REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 556 of 2003

(From original conviction and sentence of the Chief Magistrate's Court at Nakuru in Criminal Case No. 299 of 2003 – S. Muketi [S.RM.]

JOHN KARIUKI WANGARE……...APPELLANT

VERSUS

REPUBLIC……....……..RESPONDENT

JUDGMENT OF THE COURT

The appellant, John Kariuki Wangare was charged with **Attempted Robbery** with violence contrary to **Section 297(2) of the Penal Code**. The particulars of the offence were that on the 1st of February, 2003 at Lake View Estate within Nakuru District, the appellant jointly with another who was acquitted at the trial, while being armed with pangas attempted to rob Wycliffe Khalakoli Sibelenje of his money and at or immediately before or immediately after the time of such attempted robbery, used actual violence to the said Wycliffe Khalakoli Sibelenje. The appellant pleaded not guilty to the charge. After a full trial, the appellant was found guilty as charged and sentenced to death as is mandatorily provided by the law. The appellant was aggrieved by his conviction and sentence and has appealed to this court.

The appellant raised several grounds of appeal challenging the decision of the trial magistrate in convicting him on the charge. The thrust of his complaint is that the trial magistrate had not considered the fact that the complainant had not properly identified especially putting into account the fact that the said identification was made in difficult circumstances. He was further aggrieved that the trial court had convicted him based on insufficient and uncorroborated testimony of the prosecution witnesses. He was aggrieved that the trial magistrate had not considered his defence before she arrived at the said decision convicting him.

At the hearing of the appeal, the appellant, with the leave of the court, presented to this court written submissions in support of his appeal. He urged this court to allow the appeal and quash his conviction by the trial magistrate. Mr. Koech, learned State counsel, did not support the conviction of the appellant. He submitted that the evidence adduced by the prosecution was not sufficient to sustain a conviction on the charge of attempted robbery against the appellant. He stated that there was no sufficient evidence by the prosecution to support the contention by the complainant that he had identified the appellant among the people who had assaulted and attempted to rob from him. He urged this court to allow the appeal and quash the conviction of the appellant as it was unsafe.

We shall revert back to the arguments made on this appeal after briefly setting out the facts of this case.

On the 1st of February, 2003 at 10.00 p.m., the complainant PW1 Wycliffe Khalakoli Sibelenje was walking from his house to a local shop to buy milk. He testified that as he was walking to the shop, he was accosted by the two people who hit and injured him. He screamed and alerted the people who were nearby, including the police officers, who apprehended one person who had run away after the complainant was hit and injured. The complainant testified that he was able to identify the appellant as being in the group of two people who accosted and injured him. He said he was able to identify the appellant by the moonlight. The complainant did not however tell the trial court how he was able to be certain that it was the appellant who had accosted and injured him. He did not describe the clothes that the appellant was wearing neither did he tell the trial court any specific physical characteristics that made him positive that it was the appellant who had accosted and injured him. The complainant testified that after the said assault, he was taken to the hospital where he was treated and discharged. A P.3 form was issued to him by the police. The same was filled by a doctor but was not produced in evidence during trial.

PW2 David Obuya, a brother to the complainant testified that he was at his place of business on the material night when he heard the complainant screaming. He testified that he went out to answer the call of distress by his brother. There were many people who responded to the scream for help by the complainant. He testified that he saw a man carrying a piece of timber which he suspected to have been used to assault the complainant. He apprehended him and handed him over to the police who were on patrol in the area. The person who was apprehended is the appellant. He testified that prior to the incident, he had not known the appellant. He further testified that the appellant was apprehended about 10 metres from where the complainant was injured. He confirmed that nothing was robbed from the complainant.

PW3 PC Bernard Wangai testified that he was on patrol with another police officer at Pangani Estate when they heard screams and when they went to investigate, they saw the complainant having been injured and a suspect (*the appellant*) had been apprehended by members of the public who alleged that the appellant had been armed with a piece of timber. PW3 arrested the complainant, took him to the police station where he was later charged with the offence for which he was convicted. The prosecution did not call any other witness and were forced to close their case after they had been granted several adjournments in a futile effort to enable them get their witnesses.

When the appellant was put on his defence, he denied that he had attempted to rob the complainant. He testified that as he was walking to his aunt's place on the material night, he was accosted by three people who apprehended him on the false allegation that he had attempted to rob the complainant. He testified that he had nothing to do with the assault of the complainant. He stated that he was innocent of the charge brought against him.

