKU KANGETHE her motor vehicle registration No. KAM 235 E make Toyota Corolla and at or immediately before or immediately after the time of such attempted robbery wounded the said ROSEMARY WANJIKU KANGETHE".**

After a full trial, the appellant was found guilty, convicted of the offence, and sentenced to serve seven (7) years imprisonment with two (2) strokes of the cane. Being dissatisfied with the conviction and sentence, he filed this appeal challenging both the conviction and sentence.

In his submissions before us, in support of his grounds of appeal, the appellant asked us to peruse the evidence on record and the charge sheet, as the registration number of the car in the charge sheet was different from that given in the evidence of PW1. The appellant also submitted that there was a long delay by PW1 (the complainant) in reporting the incident, and the OB was not produced. He also submitted that he was arrested in connection with another offence on which he had already been convicted and sentenced to serve seven (7) years imprisonment. Therefore the charge herein was a frame up.

Learned State Counsel, Ms Nyamosi, opposed the appeal and supported the conviction. She however, submitted the sentence of 7 years imprisonment and 2 strokes of the cane was an illegal sentence. The only lawful sentence for the offence was death.

On the conviction, learned State Counsel submitted that there was overwhelming evidence to support the same. It was her contention that the attempt to rob PW1 occurred in broad daylight, and the said PW1 was wounded by being shot and PW9 took her to hospital.

She submitted that the conditions for identification were favourable. In addition, PW1 broke down in tears when she saw the appellant at the police station, a few days later. Though no identification parade was conducted, the identification of the appellant was positive.

She further submitted that there was a confession statement of the appellant which was admitted in evidence, after a trial within a trial. She contended that the confession of the appellant was corroborated by the evidence of PW1.

The learned State Counsel urged us to dismiss the appeal and regularize the sentence.

As a first appellate court, we are duty bound to re-evaluate the evidence on record and draw our own inferences and conclusions, while bearing in mind that we have neither seen nor heard the witnesses to determine their demeanour, and to make due allowance for this (see **OKENO – vs – REPUBLIC [1972] EA 32**).

We have perused the record of proceedings and the judgment. Indeed, the learned trial magistrate relied on the identification and the confession statement of the appellant, to found the conviction.

The identification of the appellant was by a single identifying witness PW1 Rosemary Wanjiku, who was the complainant. The learned trial magistrate appreciated that the evidence of identification was that of a single identifying witness, and found that it was positive identification. She cited, at page J7 of the Judgment, the case of **ABDALLA BIN WENDO – vs – REPUBLIC (1953), 20 EACA 166,** in which the Court of Appeal for Eastern Africa stated that –

"Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of the single witness".

We have carefully reviewed the evidence of PW1, who was the single identifying witness. Contrary to the findings of the learned trial magistrate, there was no evidence that PW1 actually identified the appellant. What PW1 stated in evidence about the appellant was that –

"**After two weeks later I heard that people were arrested around Wilson Airport and an informer told the police that he saw the vehicle parked outside near our office. I went to the police post Wilson on my own to see the people who had been arrested, the 1st suspect (accused) was the one who was shooting at me. I was taken to another room and shown another person who was clear shaven dark and a bit stout. He was the driver of that motor vehicle. I did not do anything I left matters at that. As I stand in court, I cannot identify them".**

The above testimony of the complainant PW1 cannot be said to be identification of the appellant by PW1. She did not state how she came to the conclusion that the people that she saw at the police post Wilson were the people who attempted to rob her. Worse still, she did not even say in court that the appellant was one of those people that she saw or identified at the police post Wilson.

In addition to the above, the appellant herein is called **MICHAEL ATANGA LOTI**. PC James Musyimi, who testified as PW4, was present at the police station when PW1 allegedly identified one of the persons who attempted to rob her. He was the one who showed the suspects to PW1. His evidence on the identification was as follows –

"**I took the suspect Francis Irungu Kibia and she said that he was not the one. I took accused Salvo Abundi Mbambi, she broke down and said he is the one".**

Clearly, the names of Salvo Abundi Mkambi and the appellant herein Michael Atanga Lot are two totally different names. They must be referring to two different people. The person who is said to have made the complainant PW1 break down was Salvo Abundi Mbambi, not the appellant herein Michael Atanga Loti.

In our humble view, the learned trial magistrate erred in finding that the complainant, PW1, identified the appellant as one of the people who attempted to rob her. From the evidence on record, the appellant was arrested for a different reason, and was not identified by PW1 as one of the people who attempted to rob her. In any event the police should have conducted proper and fair identification parades before exposing the appellant to PW1.

We now turn to the issue of the confessionary statement. The statement of the appellant was repudiated by him and was admitted in evidence after a trial within a trial. The appellant had repudiated the statement, on the ground that, he was forced to sign a statement which he neither wrote, nor did he know its contents.

In considering the statement, the learned trial magistrate stated at page J7 of the judgment -

"**Finally the accused recorded a detailed statement at the Langata police station. He repudiated the statement that he did not make the statement. During trial within trial he retracted the statement claiming that he was tortured to make the statement. The court finds the two assertions to be inconsistent and the facts allegedly (sic) the accused untrue. Here the statement was accepted in evidence. Now, a reading of the statement indicates and confirms a detailed statement of the salient facts, a chain of consistency in terms of events, facts and names of other participants. The accused had *mens rea* to commit the offence although the retracted/repudiated statement is not the best evidence, it sheds lights (sic) on the fact that the accused knew and was involved in the said attempted robbery of PW1".**

From the above observations in the judgment, it is apparent that the learned trial magistrate was doubtful as to the evidential worth of the statement. That must be the reason for stating in the judgment that it was not the best evidence. Secondly, the learned trial magistrate was bound to determine the truthfulness of the statement and to warn herself of the dangers of convicting on the evidence of such a retracted/repudiated confession (see **ODHIAMBO – vs – REPUBLIC [2002] 1 KLR 241**. The learned trial magistrate did not warn herself of the danger of convicting on the retracted/repudiated confession, which she was in fact in doubt as to its worth. She also did not determine its truthfulness. We are of the humble view that, had the learned trial magistrate considered the truthfulness and warned herself on the danger of convicting on the repudiated/retracted statement of the appellant, she would not have convicted the appellant on the same.

Having reviewed all the evidence on record, we come to the conclusion that the conviction entered by the learned trial magistrate is unsafe and cannot be sustained. We have to quash the conviction.

The sentence of the learned trial magistrate was clearly illegal, as the only lawful sentence for the offence of attempted robbery, under Section 297(2) of Penal Code is death. However, we will not substitute the sentence as we are quashing the conviction. The sentence will also have to be set aside.

For the above reasons, we allow the appeal, quash the conviction and set aside the sentence. We order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated at Nairobi this 3rd day of May 2007.

LESIIT

JUDGE

DULU

Judge

Read and Delivered in the presence of –

Appellant

Ms Nyamosi for State

Tabitha/Eric – Court Clerks

LESIIT

JUDGE

DULU

JUDGE