REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

Criminal Appeal 275 of 2003

(From original conviction(s) and Sentence(s) in Criminal case No. 15111 of 2001 of the Chief Magistrate's Court at Makadara (Mrs. Juma –PM.)

SIMON MBURU KAMAU…… ……..……...…….…..APPELLANT

VERSUS

REPUBLIC…… ……..…...RESPONDENT

J U D G M E N T

SIMON MBURU KAMAU was charged with three counts. In the first count he was convicted of **ATTEMPTED ROBBERY WITH VIOLENCE** contrary to Section 297(2), in count two of **POSSESSION OF A FIREAM WITHOUT A FIREARMS CERTIFICATE** and in count three of **POSSESSION OF AMMUNITION WITHOUT FIREARMS CERTIFICATE** both contrary to Section 4(2) (a) of the Firearms Act. He was sentenced to death in the first count after being found guilty and convicted of it. He as acquitted in counts two and three.

In brief the facts of the prosecution case was that the Complainant PW1 **WAMBUGU**, was seated with three friends in his car, one in front seat, PW2, KIMANI and two in the back seat, **MAINA** and **KAMAU**. It was 8.00 p.m. That as they sat with his window open, WAMBUGU felt a metal on the right side of his head and the words, "Try to be non-sensical".

Then he raised his hand and the man entered the back seat. As two of his accomplices moved towards the left side of the car, WAMBUGU drove off. The man with the metal started saying, "you are going, you are going" while pointing a gun at Wambugu. The man was then wrestled and put under control. Wambugu then saw a police vehicle in which was **IP CHACHA**, PW3, **CIP GITAU**, PW5 and other police officers. They handed over the man to the police. The man was the Appellant who was eventually charged with the three counts. IP Chacha PW3 said they went back to scene where the Appellant had entered the Complainant's vehicle to search and retrieve a gun. CIP Gitau PW5 corroborated his evidence.

The Appellant in his defence had said he had quarreled with Maina at a bar. That he, the Appellant decided to pay for his drink and leave. Then Maina had followed him and with help of friends arrested him and handed him over to police fabricating him with stealing.

We have carefully re-evaluated the evidence adduced before the trial court as expected of us as the first appellate court. See **OKENO vs. REPUBLIC 1972 EA 32**. The Appellant argued an amended ground of appeal in which he raises four issues. The key issue was the first one in which the Appellant argued that the prosecution failed to prove that any of the witnesses had been assaulted and that **ASSAULT** was a prime ingredient for the offence of **ATTEMPTED ROBBERY WITH VIOLENCE** under **Section 297(2)** of the **Penal Code**.

MRS. KAGIRI learned counsel for the State opposed the appeal. The learned counsel submitted that the ingredients of the offence were proved in that the evidence adduced by the prosecution proved that the Appellant and others attempted to rob the Complainant of his vehicle. That the prosecution proved that the Complainant was assaulted when the Appellant pointed a gun at him. **MRS. KAGIRI** relied on one case **CUPRIANO MURORI vs. REPUBLIC CA No. 30 of 2001** at page 4. The learned counsel did not point out what exactly she was relying on but we have gone through the cited authority. It reads in part as follows: -

> **"Mr. Ikiara, submitted before us, that in view of those conflicting dates, medical evidence should be ignored. In his view, if that is done, a case of attempted robbery with violence would not be made out. But that is not the only evidence available to support the aggravated aspect of the charge. The particulars of the charge against the Appellant also allege that the appellant was in company of other people not before the court, which is one of the ingredients under Section 297(2) of the Penal Code…"**

After citing the said authority, ***MRS. KAGIRI*** made two statements which in our view are conflicting. Counsel submitted that assault need not be proved by physical violence. Counsel also said that the Appellant was also in company with other people and consequently the offence of attempted robbery with violence contrary to Section 297(2) of the Penal Code was proved. The conflict we see in these two statements is simple. Was the counsel propagating that assault need not be proved at all to support the charge in which case her second statement then would mean that attempted robbery with violence can be proved even where assault was not inflicted at all. If that were the case then it was not necessary to rely on the "The Letric Law Library's Lexicon on ASSAULT". No matter what the learned counsel meant, we have taken all these submissions into consideration.

The definition relied upon by learned counsel read in part as follows:

> ***"ASSAULT – Whenever one person makes a willful attempt or threat to injure someone else, and also has an apparent, present ability to carry out the threat such as by flourishing or pointing a dangerous weapon or device at the other an "assault" may be committed without actually striking or injuring another person. (Same as forcible assault)".***

Dealing with the cited case first the learned justices of appeal did not suggest anywhere in **MURORI's** case that 'assault' need not be proved in the charge brought under Section 297(2) of the Penal Code. Even though Mr. Kiara for the Appellant in Murori's case suggested to their Lordship's to ignore the medical evidence due to discrepancies on dates, their Lordships did no such thing. Instead they went on to find that the aggravated aspects of the charge was supported in evidence by other ingredients including the fact the Appellant was in company with others and that he was armed with a dangerous weapon.

Going on with the issues of the offence charged and whether the charge was proved, we shall look at the issue of 'assault' as well as other ingredients of the offence in this case. We are not very much concerned with whether the assault needed to be proved, was actual physical assault or a 'threat' or 'attempt' to assault. See **ABUBAKAR vs. UGANDA 1973 EA 230; WACHIRA vs. REPUBLIC 1979 KLR 293**. The learned counsel relied on the assumption that the prosecution was able to prove that the Appellant was armed with an offensive weapon, namely a gun in the learned trial magistrate's judgment at J7, she found thus: -

> ***"The evidence relating to counts II and III is not very conclusive when it comes to the guilt of the accused. All the witnesses are talking about a pistol which they had not properly recognized and which was not found in the possession of the accused to the extent that it can be tied down to him and to nobody else."***

The learned trial magistrate went ahead and concluded the matter at J9 thus: -

> ***"There is insufficient evidence in counts II and III and presumptions are what the evidence is all about. The accused is accordingly acquitted in counts II and III under Section 215 of the***

Criminal of the Criminal Procedure Code."

