REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 958 of 2003

(From original conviction(s) and Sentence(s) in Criminal Case No. 5751 of 2003 of the Chief Magistrate's Court at Kibera (Miss Mwangi – SPM)

JOSEPH GITONGA KARIUKI…….....……..…....APPELLANT

VERSUS

REPUBLIC…….....……..……....RESPONDENT

J U D G M E N T

JOSEPH GITONGA KARIUKI was 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, he lodged this appeal.

The Appellant has raised several grounds of appeal which in the main he challenges the sufficiency of the evidence to sustain the charge and the lack of evidence to establish an intention to steal from the Complainant and finally lack of identification by the Complainant.

When this appeal came up for hearing on 9th March 2006, the learned counsel for the State conceded to the appeal. MISS GATERU cited the lack of evidence to prove an assault on the Complainant or any other person at the time of the offence. Learned counsel also submitted that an intention to rob the Complainant was not proved.

We have analyzed and re-evaluated the evidence adduced before the trial court as required of us as a first appellate court. See **OKENO vs. REPUBLIC 1972 EA32**.

The brief facts of the prosecution case were that the Complainant herein PW1, dropped PW2 at the gate of his house in Riruta. PW2 entered the gate and went to his house. The Complainant could not restart his vehicle and he stayed for sometime. Then he says he saw 3 people open the vehicle and order him to get out. Instead of getting out he started screaming and went to the rear seat. The man, one with a sword and another with a pistol then ran away. PW1 drove back to his place of work at Kenyatta National Hospital. At around the same time, PW3, Police officer on duty with others said they saw people running. That he shot at them and hit one of the men in the leg. They arrested him and he was eventually charged. PW1 saw the Appellant at Kenyatta National Hospital and identified him as one of the three men who had ordered him out of the vehicle.

The Appellant denied the offence and he said that had been walking home when he came across people running. That he too decided to run and that is when he was shot on his leg.

Section 297 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.

(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."

To prove the offence under **Section 297(2)** of the **Penal Code** one must prove that the person charged assaulted another while either in order to steal something or while trying to prevent or overcome resistance to the theft.

In addition to proving assault and the use of force there must be evidence to establish that the accused person had an intention to steal something and that he was either armed with a dangerous or offensive weapon, or was in company with another or others or immediately before, during or after the attempted robbery used or threatened to use personal violence on another.

In the instant case, no evidence was adduced to prove that anyone was assaulted during this incident. There was no evidence from which an inference can be made that an intention to rob the complainant of anything if at all existed. Such inference can be made either from an act or conduct of the accused person. In this case, the Complainant was confronted as he sat inside his vehicle and ordered to come out. The Complainant started screaming instead and the three men who had approached him immediately started running. The conduct of the three men, cannot be said to have established that the necessary *mensrea* to steal existed in the minds of those three men.

What is more important to this case is the fact that the Complainant was the sole identifying witness. The Complainant says he saw the Appellant as one of the three men who had a sword. The Complainant did not witness the Appellant's arrest and only saw him later the same day at the Kenyatta National Hospital casualty. No identification parade was carried out for the Complainant to identify the Appellant. Further still, the Complainant's evidence was that there were security lights at the gate which enabled him identify the Appellant. However, from the circumstances of the case, the Complainant was confronted suddenly and on reacting by screaming as he did, his accosters ran away. The Complainant in our view had a fleeting view of the three men. Given the time of the night it was, 3.00 a.m., the fact that there was only one light at the gate, we find that the circumstances of identification were difficult indeed and not positive for positive identification by a single witness. Further more, the evidence of PW3 clearly shows that he shot in the dark and felled one person. That was after seeing people running from a vehicle which drove off without stopping. More importantly the Appellant was not armed with a sword. The Complainant's evidence of identification could not stand on its own. Other independent evidence, whether direct or circumstantial was needed to corroborate it. If the Appellant had been found with a sword fitting the description of the one the Complainant had seen with one of the three men who accosted him, that may have provided good circumstantial evidence to corroborate that of the Complainant.

The learned trial magistrate in her evidence found PW1's evidence "**very believable evidence of how he took PW2 home only for the motor vehicle to stall and he was attacked by 3 men among whom was the accused"**. The issue in the case was not whether PW1's evidence was believable but whether an offence as charged was established. Furthermore, the learned trial magistrate shifted the burden of proof against the Appellant when she observed.

"***The accused said he had gone to sell milk where he got the people who shot and arrested him. He never said how at 4.00 a.m. he could have gone to sell milk and to who. His defence is not believable…"***

In criminal cases the burden is on the prosecution to prove its case against an accused person beyond any reasonable doubt. That burden never shifts to the defence. In shifting the burden of proof, the learned trial magistrate required the Appellant to prove his innocence which was irregular and against the

known principle of burden of proof in criminal cases.

Having carefully considered this appeal we agree with the Appellant and the State that the evidence could not sustain the offence charged. Essential ingredients for the offence like an assault contemporaneously to the attempt to steal something coupled with evidence to establish an intention to steal something either by person accused alone while dangerously armed or in company with another or others were all lacking in this case. We find merit in this appeal, quash the conviction and set aside the sentence. We order the release of the Appellant forthwith unless he is otherwise lawfully held.

Dated at Nairobi this 9th day of May 2006.

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LESIIT, J.

JUDGE

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MAKHANDIA, M.

JUDGE

Read, signed and delivered in the presence of;

Appellant

Miss Gateru for the State

Wambui/Erick - CC

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LESIIT, J.

JUDGE

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MAKHANDIA, M.

JUDGE