



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)

Criminal Appeal 896 of 2003

VINCENT SHIVEKA BETI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

VINCENT SHIVEKA BETI was found guilty and convicted of **ATTEMPTED ROBBERY WITH VIOLENCE** contrary to **Section 297(2)** of the **Penal Code**. He was sentenced to death as by law prescribed. Being aggrieved by the conviction and sentence, the Appellant lodged this appeal.

The facts of the case were that the Complainant drove his pick-up to his construction site along **SIGUTA ROAD**. At the site was a gate which at the time he arrived was locked. The Complainant said that after he stopped at the gate, two men approached him. One of these men was the Appellant who first told him that he wanted a job. That after telling the Appellant to allow him to park his car so that they could talk, the Appellant produced an object and pointed it at him. That immediately the Complainant held the object and it broke into 2 pieces. The Appellant then started running but was apprehended and later charged. In the Appellant's unsworn statement he said that he was just walking when he saw a group of people coming. He decided to let them pass but one of them accused him of not answering well and he started beating him. That he woke up later at Kenyatta National Hospital. The Appellant said that he was surprised by the charges framed against him.

The Appellant has raised four grounds in his amended grounds of appeal.

Ground one was that the learned trial magistrate erred in basing a conviction on the evidence of PW1 and PW2 which evidence was insufficient to sustain a conviction and inconsistent in material particulars.

Two that the conviction was wrong for being based on the mode of arrest whilst the chain of events were not constant.

Three that the Appellants defence was sufficient to shake of the prosecution case.

Four that the prosecution failed to prove its case beyond any reasonable doubt.

We have carefully analysed and re-evaluated the evidence adduced before the lower court bearing in mind that we neither saw nor heard any of the witnesses and giving the due allowance (see **OKENO vs.**

REPUBLIC 1972 EA 32).

This appeal was opposed. In the Appellants oral submission he emphasized that the prosecution had not discharged its burden of proof. The Appellant submitted that the Complainant in his evidence did not talk about any robbery or attempt to rob him. That the prosecution failed to show the intention of the confrontation between him and the Complainant.

MRS. KAGIRI represented the State in this appeal. In her submission, the learned counsel stated that the prosecution had proved that the Complainant and the Appellant had a brief discussion before the Appellant produced a toy pistol. The learned counsel submitted that this was proof that the Appellant had posed as a job seeker before the attempted robbery. Learned counsel submitted that even though the Appellant did not say anything, she urged the Court to find that the fact that he removed a toy pistol in the circumstances proved his intention was to steal. Learned counsel urged us to dismiss the appeal as having no merit.

The key issue in this appeal is what constitutes the charge of **ATTEMPTED ROBBERY** contrary to **Section 297(2)** of the **Penal Code**. In the learned trial magistrate's judgment she made this observation.

“The Court also does not doubt what the accused wanted was to rob PW1. PW2 said they were waiting for their advance so PW1 must have been having money. The accused is said to have been the person armed with the toy pistol. He could not have been so armed for no reason...”

Section 297 of the **Penal Code** provides as follows: -

“297 (1) 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, is guilty of a felony and is liable to imprisonment for seven years.”

(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

I agree that the definition of the offence under this section is cumbersome and calls for a simplification as the Court of Appeal pointed out in **Abubakali vs. Uganda 1973 EA 230** and **Wachira vs. Republic 1979 KLR 293**. To put it in simple words, I would define the offence of **ATTEMPTED ROBBERY** with violence contrary to **Section 297(2)** as including proof of;

1. An assault of any person with intent to steal anything; and
2. The use or threat to use force in order to steal anything or obtain the thing to be stolen or prevent or overcome resistance to its being stolen.

And in addition to the first two ingredients proof of anyone of the following;

3. (i) either offender is armed with any dangerous or offensive weapon or instrument; or
- (ii) is in company with one or more other person or persons; or
- (iii) immediately before or immediately after the time of assault he wounds, strikes, beats or uses any other personal violence to any person.

In the instant case no evidence of an assault to anyone was adduced. In addition whether by direct or circumstantial evidence, there was nothing prove that the Appellant or the other in his company had any intention to steal. All the Appellant was said to have asked for was a job, before whipping out the toy

pistol. In addition to not proving any assault or intention to steal anything, no evidence was adduced to show that any personal violence was used by the Appellant against anyone.

Getting back to the learned trial magistrate's finding. It was her view that the Appellant "*must have wanted to steal*" and "*PW1 must have been having money*". With due respect to the learned trial magistrate a trial court cannot make an inference on a theory without evidence to support it. Neither can a trial court assume facts that have neither been testified to in evidence. The issue of the Appellant's intention in confronting the Complainant was for the prosecution to prove in evidence. This, they failed to adduce any evidence to prove. The issue of whether complainant had any money is largely irrelevant to this case since the issue of whether the Appellant knew he had any money and whether he had any illegal or criminal intention on that money was not addressed in the case nor proved by the prosecution. As we have clearly set out in this judgment it is abundantly clear that the evidence adduced by the prosecution could not support the offence charged and therefore failed to prove the charge. The conviction entered herein was clearly unsafe and so was the sentence. We allow this appeal, quash the conviction and set aside the sentence. The Appellant should be set free unless he is otherwise lawfully held.

Dated at Nairobi this 27th day of April 2006.

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LESIT, J.

JUDGE

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MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

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LESIT, J.

JUDGE

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MAKHANDIA _

JUDGE