We have perused the evidence and the learned magistrate's judgment and we agree with her finding of fact that the prosecution was unable to prove that the Appellant was armed with the pistol exhibited in court. In fact the learned trial magistrate found that the prosecution was unable to prove that the Appellant was armed with any dangerous or offensive weapon at all. Having found so, the prosecution was unable to prove an important ingredient to the charge of attempted robbery with violence. The Appellant was not armed with any weapon and he did not strike or threaten to strike any person in the Complainant's company that night. That ingredient of assault was therefore not proved. The prosecution had also to prove the 'intention to rob' actually existed in the Appellant's mind. This could have been perceived either by his words and or conduct. See JOSEPH KARIUKI vs. REPUBLIC 1985 KLR 507. The learned trial magistrate recognized that issue existed as can be summarized from her remarks at J6: -

> ***"The major issue in this case is that whether the prosecution has proved that the accused person jointly with others not before court, while armed with pistols attempted to rob PW1 of his motor vehicle. It is also has to be proved that the firearm and ammunition recovered had been in possession of the accused person…"***

The learned trial magistrate went further to find as follows: -

> ***"In as so far as the prosecution evidence goes, the case was a straight forward one. A suspect steps into the vehicle that is to be carjacked at gun point and its owner drives off with him. the suspect is re-arrested by the police from this vehicle. Can there be any other explanation of his presence there. Was it a case of abduction or how was it."***

The learned trial magistrate misdirected herself and made an erroneous conclusion from the facts proved in this case. In the last paragraph quoted from the learned trial magistrate's judgment, she made two assumptions as if they were proven facts. The facts were, *"a suspect steps into the vehicle that is to be carjacked at gunpoint and its owner drives off with him."* The learned trial magistrate made a specific finding that, of the four men the Complainant, PW1, saw advancing towards his vehicle; only one had pointed something at him, the Appellant. PW1 later said that the Appellant tried to fire but no bullets went off. The learned trial magistrate doubted that the Appellant had any gun at all and concluded that the one the police recovered at the scene of the robbery at the point that the Appellant boarded the Complainant's evidence could not be pinned down on the Appellant. That finding was quite correct. If indeed the Appellant had a gun and that as the Complainant drove off with him, he tried but was unsuccessful to fire with it, how could the same gun have been found at the scene of the incident? It could not have been the one the Appellant had if at all he had any. In fact the ballistic expert's evidence seems to prove that fact even more. The expert found that the exhibited gun was in good mechanical order and could fire. He even fired three shots with it. If the Appellant was unable to fire, then it could not have been the same gun. It was on that basis that the learned trial magistrate acquitted the Appellant for counts II and III. The learned trial magistrate statement that Appellant entered Complainant's vehicle at gun point was a serious misdirection. The second fact was also a misdirection that the Complainant's vehicle was to be car jacked. The prosecution evidence did not prove that fact. The Appellant was inside the Complainant's vehicle and that is not denied. However, the motive to 'rob' was not proved at all. The Appellant's words which he first spoke according to PW1 were 'try to be non-sensical". Later when PW1 drove off the Appellant said, "you are going, you are going". None of these words can be deduced to mean that the person saying them had an intention to steal. The words did not advance the prosecution case at all and the learned trial magistrate, as opposed to **MRS. KAGIRI's** submission, did not rely on them and in our view rightly so.

The only other issue was the Appellant's presence in the Complainant's vehicle. Since the prosecution did not prove he had a gun or offensive weapon, if the prosecution failed to prove he spoke words that revealed an intention to rob the Complainant of his vehicle, then what was the Appellant doing in the Complainant's vehicle. The prosecution case does not answer that question. The Appellant's defence seemed to have offered an answer which the learned trial magistrate summarized in one word; "afterthought". The Appellant's explanation was that he had a quarrel with one Maina, one of those in the

Complainant's vehicle and who was not called as a witness. The Appellant raised the issue during the trial but the said Maina was not called as a witness. In her judgment, the learned trial magistrate stated that it was not necessary to call the said Maina as a witness. The Appellant's defence was he quarreled with Maina at a bar in Bahati Shopping Centre. That he left the bar and Maina followed him. Maina was joined by another, PW2 who said that the Appellant wanted to rob him earlier. That the two decided he should be taken to the police and that, that was how he landed in the hands of the police. That defence was both reasonable and plausible and ought to have been analyzed against the prosecution case.

On the whole, we find that none of the essential ingredients of a charge of 'attempted robbery with violence, was proved. That the learned trial magistrate misdirected herself and came to an erroneous conclusion to convict. We would say that in those circumstances the conclusion arrived at by the learned trial magistrate led to a serious miscarriage of justice. Having considered this appeal, we find that all four issues raised by the Appellant were meritorious. We allow the appeal, quash the conviction and set aside the sentence. We order that the Appellant be set at liberty unless otherwise lawfully held.

Dated at Nairobi this 29th day of November 2005.

……

LESIIT, J.

JUDGE

……..……..

MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

……

LESIIT, J.

JUDGE

……..……..

MAKHANDIA

JUDGE