REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(CORAM: OJWANG, J.)

CRIMINAL APPEAL NO. 188 OF 2006

BETWEEN

RIFFORD MURIUKI JAMES.....APPELLANT

-AND-

REPUBLIC….....RESPONDENT

(An appeal from the Judgement of Principal Magistrate K.W. Kiarie dated 26th April, 2006 in Criminal Case No. 3738 of 2005 at the Kiambu Law Courts)

JUDGEMENT

The appellant had been charged on two counts, the first one being robbery with violence contrary to s.296(2) of the Penal Code (Cap.63); the second being attempted robbery contrary to s.297(1) of the Penal Code (Cap.63).

The learned trial Magistrate found that there was no linkage between the appellant and the offence, on the first count, for want of the required standard of identification; and he acquitted the appellant in respect of that count.

The trial Court, however, made a different finding in respect of the second count of the charge, and in this regard, the words of the learned Magistrate may be quoted:

> ***"The [appellant] contended that he met… a group of people…[They] arrested him…The contention by the accused cannot hold, for it is not supported by the evidence on record. It is clearly an afterthought, for he never confronted his arresters with it during cross-examination. The prosecution has, therefore, proved its case beyond reasonable doubts, that the accused was arrested at the scene while hiding in some tea bushes after attempting to rob the second complainant. I find him guilty of the offence he is charged with, and, accordingly, convict him…on the second count."***

It is the conviction and sentence on the second count which is the subject of the instant appeal. The grounds of appeal stated are as follows:

a. that, the trial Court erred in fact and in law, in holding the charge to have been positively proved;

b. that, there were contradictions in the testimonies and, consequently, proof beyond reasonable doubt had not been achieved;

c. that, the learned Magistrate misdirected himself on the evidence adduced, and on burden of proof;

d. that, the trial Magistrate did not consider the appellant's sworn evidence.

Learned counsel ***Mrs. Kagiri*** opposed the appeal, on the ground that the prosecution had adduced sufficient evidence to support the charge on the second count. She urged that the complainant, PW3, had given clear, consistent and credible evidence on how the appellant and another, armed with machetes, had suddenly emerged from tea bushes and accosted PW3. PW1 was one of those who responded to PW3's alarm, and, it was urged, PW1's evidence well corroborated PW3's testimony. PW1 had said he was just behind PW3, and was able to observe the actions of the appellant and the appellant's companion. Counsel contended that there was no contradiction in the prosecution evidence, and that conviction had been rightly arrived at, from the direct evidence of both PW1 and PW3.

Mrs. Kagiri contested the contention of the appellant, that the offence of attempted robbery had not been proved, because he and his companion had *demanded nothing* from PW3. She urged that all the circumstances be taken into account; and that both the direct and the circumstantial evidence showed that the appellant had i*ntended* to rob the complainant – and the offensive weapons which were intended to be used in the commission of the offence, had been recovered, and had been exhibited in the trial Court.

The charge in count 2 was that the appellant, on 12th December, 2005 at Karambaini Sub-Location in Kiambu District, within Central Province, jointly with another not before the Court, attempted to rob ***Henry Muriuki Gichobi*** of his bicycle valued at Kshs.3000/=, and at, or immediately before, or immediately after the time of such attempted robbery, threatened to use actual violence against the said ***Henry Muriuki Gichobi.***

PW1, ***Francis Kuria Kombo***, a security officer at Karirana Tea Estate Ltd., was walking home from his place of work, on 12th December, 2005 at about 6.30 a.m. ***Henry Muriuki Gichobi***, the complainant, came from behind, riding his bicycle, and went past PW1. As soon as the complainant passed, two people, armed with machetes, emerged from the tea bushes and stopped him. These two had lifted their machetes, but upon seeing PW1, they took off. PW1 raised the alarm, and assistance was called for, a short distance away. The complainant, PW1, and guards from a nearby tea company, searched in the tea bushes, and arrested one of the two men who had escaped. The appellant herein was arrested and found with a machete; his companion escaped, dropping his machete as he fled. PW1 identified the appellant herein, as the person he and others arrested on the said occasion.

On cross-examination, PW1 said:

> "You wanted to rob ***Muriuki*** of his bicycle. We found you [next to the *locus in quo*], inside the tea [bushes]."

PW3, ***Henry Muriuki Gichobi*** testified that he was riding on his bicycle at about 6.00 a.m. on the material day, when two people, bearing machetes, suddenly emerged from the tea bushes. The two lifted their machetes in readiness for attack, when PW3 raised the alarm; after which members of the public came along, and helped to arrest the appellant herein.

PW4, No. 67610 ***P.C. Derrick Kithinji*** testified that PW3 had reported an attempt to rob him, on 12th December, 2005. The witness took custody of the appellant herein, and recorded witness statements.

The outcome of this appeal, it is apparent to me, will depend on the correct signification of "attempted robbery", and on a finding whether the actions of the appellant fell within that category.

