



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KITALE

Criminal Appeal 50 of 2006

JACKSON BULIMO JAKONA..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

J U D G M E N T

The appellant, JACKSON BULIMO JAKONA, was convicted for the offence of attempted robbery contrary to section 297 (1) of the Penal Code.

By the appeal which he lodged before the High Court, the appellant asked that his conviction be set aside and also that the sentence be set aside. The sentence that had been meted out against him was one of four years imprisonment.

When the appeal came up for hearing, the learned state counsel, conceded it, as he held the view that the prosecution had failed to prove the ingredients for the offence of attempted robbery.

From the record, it is clear that there were three prosecution witnesses. PW1, BETTY ENDUSA, was the complainant. She said that on 12/2/2005, at about 8.30 p.m., she was at her place of work, at a “Miti ni dawa” premises, in Moi’s Bridge. The appellant was also said to have been inside the same premises.

When PW1 went outside the premises, to answer a call of nature, the appellant followed her and put his hands inside the trouser pockets of PW1.

According to PW1, the appellant intended to steal her money, whilst she was bending. She therefore cried out, as she ran into the “Miti ni dawa” premises.

PW2, JACOB BARASA WAMALWA, who was a night watchman at the said premises, heard the cries of PW1. He cut the appellant on the face, and the appellant ran away.

Both PW1 and PW2 went to report the incident to the police, soon after it happened.

The appellant was arrested after three days, when PW2 identified him, as the appellant was walking about, within Moi’s Bridge.

PW3, PC LUKE MARMA, was a police officer attached to Moi’s Bridge Police Station at the material time. He said that the complainant had reported the incident on 12/7/2005.

PW3 also recalled that on 17/7/2005 at 8.00 p.m, he was on night patrol with a colleague, when they

met the appellant. They arrested him, after the appellant had been identified by the complainant.

In cross-examination, PW3 reiterated that it was the complainant who identified the appellant.

After the prosecution closed its case, the appellant gave an unsworn defence. He said that on the material night, (12/7/2005), he got home from Eldoret, at about 7.30 p.m. He then went to rest. In other words, his was a defence of an alibi, because he could not have been at the scene of crime whilst at the same time he was resting in his house.

The appellant also said that he was arrested on 15/7/2005, by police officers who were looking for one Emmanuel. Even after he was arrested and taken to the police station, the complainant is said to have told the police officers that the appellant was not the one. However, the police decided to charge him nonetheless.

Having given consideration to the evidence on record, the learned trial magistrate held that what the appellant did was unlawful and that had PW2 not gone to the rescue of PW1, a more serious offence would have occurred. The court therefore found the appellant guilty as charged.

From the record, it is evident that the analysis by the learned trial magistrate was brief. That of itself is not wrong. However, in this case, it does not come out clearly, what it is that the trial court found to have constituted the unlawful act of the appellant.

From the evidence on record it shows that the appellant did put his hand into the pockets of the trouser which the complainant was wearing. None of the three prosecution witnesses talked of there being any other person, in the company of the appellant. Therefore the evidence did not support the particulars of the charge, which stated that the appellant had acted jointly with another person who was not before court.

The particulars of the charge also stated that the culprits attempted to use actual violence on the complainant, immediately before or immediately after they attempted to rob her.

Again, none of the prosecution witnesses said that the appellant threatened to or used any violence on the complainant at any time.

The only eye-witnesses, PW1 and PW2, did emphasize that the appellant had his hands inside the complainant's trouser pockets. Even when PW1 screamed as she ran into the "Miti ni dawa" premises, the appellant is said to have continued to hold onto her trousers. Therefore, the prosecution evidence did not support the charge in that respect too.

Pursuant to the provisions of section 297 (1) of the Penal Code, attempted robbery is committed if;

"Any person who assaults any person with intent to steal anything, and, at or immediately before or immediately after the time of the assault, uses or threatens to use actual violence to any person or property in order to obtain the thing intended to be stolen, or to prevent or overcome resistance to its being stolen"

In this case, the prosecution did not prove that the appellant assaulted the complainant. The prosecution also failed to establish that the appellant used or threatened to use violence on either the complainant or on the watchman, or against any property. Accordingly, the prosecution did not satisfy the ingredients of the statutory provision.

In the circumstances, I find and do hold that the appellant's conviction was not based on a solid foundation. It cannot stand. It is therefore quashed and the sentence is set aside.

The appellant should therefore be set at liberty forthwith, unless he is otherwise lawfully held.

Dated and Delivered at Kitale, this 23rd day of October, 2007.

FRED A. OCHIENG.

JUDGE.