

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
Criminal Appeal 75 of 2005

(From Original Conviction and Sentence in Criminal Case No. 112 of 2005 of the Senior Resident Magistrate's Court at Kangundo (D. MOCHACHE- SRM) on 20/7/2005).

JOSEPH MWANZIA KILUNGU
APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant JOSEPH MWANZIA KILUNGU was the second accused in the trial court in which he and his co-accused PETER KIOKO KASOLA were charged with the offence of Attempted Robbery contrary to section 297 (1) of the Penal Code. After a full trial, both the appellant and his co-accused were convicted and sentenced to serve 2 years imprisonment.

The appellant has raised one key ground in his appeal that the prosecution did not adduce sufficient evidence to demonstrate the nexus between him and his accused in this case and that the circumstances of identification by the witnesses was unreliable.

Mr. O'mirera for the state started by stating that the state was opposing the appeal on grounds that the appellant and his co-accused were properly recognized by the complainant, his wife and son, PW1 PW2 and PW3 respectively. Counsel submitted that as a result of the recognition, PW5 the arresting officer was able to trace the appellant and his co-accused using the names the three eye witnesses had given him. Later Mr. O'mirera seemed to change his position. He submitted that since the main ingredient for the offence was assault and that since that ingredient was not proved then the charge was not proved.

Section 297 (1) of the Penal Code provides:-

“ Section 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.”

Assault is the key and most important ingredient for the offence under section 297 (1) of Penal Code. The evidence adduced by the prosecution clearly indicates that the attackers who went to the complainants house on the night in question did not gain entry into the complainants house. No one was hurt in the entire episode. As far as the offence of Attempted Robbery contrary to section 297 (1) of Penal Code was concerned, it could not be proved from the evidence adduced before the court.

From the evidence of the complainant he saw the appellant and others outside the windows of his house. They had torches. He switched on his tube lights which he said were powered by a generator. For sure the complainant and his family may have seen the appellant and his accomplices quite clearly. However none gained entry into the house. While PW1 the complainant and his wife said that the appellant in particular was ordering and told them to switch off the alarm because they must accomplish what took them to the complainants home, none of them could tell what the mission was. The appellant and his accomplices did not disclose what the mission was. Whereas the circumstances of the case are a clear indication that the appellant and his accomplices had not gone in peace, it was the duty of the

prosecution to establish what took them to the complainants house. That matter ought not to have been left to speculation as happened in this case.

In the circumstances, having considered this appeal I find merit in it. I will allow the appeal, quash the conviction and set aside the sentence imposed on the appellant.

Since the appellant's co-accused faced same charge and conviction, the interest of justice requires that he too should benefit from the court finding in the appellants appeal. I consequently quash the conviction entered against PETER KIOKO KASOLA and set aside the sentence imposed against him. The appellant and PETER KIOKO KASOLA should be set free unless they are otherwise lawfully held.

Dated at Machakos this 31st day of May, 2006.

J. Lesiit

JUDGE