REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL 829 OF 2002

SAMMY MWANIKI THEURI……...……APPELLANT

VERSUS

REPUBLIC…….……....RESPONDENT

J U D G M E N T

SAMMY MWANIKI THEURI, was found guilty and convicted of the offence of ATTEMPTED ROBBERY WITH VIOLENCE contrary to Section 297(2) of the Criminal Procedure Code. He was sentenced to death as by law prescribed. The particulars of the offence was:-

“On the 25th October 2001, at Simmers Restaurant along Kenyatta Avenue in Nairobi area, jointly with others not before court, while armed with an offensive weapon namely one toy pistol attempted to rob SULEIMAN MURUNGA of his cash Kshs.300,000/- and at or immediately before or immediately after the time of such attempted robbery wounded the said SULEIMAN MURUNGA.”

The prosecution case was that the Appellant walked into the Complainant’s office at 9.30 a.m. on the day in question. That the Complainant asked him what he wanted and he answered and said that he wanted money. That when the complainant looked at the Appellant, the Appellant raised his shirt and exposed an item that looked like a pistol. He pulled out the object, upon which the Complainant told him to get the money himself from the drawers. It is as the Appellant went for the drawers that the Complainant punched him and after a struggle in which the Complainant disarmed him, the Appellant was arrested. The struggle spilled over from the Complainant’s office into the bar area where the Complainant’s workers PW2 and PW3 were working. PW5 a Police Officer, also walked into the bar area as the two struggled. The Appellant was apprehended and later charged with this offence. The Appellant in his unsworn statement, in his defence, denied having committed the offence. He said he had just taken tea at the restaurant, when a woman employee arrested him for an offence he did not know.

The first issue canvassed by the Appellant was that the charge sheet in the case was fatally defective on account of two things. The first was that it alleged in the particulars that the Appellant was in company with others. Yet the evidence adduced by the Complainant was very clear that he was alone. The second thing that rendered the charge defective according to the Appellant was the fact that it alleged he was armed with an offensive weapon. The Appellant submitted that indeed the object he had was a spray gun. He alleged further that the Complainant realized immediately that the object was not a gun and was therefore, not threatened. He argued that the offensiveness of the object was removed and the charge could not therefore stand. MISS NYAMOSI for the State did not quite address the issue of the weapon the Appellant had at the time of the offence. All she submitted was that an offensive weapon was used and she agreed with the learned trial magistrate’s finding on the same.

We have re-evaluated the evidence adduced by both the prosecution and the defence in this case. The learned trial magistrate, while quoting from Section 34(2) and (3) of the Firearms Act Cap 114 found: -

“In this light, the accused was armed with a dangerous weapon. This is the key turning point in the robbery because the offence would have been an attempted simple robbery, the accused having been alone..”

We do not have any quarrel with the provisions of Section 34 of the Firearms Act. Section 89 of the Penal Code which deals with possession of firearms etc. defines offensive weapon thus; -

“ ‘Offensive weapon’ means any article made or adapted for use for causing injury to the person or intended by the person having it in his possession or under his control for such use.”

While dealing with the issue of what constitutes a “dangerous or offensive weapon”, SIR JAMES WICKS, CJ. in MWAURA & OTHERS vs. REPUBLIC 1973 EA 373 at page 375 held: -

“In our view, dangerous or offensive weapons means any articles made or adapted for use for causing injury to the person, such as a cosh, knuckle duster or revolver; or any articles intended, by the persons being found with them, for use in causing injury to the person.”

We adopt that holding, having been persuaded by it. In the instant case, the prosecution called a Firearms Examiner, MR. NDIWA PW4. He examined the object recovered from the Appellant and identified it thus: -

“I recall I received some exhibits on 25.2.2002 – spray gun marked A. I examined the exhibit. It is a metallic spray gun that has been detached from its gun. It has the general appearance of a firearm. It is not a firearm in terms of the Firearm Act.”

MR. NDIWA stopped short of telling the Court what the spray gun is used for or whether the spray gun could be used to cause injury to the person. He was however clear that it was not a firearm. We find that the spray gun exhibited in Court and which was recovered from the Appellant does not qualify to be a dangerous or offensive weapon under Section 297 (2) of the Penal Code.

An offence under Section 297 (2) of the Penal Code can be proved if it is shown: -

1. That the offender assaulted any person.

2. That the assault was committed with intent to steal.

3. (a) That the offender was armed with any dangerous or offensive weapon or instrument or

(b) the offender was in company with one or more other persons or

(c) 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.

In this case the Prosecution has proved that the Appellant assaulted the Complainant and that the intention to steal was present and demonstrated. That brings the offence committed within Section 297(1) of the Penal Code for which the maximum sentence is seven years imprisonment.

The Appellant raised two other issues. One, that there was inconsistency in the prosecution evidence. PW2 and PW3 were honest when they said that they saw the Appellant and Complainant struggling with each other from the Complainant’s office into the bar/restaurant area but that they did not know the reason for the struggle. They had not witnessed what had transpired inside the Complainant’s office and no one had explained anything to them at the time. Failure to know the reason of a struggle cannot be interpreted to mean an inconsistency by any stretch of that word. Nothing turns on this point.

The other issue raised by the Appellant was that his defence was not given due consideration. The learned trial magistrate did consider the Appellant's defence at length but correctly found that the Appellant had been arrested at the locus in quo of the offence. We therefore find no merit on this issue. The first issue the Appellant raised is that the learned trial magistrate erroneously found that he, the Appellant, was in possession of the alleged 'toy pistol' at the time of arrest. We find no merit in this issue. The person who arrested the Appellant first was the Complainant. The Complainant also disarmed the Appellant of the spray gun. The rest of the people, PW2, PW3 and PW5 all came after the Complainant had apprehended the Appellant and had successfully thwarted the bid to steal. In the circumstances there is no merit in the ground raised by the Appellant.

Having considered this appeal, we find that the learned trial magistrate erred in finding the Appellant guilty of attempted robbery contrary to Section 297(2) of the Penal Code. The offence proved was under Section 297(1) of the Penal Code. We quash the conviction entered under Section 297(2) of the Penal Code and set aside the sentence. In substitution thereof, we enter a finding of guilt and conviction for the offence under Section 297(1) of the Penal Code. This is by virtue of Section 179 of the Criminal Procedure Code. On the sentence, we note that the Appellant was a first offender. We therefore substitute the sentence with an imprisonment term of 3 years from the date of the original sentence. To the extent explained herein above, the Appeal succeeds. The upshot of the Appeal is that the Appellant should serve a sentence of 3 (three) years with effect from 22nd July 2002.

Orders accordingly.

Dated at Nairobi this 2nd day of June 2005.

LESIIT, J.

JUDGE

F. A. OCHIENG'

JUDGE