REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 122 of 2004

(From original conviction and sentence in criminal case No. 6658 of 2003 of the Chief Magistrate's Court at Kibera, Ms. Siganga, SRM)

EVANSON MUIRURI GICHANE ……..…..……
APPELLANT

VERSUS

REPUBLIC…….....……. RESPONDENT

JUDGMENT

The Appellant, ***EVANSON MUIRURI GICHANE***, has come to us on appeal, challenging his conviction and sentence by the Chief Magistrate's Court at Kibera, for the offence of attempted robbery with violence contrary to Section 297(2) of the Penal Code. Upon conviction, the appellant was sentenced to death. The appellant raised several grounds of appeal:

One, that the ingredients of the charge were not proved.

Two, that the evidence adduced by the prosecution was contradictory.

Three, that vital witnesses were never called and four, the defence was inadequately considered.

The prosecution case in summary was that on 5th September, 2003 at about 3.15 p.m, three people came to the gate of one Kennedy M. Kamwathi, P.W.5 at Riverside drive claiming that they had been sent by P.W.5 to carry out fumigation exercise in his compound. P.W.5's laundry man, Ernest, opened the gate for the three men, despite protests from P.W.5's other employees – Philip Etale (P.W.4) Shamba boy and Phillip Ombuya P.W.1 a cook. Once inside the compound, the three men and Ernest, grabbed PW.1 and P.W.4, and threatened them with knives. P.W.4 screamed for help. The commotion and screams attracted the attention of other workers in the neighbouring compounds. These workers included Wiliam Shivachi P.W.2 and Paul Mulinda Shisundi P.W.3. The three people panicked and two jumped over the hedge. The third person, who is the appellant was not so lucky. He was cornered as he tried to escape by a crowd including P.W.3. He was arrested and escorted back to P.W.5's compound. Police Officers were summoned. They came and re-arrested the appellant whom they escorted to Kileleshwa police station and subsequently charged him with the offence.

In his unsworn statement of defence, the appellant told the Court that he was walking to the bus-stop along Riverside drive, from his Kiosk, located along Suna road in Kileleshwa. However, before he could reach the bus-stop he was surrounded by a mob of people who descended on him with blows and kicks

claiming that he was one of the thieves. He was then dragged to a nearby compound from where he was collected by police and then taken to the police station. He was later charged for an offence he knew nothing about.

When the appeal came up for hearing the appellant with the permission of the Court tendered written submissions which we have carefully read and considered.

The state conceded to this appeal stating that the prosecution did not sufficiently prove its case as per the charge sheet. Miss Abenge, learned State Counsel submitted that on the evidence on record however an offence was committed. She was of the view that the offence disclosed was one of assault with intend to steal contrary to Section 298 of the Penal Code or attempted robbery contrary to Section 297(1) of the Penal Code. Counsel therefore urged us to exercise our discretion and find the appellant guilty of any of the above offences and impose an appropriate sentence.

We have carefully considered this appeal and have subjected the evidence adduced before the trial Court to fresh analysis and evaluation as expected of us as the first appellant Court. See ***OKENO VS REPUBLIC (1972) EA 32.***

The offence of attempted robbery with violence contrary to Section 297(2) of the Penal Code is proved if the prosecution show that the person charged assaulted another either in order to steal something or 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 the company with another or others, or, immediately before, during or after the attempted robbery used or threatened to use personal violence on any person.

In the instant case, there is evidence that the appellant was in the company of more than on person. They were armed with knives with which they threatened the complainant. In fact, according to the recorded evidence, the appellant held the knife on the throat of PW.1 as if he intended to slaughter him. The act of placing a knife on the throat of P.W.1 to our mind amounts to an assault as contemplated by Section 297(1) of the Penal Code. Assault need not be battery as understood in civil law. All that is required is to put the victim in apprehension of immediate and unlawful personal violence. See ***ABUBAKAH & ANOTHER (1973) E.A. 230.*** Further the appellant and his cohorts were armed with knives. The purpose to which the knives were put during the incident turned them into dangerous or offensive weapons.

Did the appellant and his accomplices intend to steal anything from the complainant? There is no direct evidence on this aspect of the matter. Neither the appellant nor his accomplices said anything remotely suggesting that they intended to steal anything. Although the charge sheet talks of an attempt to rob their complainant of household goods, no evidence was tendered along those lines. Is there however any evidence from which an inference can be drawn that an intention to rob the complainant of anything if at all was in the offing? From our reading of the record, the answer is irresistably in the affirmative. Such inference can be made either from an act or conduct of the accused person. In this case, the appellants confronted PW.1, and P.W.4 under the pretext that they had been sent to the residence by its owner P.W.5 to do fumigation in the compound as well as inside the house. This was not true as P.W.5 the owner of the premises testified that he issued no such instruction to the appellant and his accomplices. One of the appellants accomplices was one Ernest, an employee of P.W.5. He was the first to attack P.W.1 before the robbery was foiled, and he ran away and was never traced upto the time that the trial was concluded. He was in our view a principle offender in the plot. He knew exactly what the appellant, the other accomplices and himself were upto in P.W.5's compound on that day. They were upto no good. It is instructive to note that despite protests by P.W.1 and P.W.4, not to let into the compound the appellant and his accomplices, who were all strangers, Ernest surreptitiously allowed them in. Once inside they demanded to enter the house but P.W.1 & P.W.4 resisted they became violent. Obviously the intention of the robbers was to get into the house at whatever cost. They must have known what they wanted from the house. There must have been some house hold goods or other items in the house which perhaps they intended to steal.

