



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

Criminal Appeal 423 of 2003

(From original Conviction and Sentence in Criminal Case Number 234 of 2003 in the District's Magistrate's Court at Mukurwe-ini by Mr. P. K. Kariuki – D. M. 1 dated 19th November 2003)

JOHN MUTHEE MUTIRIMU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

John Muthee Mutirimu hereinafter referred to as the Appellant was tried and convicted of attempted robbery Contrary to Section 297(1) of the Penal Code by the District Magistrate Mukurwe-ini. He was sentenced to serve 3 years imprisonment. Being dissatisfied the Appellant has brought this appeal against both his conviction and sentence contending *inter alia* that He was not properly identified and that the trial magistrate failed to consider his defence which was consistent with the prosecution evidence.

During the Appellant's trial in the lower court, four witnesses testified on behalf of the prosecution. Their evidence was briefly as follows:-

On the material night at about 2.00 am the complainant (P.W.1) was asleep in his house when He was woken up by the barking of dogs. On waking up He saw torches outside and inquired who was out there. One of the people responded that they were police officers. Being suspicious however the complainant and his wife screamed for help. The complainant's neighbours who included Mathew Kuria Wachira (P.W.2) responded to the alarm and the complainant's assailants ran away. The complainant and his neighbours decided to follow the intruders. On the way they met 3 men who ordered them to stop. The complainant realized that the voice was the same as that of the man who had accosted him pretending to be police officers. The 3 men ran away on realizing that the complainant and his colleagues were armed.

The complainant and his colleagues pursued the 3 men and P.W.2 managed to apprehend the Appellant who was one of the 3 men. The Appellant was taken to Gakindu A. P. Camp where He was handed over to Cpl. Wilson Mugambi (P.W.3). The Appellant was later handed over to P.C. Daniel Ekwam (P.W.4) of Mukurwe-ini police station. He was later charged with this offence.

In his defence the Appellant explained that He had gone to visit his girlfriend whom He found at Mihuti. He decided to go back to Othaya when the girlfriend told him that she had another boyfriend. He could not get a vehicle so He walked to Gakindu Trading Centre. It was then that He met 3 people who attacked him cut him on the neck, head and back and left him for dead.

The Appellant however got up and walked away. He hid when He saw some people as He sensed danger. He was however flushed from his hiding place and was severally assaulted, his assailants

claiming that He was a thief. He was taken to Mukurweini police station. He explained that He was simply a victim of circumstances as He was new in the area. He was nevertheless charged.

In his judgment the trial magistrate believed the evidence of the prosecution witnesses and rejected the defence of the Appellant. He therefore convicted him of the offence thereby giving rise to the current appeal.

I have re-considered and evaluated the evidence. The complainant was quite positive that He identified the Appellant by his voice as one of the persons who had attempted to gain access to his house. The appellant and his colleagues attempted to escape but P.W.2 followed the appellant and arrested him. P.W.2 swore that He never lost sight of the Appellant and therefore could not have confused him with someone else. It is evident that the appellant was arrested at a very ungodly hour. His explanation that He had gone to visit his girlfriend is not very convincing.

Moreover, He contradicted himself as to where the girlfriend was living. I find that in the circumstances of this case the trial magistrate was right in rejecting the defence of the Appellant. I find that there was sufficient evidence to prove that the Appellant was one of the persons who accosted the complainant and his wife in an apparent attempt to gain access into their house with a view to robbing them. The Appellant's guilt was therefore established and he was properly convicted. I find no merit in his appeal against conviction.

As regards sentence, the period of 3 years is not so excessive as to warrant the intervention of this court.

Accordingly I dismiss the Appellant's appeal against both conviction and sentence.

Dated, signed and delivered this 14th day of September 2005.

H. M. OKWENGU

JUDGE