REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL 97 OF 2002

BONIFACE OCHIENG ……..…..……..…….. APPELLANT

VERSUS

REPUBLIC ……..…….…….RESPONDENT

CONSOLIDATED WITH CRIMINAL APPEAL 122 OF 2002

GEORGE ODHIAMBO ……..…....…….....…….APPELLANT

VERSUS

REPUBLIC……...……..…..……..RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 7334 of 2001 of the Chief Magistrate's Court at Kibera)

JUDGEMENT

BONIFACE OCHIENG and GEORGE ODHIAMBO, the Appellants, with one other, were jointly charged before the Senior Principal Magistrate's Court at Kibera with one count of attempted robbery with violence contrary to Section 297 (2) of the Penal Code. The particulars of the charge were that:-

> ***"GEORGE ODHIAMBO, JOSEPHAT ISINYA and BONIFACE OCHIENG on 22nd day of November, 2001 at Loresho in Spring Valley within the Nairobi Are Province jointly with anther not before Court being armed with dangerous or offensive weapons namely swords and rungus attempted to rob NICK GHELANI of house holds and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said NICK GHELANI."***

After a full trial, the Appellants were found guilty of the charge. They were accordingly sentenced to death as mandatorily provided for under the Law. The co-accused was however acquitted. The Appellants were aggrieved by both the conviction and sentence. Consequently they lodged separately and individually Appelas.

The Appellant's appeals No. 971 of 2002 and 122 of 2002 were consolidated during the hearing and were heard together as one. The Appellant's grounds of Appeal are more or less similar. In their petitions of Appeal, the Appellants have faulted the decision of the trial Magistrate's Court on the grounds of identification, mode of arrest of the Appellants, contradictions in the Prosecution case and finally that their defences were not given due consideration by the trial Magistrate.

The Appellants presented to Court written submission in support of their Appeals which submissions we have considered in the course of writing this Judgment. Mr. Makura appeared for the State and presented oral submissions opposing the Appeals and supporting the conviction and sentence by the trial Magistrate. Before considering the Appeal in detail, we think it is necessary to set out albeit in a summary form the facts of the case. On 22nd November, 2001 at about 11 p. m. the Complainant in this case, Nick Ghelani (PW1) drove into his compound in Loresho Estate Nairobi. He parked his motor vehicle and walked towards the house. Suddenly he was confronted by three (3) people from behind. He turned round and saw a person whom he told the Court was the 2ND Appellant and another one who according to him was the 1st Appellant and a third person whom he told the Court was never arrested.

It was the testimony of PW1 that the 1st Appellant whom he stated stood on his left side was armed with a sword whereas the 2nd Appellant was armed with a pair of shears. The third person was armed with a Rungu. Sensing danger, the Complainant confronted the intruders, grabbed the shears from the 2nd Appellant and kicked him. In the meantime, the 1st Appellant cut his back with the sword. He made noise. The intruders eventually ran into the nearby bushy shamba within the compound and hid. The Complaint then alerted his shamba boy (PW3) and an askari guarding the neighbouring Mexican Ambassador's Residence to be on the look out for the intruders. A search within the compound was mounted and two persons who are the Appellants were allegedly found hiding in the thickets in the shamba and were arrested. Police were summoned and they re-arrested the Appellants. They were all upon conclusion of investigations subsequently charged with the offence.

PW2 (the watchman) and PW3 (the shamba boy) also testified. However their testimony was limited to the search and eventual arrest of the Appellants. None of the two witnesses however witnessed the alleged attempted robbery. Indeed apart from the Complainant, no other person witnessed the incident.

PW4 (P.C. Robert Nyangau) from Spring Valley Police Station also testified. His testimony was however limited as to how he re-arrested the Appellants from the Complaint's residence in the company of the duty officer.