when these factors are taken into account, an irresistible inference can be drawn that the appellant and his cohorts intended to commit a robbery. The conduct of the appellant and his accomplices established that the necessary mensrea to steal existed in their minds. Contrary to the submissions by the learned State Counsel that the prosecution did not prove its case sufficiently, we are of the view that indeed the prosecution proved its case to the required standard. Further contrary to the submission by the appellant that the ingredients of the offence of attempted robbery with violence were not met since there was no assault, we find that indeed there was an assault when the appellant placed a knife on the throat of PW1 whilst threatening him. In such scenario the evidence of police surgeon was not necessary contrary to the assertion by the appellant that such evidence was necessary to prove the element of assault.

The appellant was arrested as he attempted to flee from the scene of crime. It was noteworthy that the offence was committed in broad daylight at about 3.00 p.m. The robbers spoke with P.W.1 & P.W.4 for a while. These witnesses had opportunity to observe the appellant and how he was dressed. He was not disguised at all. The witnesses vividly recounted the role that the appellant played in the crime. Immediately he was arrested, he was taken to the scene of crime and he was positively identified by P.W.1, P.W.3 and P.W.4. The proximate time between the attempted robbery and the arrest of the appellant was so close that none of these witnesses could be accused of faded memory. The facial appearance of the appellant and his style of dress was still fresh in the mind of these witnesses, such that it cannot be said that the witnesses may have identified the appellant by mistake as the appellant in his defence wanted the Court below to believe. In our view the appellant was positively identified as part of the gang that attempted to rob P.W.1. He was chased and arrested within the vicinity of the crime. He was chased and cornered and arrested as he unsuccessfully tried to jump over the wall. In those circumstances he could not have been a victim of mistaken identity.

The appellant has also raised the issue of contradictions in the prosecution case. That the prosecution case was littered with contradiction and inconsistencies which contradictions and inconsistencies the learned Magistrate failed to resolve in favour of the appellant. Some of the contradictions pointed out to us by the appellant are that whereas P.W.3 stated that upon the arrest of the appellant he was armed with a knife. However under cross-examination, he changed his mind and stated that the said knife was recovered on the verandah near the bag. Further, whereas P.W.3 alleged that the appellant jumped over the kai-apple hedge and fell on the road and was chased to a dead-end and then arrested, P.W.1 on the other hand stated that the accused fell over the wall and was momentarily confused. It was then that he was arrested. To our mind these contradictions are minor and did not go to the root of the prosecution case. The issue is whether the appellant was arrested in the vicinity of the area of crime and positively identified. In our evaluation of the evidence, we have no doubt at all that the appellant was chased and arrested within the vicinity and was positively identified. These minor contradictions cannot turn P.W.1, P.W.3 and P.W.4 into incredible witnesses as the appellant urged us to hold.

With regard to essential witnesses not being called, the appellant points out that, the investigating officer was not availed as a witness. The often trodden principle of law is that the prosecution is obliged to prove its case against an accused person beyond reasonable doubt. How many witnesses is it expected to call to satisfy that burden?

In ***BUKENYA AND OTHERS –VS- UGANDA (1972) E.A. 349,*** the Court of Appeal for East Africa held that the prosecution has the discretion to decide who are the material witnesses. That Court, however, qualified that general principle by stating:-

"…….***..there is a duty on the Prosecution to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent…. While the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses, available who were not called, the Court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case."***

We have not been asked to draw any adverse inference, and even if that were so, we would not have been inclined to do so as the evidence on record even without that of the investigating officer is sufficient

to convict the appellant. In our view the prosecution case did not leave unbridgeable gaps to warrant the testimony of the investigating officer.

Finally, the appellant claims that his defence was not adequately considered. This cannot be possibly correct. The trial magistrate did sufficiently consider the appellants defence before coming to the conclusion that the same was not credible. She delivered herself thus:-

"…….***His defence is not credible and in my opinion, controverted by the prosecutions evidence against him. Although there is not set formula for considering a defence put forth by an accused person, there is no doubt in my mind at all that the appellant's defence was duly considered by the learned trial magistrate before it was rejected…."***

Accordingly we have no hesitation in disagreeing with the learned State Counsel on the reasons advanced for conceding to the appeal. The offence of attempted robbery with violence was proved beyond reasonable doubt. The inevitable conclusion then is that the appellant's appeal against conviction lacks merit. It is accordingly dismissed. As for sentence, the only sentence prescribed by law is death. Consequently, the appellant's appeal against sentence is also dismissed.

Dated at Nairobi this 26th day of September, 2006.

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LESIIT

JUDGE

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MAKHANDIA

JUDGE

Judgment read, signed and delivered in the presence of:-

Appellant: Present

Miss Abenge: For state

Erick/Tabitha: Court clerks

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LESIIT

JUDGE

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MAKHANDIA

JUDGE