REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 83 of 2004

(From original conviction and sentence in criminal case No.7938 of 2003 of the Chief Magistrate's court at Kibera (Ms. Siganga - SRM)

ANTONY KINYUA MWENDA …….....…….APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

ANTHONY KINYUA MWENDA was found guilty of **ATTEMPTED ROBBERY WITH VIOLENCE** contrary to **Section 297(2)** of the **Penal Code** convicted and sentenced to death as by law prescribed. The particulars of the charge alleged that on 27th October, 2003 at Ongata Rongai, the Appellant with others who were armed with a wooden pistol or toy attempted to rob the shop of **Beatrice Wangechi** and in the process threatened to use violence on her watchman **Lesian Moso Leserogu**.

The Appellant appeared in person. The State was represented by **Miss Nyamosi**, learned State Counsel. The State partially conceded to the appeal.

The prosecution case was that P.W.1 owned a shop in a compound that was guarded by Lesian, P.W.3. At 2 .00 a.m. on the material night, an attempt to break into the Complainant's shop was made but thwarted by the watchman, because, according to Lesian, he was awake. At 4.00 a.m. another attempt was made. This time a man armed with a pistol ordered P.W.3 to lie down while another went to the door of the shop. P.W.3 said that when the armed thug was distracted and he looked aside, he seized the opportunity to hit him on the shoulder causing him to release his gun and to run away. The gun was later discovered to be a piece of iron and was exhibited in Court. The Appellant was arrested three days later after the watchman, P.W.3, identified him to P.W.2, a police officer. The learned trial magistrate based the Appellant's conviction on the evidence of visual identification as given to her by P.W.3, the watchman.

The learned State Counsel urged us to reduce the conviction by setting aside the conviction under **Section 297(2)** of **Penal Code** and substituting it with one under **Section 306(a)** of the **Penal Code**. Counsel submitted that the basis for the application for substitution of the charge was the lack of evidence to prove assault which, Counsel submitted, was one of the ingredients for the offence of attempted

robbery with violence under **Section 297(2)** of **Penal Code**. We shall deal with this issue very briefly by quoting from our earlier judgment in which we dealt with the issue at length. In the case of **MORRIS OTIENO ODUOR vs. REPUBLIC HCCA No. 719 of 2003** we held thus: -

"***In conclusion therefore on this point and relying on Abubakali case, Supra, Gakuu Machane's and Wachira's case, Supra, we find that for a charge under Section 297(2) of the Penal Code to be proved, it is enough to show that the accused persons either used or threatened to use force contemporaneously in an attempt to obtain the thing intended to be stolen or to prevent or overcome resistance to its being stolen. The word "assault" used in that section need not be actual assault causing harm or battery but any act by which it is intended to create an apprehension of an immediate and unlawful personal violence."***

We relied on the following cases, **Abubakali & Another vs. Uganda 1973 EA 230, Gakuu Machane vs. Republic 979 KLR 364, Wachira vs. Republic 1979 KLR 293**.

The learned State Counsel misconstrued the necessary ingredients for the offence under **Section 297(2)** of **Penal Code**. It is not necessary to prove that an assault occasioning actual bodily harm was suffered by the victims of the crime if it can be shown that an act that was intended to cause apprehension that physical violence or injury may be caused is sufficient to support such a charge.

Be that as it may, we now turn to the appeal before us. The Appellant's first ground of appeal is that the charge facing him was defective in that it alleged he had in his possession an imitated wooden (toy) pistol while the exhibit produced in Court was a piece of iron bar. We have analyzed and evaluated afresh the evidence adduced before the lower court while giving due allowance to the disadvantage we face that we neither saw nor heard any of the witnesses. The evidence adduced by the only eye witness, P.W.3, was that the two men who attacked him that night were armed with a piece of iron bar which he said he thought was a pistol. P.W.3 is the one who recovered it at the scene after the robber, whom he identified as the Appellant, dropped it. It was an exhibit in Court. We agree with the Appellant that there was a variation between the particulars of the charge and the evidence adduced. The evidence did not support the charge. We shall get back to this issue later.

The second ground raised by the Appellant was that the evidence adduced by the prosecution was scanty and the third ground was that the evidence of identification by P.W.3 was not positive and for both reasons no conviction should have resulted. The Appellant in his written submissions maintained that the evidence of the prosecution was inconsistent and unreliable. The Appellant pointed out the evidence of P.W.1 who said that her sister, one Ann, not called as a witness, was sleeping inside her shop. That at 2.00 a.m. her sister went to her house and reported that thieves had broken into the shop. That when P.W.1 went to the shop, she found it closed but things were scattered all over the inside. The Appellant urged the court to find that P.W.3's evidence that the thugs did not manage to enter the shop at 2.00 a.m. because he was awake, was inconsistent with the complainant's evidence. The Appellant highlighted other inconsistencies in the prosecution case. The fact that when the Complainant questioned P.W.3, P.W3 told her that he was able to identity the one who tried to break into the shop. That in Court, P.W.3 contradicted his statement to the Complainant by saying that he could not identity the one who tried to break into the shop but the one who was guarding him.

