



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal No. 129 of 2004

WILFRED AMENYA MOMANYI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT OF THE COURT

The appellant was charged with the offence of attempted robbery contrary to **Section 297(2)** of the **Penal Code**. The particulars were that on 23/1/2004 at Jogoo Trading Centre (Mau Summit) Nakuru District, jointly with others not before court, while armed with dangerous weapons namely a panga, the appellant attempted to rob Margaret Wairimu Mwangi of her money and at the time of such robbery wounded her.

He was tried, convicted and sentenced to death and being aggrieved by the said conviction and sentence has appealed against the same to this court.

The prosecution case briefly stated was as follows:-

The complainant, PW1, testified that on 23/1/2004 at about 7.00 p.m. he had gone to sell clothes at Mau Summit area and was on her way back with one Lucy Wanjiku, PW2, when the appellant suddenly came from behind them and grabbed her by the neck. He began to strangle her. He threatened the ladies with a panga that he had in his possession and demanded to be given money. As the appellant tried to cut PW1 on the head, she raised her left arm to shield her head and as a result her left arm was cut. In the meantime, PW2 was screaming and so the appellant left them and ran away. The ladies then went and reported to the police and sought medical help. PW1 said that prior to the said attack, she had known the appellant for over a year. The following morning PW1 saw the appellant and with the help of members of the public, he was arrested and taken to Mau Summit Police Station. He admitted having committed the said offence and he accompanied some police officers to his house where the panga was recovered.

PW3 corroborated the evidence of PW1 and it is instructive to note that the appellant did not ask her anything at the time of cross examination.

PW3 was a Clinical Officer at Molo District Hospital. He examined PW1 on 23/1/2004 and found that she had tenderness and bruises on her neck and lower chin. She also had a cut wound on the left wrist joint which had been inflicted by a sharp object. The tenderness and bruises on the neck had been occasioned by a blunt object. He produced the P3 form which he had filled.

PW4 was the arrested officer. He told the court that the appellant, subsequent to his arrest confessed

having committed the said offence.

The court found that the appellant had a case to answer but the trial court did not strictly comply with **Section 211** of the **Criminal Procedure Code**. He gave an unsworn statement in his defence and denied having committed the offence but admitted that the police recovered a panga from his house.

The trial magistrate found that the appellant had committed the offence as charged and that in so doing, he was armed with a dangerous weapon and that at the same time he wounded her using the said weapon. He even strangled her. The complainant and PW2 knew the appellant very well and clearly recognised him and immediately after the said incident, reported to the police that the appellant had attacked them with an intention of robbing them and they even showed the police where he lived. There was no possibility of mistaken identity in the circumstances.

The appellant faulted the trial magistrate for his failure to expressly state in his record that he had complied with the provisions of **Section 211** of the **Criminal Procedure Code**. We agree with him but as was rightly submitted by Mr. Gumo, Assistant Deputy Public Prosecutor, that failure was not fatal to the conviction, it is curable under the provisions of **Section 386** of the **Criminal Procedure Code**.

Having carefully analysed all the evidence that was tendered before the trial court, we are satisfied that the appellant's conviction and sentence were proper in law and hereby dismiss the appeal in its entirety. Right of appeal within 14 days from the date of this judgment.

DATED at Nakuru this 13th day of February, 2006.

D. MUSINGA

JUDGE

13/2/2006

L. KIMARU

JUDGE

13/2/2006

Judgment delivered in open court in the presence of Mr. Gumo Assistant Deputy Public Prosecutor for the state and the appellant present.

D. MUSINGA

JUDGE

13/2/2006

L. KIMARU

JUDGE

13/2/2006