REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 312 of 2004

ANTONY WANJOHI RWARO ……..…….....…….. APPELLANT

VERSUS

REPUBLIC ……..……..…… RESPONDENT

(Appeal from original Judgment and Conviction in Criminal Case No. 2206 of 2003 of the Principal Magistrate's Court at Kerugoya dated 27th July 2004 by Mr. J. N. Onyiego – S.R.M.)

J U D G M E N T

The genesis of this appeal is Kerugoya Principal Magistrate's Criminal Case No. 2206 of 2003 in which the appellant herein, Antony **Wanjohi Rwaro** was arraigned before that court on one count of attempted robbery with violence contrary to section 297(2) of the penal code. He entered a plea of not guilty and his trial ensued. At the end of it all he was convicted and sentenced to death as mandatorily provided for by the law. That conviction and sentence prompted this appeal. The appellant advanced five grounds in his petition of appeal to wit:-

(1) THAT the learned trial magistrate erred in law by failing to find that the main ingredients of he charge under section 297(2) of the Penal Code were not proved.

(2) THAT the learned trial magistrate erred in both law and fact by failing to find that circumstances of identification were not conducive.

(3) THAT the learned trial magistrate erred in both law and fact by failing to find that the contradictions in the prosecution case were material and touched on their credibility.

(4) THAT the learned trial magistrate erred in both law and fact by failing to find that this was a concocted case due to the prevailing grudge.

(5) THAT the trial court went astray by failing to consider or adequately consider the alibi defence.

The prosecution case in a nutshell was that on 2nd October, 2003 at about 4.45 a.m., the complainant (P.W.1) was in his house at Kaitheri village in Kerugoya town. While there he heard a knock on the bedroom window and saw a person he claimed to be the appellant standing outside. P.W.1 was ordered to open the door and give out money or else the robbers would burn his car that was outside. P.W.1 alerted his watchman who was inside the house. The watchman reacted promptly by shooting an arrow through the window and the thugs ran away. P.W.1 soon thereafter telephoned the police who came to the scene.

P.W.1 told the police that he had recognised the appellant whom he knew very well among the thugs. He led the police to the house of the appellant but found it locked. The police searched other houses within the compound and found the appellant sleeping in his brother's house. He was then arrested and charged.

Put on his defence, the appellant elected to give a sworn statement of defence and told the court that he did not commit the offence. He claimed that he was framed in the case because of a grudge he had with the village vigilante group and the complainant after they had assaulted him.

In support of his petition of appeal, the appellant tendered written submissions that we have carefully read and considered.

Mr. Orinda, learned principal state counsel started of his submissions by stating that there was a problem with identification. He submitted that the issue at hand was recognition of the appellant at night in difficult circumstances and though the source of light had not been properly considered by the learned magistrate, he was nonetheless going to oppose the appeal. Counsel submitted that the source of light at the home of P.W.1 was security light. That the appellant happens to be a neighbour of the complainant and was seen at the scene of crime. When arrested he was found wearing the same jacket he was seen with by P.W.1 & P.W.2 at the scene of crime. That the light in the compound of P.W.1 was sufficient for recognition. Regarding the appellant's defence, counsel submitted that the trial court considered the same and came to the conclusion that it was far fetched. To counsel the identification of the appellant was safe and his appeal ought therefore to be dismissed.

As the first appellate court, we are alive to our duty as spelt out in the case of **Okeno v/s Republic (1972) E.A. 32** which is that we have to analyse the evidence tendered during the trial afresh, evaluate it and arrive at our own independent conclusion but remembering that we did not have the advantage of seeing and hearing the witnesses and giving allowance for the same.

The conviction of the appellant from the evidence on record turned upon his alleged recognition at the scene of crime by P.W.1 and P.W.3. However first and foremost we need to ask ourselves whether the ingredients of the offence of attempted robbery with violence contrary to section 297(2) of he Penal Code were met in the circumstances of this case?

In a charge of this nature, two main ingredients have to be proved; first that there was an assault on the complainant or any other person in the cause of the attempted theft and secondly existence of the thing intended to be stolen. Indeed section 297(1) of the penal code defines attempted robbery as "**Any person who assaults any person with intent to steal anything and …….**"

From the foregoing it is crystal clear that for a person to be convicted under the section, the prosecution must endeavour to proof with cogent evidence the element of assault and availability of the thing intended to be stolen. The burden is upon the prosecution to meet those challenges in terms of section 107(1) of the Evidence Act which provides:

"… **Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist ….**"

In the circumstances of this case, the prosecution failed miserably to prove that the complainant and or any other person was assaulted in the cause of attempted robbery. The evidence on record merely shows that the robbers threatened to burn P.W.1's car parked outside if he refused to open the door for them. This threat though not carried out eventually cannot by any stretch of imagination be termed an assault on the complainant whether direct or constructive. Similarly the prosecution did not produce, prove or show the court any item that was intended to be stolen in the alleged crime in question. There was no evidence that P.W.1 or his watchman (P.W.3) had any money that could have been stolen by the robbers if they had succeeded in their mission although the robbers demanded the same.