Firstly, I have to state my agreement with the learned Magistrate's finding on fact: at about 6.30 a.m. on the material date, the appellant, in the company of an escaped accomplice, and while the two were armed

with offensive or dangerous weapons in the form of machetes, *assaulted* the complainant, by menacingly brandishing the same at him, even as they halted his further movement as he rode on his bicycle. In this way, it can rightly be said, they arrested PW3; they denied him his liberty. From those facts alone, certain ingredients of the conditions for the realisation of a robbery, were present: a *plurality* of suspects; being *armed*; posing a *state of violence.*

Of *attempted robbery*, J.J.R. Collingwood in his work, *Criminal Law of East and Central Africa* (London: Sweet & Maxwell, 1967) thus writes:

> ***"Where robbers use or threaten violence against a man with intent to steal, but nothing is in fact stolen, the appropriate charge will normally be attempted robbery***."

Now in the present matter, the appellant was in *company,* and both of them were *armed;* they demonstrated *violence* by curtailing the complainant's constitutional right to ride peacefully on his bicycle; they took away the complaint's *freedom of the person* by cowing him, and unceremoniously ordering him to stop; they *intimidated* the complainant, in the manner they intruded upon him; they put the complainant in real *fear for life and limb*, when they raised their weapons ready to strike, if their unlawful orders were not obeyed. However, the appellant and his accomplice *took off*, when the alarm was raised; they did not take the complainant's bicycle; indeed, they did not even have a chance to make *demand*s that the said bicycle be surrendered to them. So, was there a situation of *robbery* in this case? Did the appellant and his accomplice *attempt* a robbery?

The several factual points above-enumerated were, apparently, not adverted to by the learned Magistrate; and so he made a certain assumption which did not, with respect, arise from the evidence: that the attackers intended nothing but the *theft*, in conditions of *violence*, of the appellant's *bicycle*. Could the attackers not, possibly, have intended to commit some other offence than bicycle-theft? I think it is not correct, in the circumstances emerging in the evidence, that all that the attackers would have sought was the *bicycle.*

Consequently, it cannot be concluded that, firstly, there was a *preparation* on the part of the attackers to *steal the bicycle*; and secondly, that endeavours to steal the bicycle went *a stage beyond mere preparation.*

The law on "attempts" is stated in ***Blackstone's Criminal Practice 2002*** (12th ed., by Peter Murphy) (Oxford: OUP, 2002), s.A6.34 (p.99): a criminal attempt is an attempt which expresses itself in a scenario ***"more than merely preparatory***." In that learned work, certain pertinent cases are considered. In ***Campbell v. R***. [1991] Crim L.R. 268, the appellant had armed himself with an imitation gun, and he then approached to within a yard of a post office which he intended to rob. He, however, did not draw his weapon. It was held, in these circumstances, that there was no evidence on which the jury could properly have concluded that his acts went beyond *mere preparation.*

In ***Gullefer v. R [***1990] 1 W.L.R. 1063, the crucial question was stated to be, whether the accused had "*embarked upon the crime proper"*, but that, it was not necessary that the accused, while so engaged, should have reached a "point of no return" in the execution of the offence.

Had the appellant herein, with his escaped accomplice, "embarked *upon the crime proper*"? And the crime proper, according to the charge sheet, would be *violently stealing the complainant's bicycle.*

I have considered this question carefully, and I have reached the conclusion that the appellant could not be said to have "embarked upon the crime proper," of violently stealing the complainant's bicycle.

Upon coming to that conclusion, and given the facts showing *violence* and *fear,* which the appellant and his companion unleashed upon the complainant, I must consider whether a *different offence* would have been committed, and in respect of which justice requires the imposition of a penalty, in accordance with the law.

I have already referred to the agony to which the appellant and his escaped accomplice subjected the complainant as *assault*, and this concept, indeed, defines the possible area of criminal liability under which the appellant could, properly, have been charged. The Penal Code (Cap.63), ss.250 – 253 provides for *assaults*, and among these is *common assault* which is a misdemeanour, and is committed, as indicated in J.J.R. Collingwood, ***Criminal Law in East and Central Africa*** (supra, p.197), by a person who –

> ***'"unlawfully and intentionally displays force against another person in such a way as to create a reasonable belief in the mind of the other person that force is about to be used against him…."***

The foregoing offence, I have no doubts, was committed by the appellant on the material date, and he should have been charged with, and, on the evidence brought before the trial Court, convicted on that basis.

In view of these findings, I will make orders as follows:

1. The appellant's appeal is allowed, in respect of the conviction on the charge of attempted robbery contrary to s.297(1) of the Penal Code (Cap.63).

2. In substitution of the conviction referred to in Order No. 1 above, I hereby find the appellant guilty of the offence of assault, under s.250 of the Penal Code (Cap.63), convict him, and sentence him to imprisonment for ten (10) months as from the date of conviction and sentence by the trial Court.

3. If the appellant will have served the term of imprisonment imposed in Order 2 hereinabove, then he shall forthwith be released, unless otherwise lawfully held.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 24th day of October, 2007.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Mr. Odero

For the Respondent: Mrs. Kagiri

Appellant in person