When put on their defence, both Appellants claimed that they were innocent visitors of the co-accused in the Court below who was an employee of the Complainant. That they had been willingly allowed into the compound by the co-accused. That therefore they had nothing to do with the attempted robbery with violence and that they were actually victims of a frame up. The High Court as the first Appellate Court is enjoined to reconsider the evidence tendered in the Lower Court, evaluate it and draw its own conclusions in deciding whether the Judgment of the trial Court should be upheld. ***(SEE OKENO VS REPUBLIC (1977) E. A. 32***. In the instant case, there is no dispute at all that the Appellants were at the scene of crime. They say so in their own unsworn statements of defence. What we have to determine is whether they were at the scene of crime innocently as they claimed innocent as they claimed.

The offence of attempted robbery is defined by Section 297 (1) of the Penal Code and is in the following terms:-

> ***"Any person who assaults any person with intent to steal anything, and , at or immediately before or immediately after the time of assault, uses or threatens to use actual violence to any person or property in order to obtain the thing intended to be stolen, or to prevent or overcome resistance to its being stolen, is guilty……."***

However the offence of attempted robbery with violence is disclosed where the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons or if, 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.

To our mind the element of assault is central to a charge of attempted robbery and also attempted robbery with violence. The prosecution must therefore prove that in the course of attempted robbery, some violence was visited upon the Complainant or to any other person. From the definition aforesaid, it is also necessary to show by evidence that there was intention to steal something from the persons(s)

assaulted.

Mr. Makura, Learned State Counsel submitted that the charge of attempted robbery with violence against the Appellants was proved as the Complainant was attacked. That the first Appellant had a sword whereas the 2nd Appellant had shears. With respect we do not agree that the ingredients of the charge of attempted robbery with violence were proved. A careful perusal of the charge sheet, reproduced at the beginning of this Judgment buttreses our holding. The 1st element in the charge sheet was that the Appellants whilst armed with dangerous or offensive weapons namely a sword, rungus attempted to rob Nick Ghelani of households.

Where did the prosecution get the impression that the Appellants intended to steal the Complainant's house hold goods. There is no evidence on record to back up the claim. Indeed there is no evidence at all that the Appellant intended to steal anything from the Complainant. The evidence we have on record is to this effect:-

> ***"…..They threatened me saying they would kill me if I did not open my door for them. I decided to co-operate…."***

No where in this evidence do the Appellants say the reason for demanding entry into the Complainants residence by the Appellant. They could have wanted to get in for any other purpose other than stealing Complainant's households. This being a capital charge and the prosecution having specifically stated in the charge sheet that the intention of the Appellants was to rob the Complainant of his households it was necessary for the prosecution to lead such evidence. This was not a matter to be left to speculation or conjecture. As assault is also crucial to the offence of attempted robbery, it behoved the prosecution to lead such evidence. From the recorded evidence, PW1 stated:-

> ***"……Accused 1 let go of the shears leaving me holding the shears by their blade. The man on my left side swung the sword and he hit me with the sword, cutting me on my back- that is accused 3 herein…."***

It is important to mote that apart form this testimony of the Complainant, no other witnesses ever testified that the Complainant was injured in the process. Surely if the Complainant was cut and injured other witnesses on the scene would have been able to testify on that aspect of the case in a bid to corroborate the Complainant's testimony. To our mind however, the best corroboration would have come from the testimony of a Police doctor.

However for unexplained reasons, the Complainant was never referred to the Police surgeon for purposes of examination and the filing of the P3 form. It would appear therefore that apart from the assertion of the Compliant that he was cut with a sword there is no independent confirmation of this fact. He did not even attempt to produce any medical treatment records to back up the claim. Even the Court itself did not bother to the Complainant's body ascertain whether indeed the Complainant was assaulted.

Further the evidence on this aspect is even at variance with the charge sheet. Whereas in the charge sheet it is claimed that in the process of attempted robbery, the Complainant was threatened with use of actual violence, the evidence of PW2 shows that he was actually assaulted.

For all the foregoing reasons we are not satisfied contrary to the submissions by Mr. Makura that the charge of attempted robbery with violence was proved beyond reasonable doubt. This is sufficient to dispose off this Appeal.

However, there are certain aspects of the Appeal which we deem necessary to consider. From the recorded evidence, we entertain no doubts at all that the Appellants were properly identified. Apart form being identified by the electricity light within the compound they were also arrested whilst within the compound. There was no suggestion that there was any break in the chain of events from the time the Complainant was allegedly attacked to the time the Appellants were arrested. The Appellants claim that they had come visiting the co-accused who however denied having invited them to his residence within

the compound of the Complainant.