It is our view in the circumstances of this case therefore that the prosecution failed to prove any of the ingredients of the offence. The prosecution did not allege and prove that the complainant and or any

other person was assaulted and injured during the attempted robbery. The prosecution too failed to prove existence of a thing to be stolen. Because of these omissions on the part of the prosecution, we would agree with the appellant that the charge remained unproved at the conclusion of the trial.

As regards the alleged recognition of the appellant at the scene of crime by P.W.1 and P.W.3, we entertain some doubts as well. It does appear to us that the two witnesses were not credible. Whereas P.W.1 in his testimony stated that he alerted P.W.3 about the arrival of the thugs who proceeded to switch off all the lights from the meter box. P.W.3 on the other hand stressed that the security lights were on throughout the incident and he could see everything clearly. Indeed under cross-examination by the appellant P.W.3 maintained that the lights were never switched off throughout the episode. A pertinent question then arises here! Were the lights switched off at the meter box as claimed by P.W.1, or, they were on throughout the episode as alleged by P.W.3. If they were switched off then how could these witnesses have been able to see the appellant sufficiently as to recognise him? It would appear therefore that one of them or even both were not being candid with the court. In the case of **Dinkrai Ramkrishna Pandya v/s Republic (1957) E.A. 336**, the court of appeal observed that where the evidence is contradictory or inconsistent in material particulars it should not be relied upon and or acted upon to return a conviction. This is the exact scenario in the circumstances of this case.

Even if we were to assume that indeed there were security lights which could have enabled the two witnesses to see the appellant sufficiently as to be able to recognise him, we note however that no inquiries were made by the learned magistrate nor did the prosecution lead any evidence as to the intensity of the alleged light, its source in relation to the appellant and for how long the appellant was under observation by the two witnesses so that the two witnesses could have seen him sufficiently as to form a true impression of him. It has been repeatedly held that failure to undertake such inquiries is an error of law and such evidence cannot safely support a conviction. See **Maitanyi v/s Republic (1986) KLR 198**. No such inquiries were undertaken in the circumstances of this case and it cannot therefore be said confidently that the alleged recognition of the appellant was free from possibility of error.

We are also surprised that the appellant would raid a home where he knew that he could easily be recognised and take no steps to at least disguise himself. This was the sort of misgivings that **Justice Lyon** had in mind in the case of **Republic v/s Eria Sebwato (1960) E.A. 174** when he said:

"…. **That this accused, well known to the complainant, should go with seven other men to commit an organized robbery in a house where he was well known seems to me to be inexplicable. He must have known he was bound to be recognized, and that, in my view, casts doubt on the evidence of the complainant and his wife ….."**

These words ring true today as when they were uttered slightly over 47 years ago.

The learned magistrate held that the defence advanced by the appellant was a mere denial. However she failed to delve further on the issue of a grudge between the appellant and the complainant which was raised by the appellant right from the commencement of the case. Considering the manner in which the alleged offence was committed and the conduct of the appellant afterwards, we are of the view that the defence was plausible and deserved better treatment from the learned magistrate.

Finally, the trial court held that the appellant was supposed to have been wearing sleeping gown and not a jacket at that hour of the night when he was arrested. The court was of the view that since he was wearing a Jacket at that hour of the morning, it showed that he had come from the robbery mission. The court went on to hold:

"……. **At that hour it is expected he could have been in sleeping attires and not wearing a jacket. There is no other explanation that he was wearing a jacket other than the fact that he had come from attempted robbery ….."**

This was a gross misdirection on the part of the learned magistrate. It was wholly unsupported by any evidence. We are not aware of any requirement that at particular hours people must be found in their

sleeping attires whatever that means. The jacket could have been part of his sleeping attire. The implication drawn by the learned magistrate therefore had no basis in law and was of necessity prejudicial to the appellant.

In conclusion we find that the appellant's appeal has considerable merit. Accordingly we allow the same, quash the conviction and set aside the sentence imposed. The appellant should be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 4th day of October 2007

MARY KASANGO

JUDGE

M. S. A. MAKHANDIA

JUDGE