This being a first appeal, it is the duty of this court to re-consider and to re-evaluate the evidence adduced by the witnesses before the trial court so as to reach its independent determination whether or not to uphold the conviction of the appellant. In reaching its decision, this court is mandated to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any finding as regard the demenour of the witnesses (*See* **Njoroge vs Republic [1987] KLR 19)**. The issue for determination by this court is whether the prosecution adduced sufficient evidence to sustain a conviction on the charge that was brought against the appellant of attempted robbery with violence.

As stated earlier at the beginning of this judgment, Mr. Koech on behalf of the State conceded to the appeal on the grounds that the prosecution had not adduced sufficient evidence to sustain a conviction on the charge of attempted robbery with violence. We have re-evaluated the evidence and we have reached the conclusion that the State was right in conceding to the appeal. The eye witness account of the complainant as regards the persons who assaulted him is very flimsy and cannot by any stretch of imagination be said to be evidence of identification which could sustain a conviction. The evidence of the prosecution witnesses disclose that the complainant was assaulted at night. It was about 10.00 p.m. Although the complainant testified that he was able to identify the appellant by the moonlight, none of the other two prosecution witnesses testified that there was sufficient moonlight which could have enable one to identify a person.

Indeed PW3 testified that they had to use a torch in order to see the injuries which the complainant had sustained when he was assaulted. Other than the fact that the appellant was arrested while he was in possession of a piece of timber, there is no evidence that it is the appellant who had assaulted the complainant. There is further no evidence that the appellant had assaulted the complainant with the intention of robbing him. Indeed the complainant did not suggest in his evidence that the two men who had accosted him had attempted to rob him. For all intent and purpose, the complainant was assaulted for some reason other than to be robbed. PW2 confirmed that nothing was robbed from the complainant nor was there a suggestion that the two people who had assaulted the complainant intended to rob him.

We were not persuaded that the appellant was identified by the complainant. Furthermore, we did not believe the evidence of PW2 that the appellant was arrested soon after he had assaulted the complainant. The facts of this case disclose that the appellant was apprehended by other people who handed him over to the police. None of these persons who apprehended him adduced evidence in court. Further, there is evidence that there were many people at the scene who were attracted by the cry for help by the complainant. No evidence was adduced by the prosecution to suggest that the appellant behaved in such a manner as to suggest that he was involved in the assault of the complainant. Our re-evaluation of the evidence is that the appeal filed by the appellant must be allowed.

Before we conclude the judgment however, we wish to comment on the charge which was brought against the appellant. The appellant was charged with the offence of **Attempted Robbery with violence contrary to Section 297 (2) of the Penal Code**. An ingredient of the charge which must establish during trial is that the victim was assaulted when the robbery attempt was made. As was held in **Morris Otieno Oduor vs Republic (Nairobi HCCRA. NO.719 of 2003) (*unreported*)** at page 13 of the judgment;

"***In conclusion therefore on this point and relying on the Abubakali case,*** *Supra****, Gakuu Machane's case,*** *Supra****, 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 person either used or threatened to use force contemporaneously in an attempt to obtain the thing intended to be robbed***."

In the present appeal, it is clear that the appellant had been charged with an inappropriate charge of Attempted Robbery with Violence. Even if the appellant were to have been found to have assaulted the complainant, there was no evidence to suggest that the said assault was for the purposes of robbing the complainant.

In this case therefore, the appellant ought to have been charged with the offence of **Assault** contrary to **Section 251 of the Penal Code**. We deprecate a habit which has now become common place of the police in making decisions to charge persons with capital robbery offences even in instances where it is clear that such a charge of capital robbery cannot be sustained. The unfortunate consequence of such decisions by the police is that suspects are unnecessarily kept in remand custody while their trial is awaited before they are either acquitted or convicted of a lesser charge under the penal code. This habit must stop.

The upshot of the above reasons is that the appeal filed by the appellant is hereby allowed. The conviction of the appellant by the trial magistrate is hereby quashed. The sentence imposed on the appellant is hereby set aside. The appellant is ordered released from prison and set at liberty unless otherwise lawfully held.

DATED at NAKURU this 14th day of November 2006

M. KOOME

JUDGE

L. KIMARU

JUDGE