In regard to the variation between the evidence adduced and the charge we note that the learned trial magistrate did not consider any of them. The position in law on this issue was well set out in the case of **KIMEU vs. REPUBLIC (2002) 1 KAR 757** holding six which held as follows:-

"***The position in law is that it is not every conflict between the particulars of the charge and the evidence which will vitiate a conviction especially with conflicts that are minor or of such nature that no discernable prejudice is caused to the accused."***

The conflict between the evidence and the charge in the instant case was that whereas the charge described the weapon that the Appellant was armed with as being wooden, an iron bar or metal was what was adduced in court to support the charge. The type of weapon the Appellant had was very material to

the charge due to its nature. The charge being attempted robbery with violence, it was material whether the 'weapon' the accused person is alleged to have had could cause injury or inflict harm to somebody. A wooden piece of wood cannot be described as a weapon particularly where it is said to be just a piece of wood. The description given was not of known pieces of wood which can be used to inflict injury like for example "a rungu". The fact a piece of iron bar was the one exhibited in Court as the one left behind by the robbers in the circumstances, caused prejudice to the Appellant. As for the inconsistencies in the evidence of the prosecution and in particular that of visual identification by the key witness P.W.3, the test applicable was well set out in the case of **Paul Etole & Another vs. Republic CA No. 24 of 2000** where it was held: -

"***The appeal of second Appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriage of justice. But such miscarriage of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally it should remind itself of any specific weakness which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but even when witness is purporting to recognize someone who he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made."***

The test that such evidence should be subjected to is whether the inconsistency is material and whether it goes to the root or substance of the case. The inconsistency between the report made to the Complainant by P.W.3 and the one she received from one Ann concerning the attempt to break into her shop at 2.00 a.m. that night is material in our view. Every case is bound to have inconsistencies because the evidence is given by human beings who are not perfect. However, the incontinences that are minor and inconsequential should not affect the case. If on the other hand the inconsistencies are material they should be considered. In this case according to PW3 the attempt to break into the Complainant's shop at 2.00 a.m. was not successful but according to the report received by the Complainant from one Ann who was sleeping inside the shop, the robbers gained access into the shop leaving things scattered all over. The Complainant said she confirmed Ann's report.

We also find material inconsistencies in the prosecution case touching on the identification of the Appellant. While P.W.3 told P.W.1 that he recognized the thief who tried to break into his shop, in Court, P.W.3 changed his story and said that he recognized the one who guarded him while holding a pistol. The most important inconsistency was P.W.3's statement to the complainant that the man he recognized and who was breaking into the shop door was using a metal bar to break into the shop and that he had a black mark on the face, in his evidence P.W.3 said that he recognized the robber who guarded him with a pistol because he stood near him and because the compound was well lit with electric lights. P.W.3 described him as having burn marks on his face. P.W.3 said that electric lights which were on around the plot enabled him identify the Appellant and that he was attacked near the door where the lights are brightest.

P.W.3 was inconsistent as to whom he could recognize, whether the man who tried to break into the Complainant's shop or the one who guarded him. P.W.3 was also inconsistent as to the weapon the man he recognized was having. At one point he said he had a metal bar, at another point he said he had a pistol. P.W.3 also contradicted himself as to the role played by the one he recognized whether he tried to break into the shop or whether he guarded him. That inconsistency was material and could not be cured under **Section 382** of the **Criminal Procedure Code**. Moreover the contradiction was such that it created the impression that the PW.3 was confused and therefore his evidence could not be relied upon to sustain a conviction standing on its own as it did.

The Appellant in his fourth ground rightly put it that the learned trial magistrate failed to warn herself before convicting him on the evidence of identification by a single witness. Not only was it important for the trial magistrate to warn herself of the inherent dangers of convicting on the evidence of a single identifying witness but also needed to treat the evidence with great caution. The learned trial magistrate

failed in her duty by failing to take either of these precautions. In the case of **Wamunga vs. Republic CA No. 20 of 1989** Court of Appeal held: -

"***Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleged to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification."***

The Appellant's third ground was that the learned trial magistrate erred in rejecting his defence. The learned trial magistrate rejected the Appellants defence on the basis that P.W.3 had positively identified him by the burn marks on his face. The learned trial magistrate misdirected herself as to the evidence of identification by P.W.3 by finding it to be positive therefore falling into error and rejecting the Appellants defence. The evidence of P.W.3 was far from positive for the basic reason that it was riddled with inconsistencies. We find that the learned trial magistrate misdirected herself as to the nature of the evidence of identification given by P.W.3 and that she fell into error when she found it sufficient to sustain a conviction. On our evaluation of the evidence adduced in this case we find that the conviction was unsafe and should not be allowed to stand. 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 26th day of September 2006

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LESIIT, J.

JUDGE

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MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

Appellant

Miss Nyamosi for State

Tabitha/Erick - CC

…….

LESIIT, J.

JUDGE

…….**….**

MAKHANDIA

JUDGE