The evidence on record however shows that to gain entry into the Complainant's residence one has to go through the main gate. Otherwise the residence is completely fenced and surrounded by neighbours. The fence is made of ka-apple and barbed wire. According to PW2

"….nobody can jump over the fence…"

So how did the Appellants gain access to the residence. There is evidence that the Appellants could have gained access to the residence at about 7 p. m. when their co-accused had temporarily taken over guard duties having sent PW2 to buy him a kilo of sugar. He did not want to go personally to the kiosk as he already had a debt. We think that this was a trick or a ploy employed by the co-accused to have the Appellants gain entry into the compound. As to whether the two Appellants were led in by the co-accused for purposes of committing a crime we cannot tell as from the recorded evidence. The Appellants raised in their defences the fact that they had been invited by the co-accused. The Learned trial Magistrate although found in her Judgment that the behaviour of the co-accused on that day was suspicious, however she did not go further to see whether the defences advanced by the Appellants were plausible. The Appellants raised the issue of the possibility of them being framed in the case and gave reasons why they thought so. We think that those reasons ought to have been explored by the trial magistrate before rejecting the defences summarily. Contrary to the submissions by Mr. Makura, we are unable to agree with him that the trial Magistrate considered the Appellants' defence before rejecting them.

Again what has bothered us in this appeal is that there were so many people in the compound of the complainant when the incident happened and yet none of them witnessed it. It was not suggested that the incident happened so fast that all these people did not have an opportunity to witness. The people whom we are referring to are of course one Eliud Shombe (the watchman – P.W.2). George Okoth (Shamba boy – P.W. 3), P.W. 1's mother and sister who were in the house and could have been alerted by the screams and shouts of the complainant as he confronted his attackers. It is also surprising that askaris from the nearby Mexico Embassy who joined in the hunting dawn of the Appellants were never called to testify. Further there is no evidence that the case was investigated as no investigating officer was called to testify. The only police officer who was called to testify was the re-arresting officer – PW4. Finally on the issue of shears, P.W. testified that:-

"I held onto the shears blade with my hand and pulled the shears and I kicked Accused 1 who was holding the shears and was standing infront of me. Accused 1 let go of the shears, leaving me holding the shears by their blade…"

This evidence goes to suggest that P.W. 1 disarmed the 2nd Appellant and took possession of the said shears. However it makes no sense when P.W. 2 and P.W. 3 later allege in their testimony that the same shears P.W. 1 took possession of as aforesaid were thereafter found elsewhere. P.W. 2 stated:-

"The Shears were found near the edge of the Shamba….." P.W. 3 on the same issue testified as follows "….The following day we received some items from the shamba near where we had found Appellate 1 and Appellate 3.These items are as follows: A pair of shears MFI – 1.

It is obvious that the evidence of P.W. 1, P.W. 2 and P.W. 3 is at variance on the same issue. How can the shears allegedly taken from the alleged robbers by P.W. 1 again be recovered from the shamba. Further it is pertinent to note that from the recorded evidence the said shears belonged to the complainant and were used by his workers. How come they were found again in the possession of the 2nd Appellant? In our view had the case been investigated properly and the investigating officer called to testify he would have been able to provide answers to this vital and pertinent questions.

From the recorded evidence, the complainant's residence was like a fortress so that a person could only get in and out through the gate. The complainant testified that he was confronted by three people armed respectively with shears, sword and a rungu. He fought them off and they ran away and hid in a shamba. A search was mounted and only two of the three was arrested. There was no explanation as to

how the 3rd person with a Rungu escaped. This raises doubt as to the credibility regarding the complainant's evidence.

In the circumstances, we have no doubt that the Appellant's convictions are both unsafe and unsatisfactory. The appeal is therefore allowed, the convictions quashed and sentences set aside. We order that the Appellants be set at liberty forthwith unless otherwise lawfully held.

Dated at Nairobi this 18th October, 2005

LESIIT J

JUDGE

M. S. A. MAKHANDIA

JUDGE