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

CRIMINAL APPEAL NO. 907 OF 2000

(From Original Conviction and Sentence i n Criminal Case
No.15 of 2000 of the Senior Resident Magistrate's Court
at Limuru).

SIMON KANARI WAMBUI……..APPELLANT

VERSUS

REPUBLIC……RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 908 OF 2000

FRANCIS CHEGE KARANJA ……..... APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

J U D G M E N T

The appellants were convicted of the offence of attempted Robbery with Violence contrary to Section 297(2) of the Penal Code by the Senior Resident Magistrate's Court at Limuru. They were accordingly sentenced to death as provided under the law.

It was alleged that on the 4th day of January, 2000 at the junction of Lower Kabete and Ngecha roads in Spring Valley jointly with others being armed with dangerous weapons namely, pistols, attempted to rob *MRS. TOLLE BREVIK* of a Land rover Discovery registration number UNEP 23K and at or immediately before or after used actual violence on the said *MRS. TOLLE BREVIK*

A total of 6 witnesses were called in support of the prosecution case. The appellants also testified by giving unsworn statements. No other witness testified on behalf of the Appellants. At the end of it all the Learned trial Magistrate was satisfied beyond reasonable doubt that the prosecution had proved its case against the appellants. He discounted the appellants defence. He accordingly convicted the appellants and sentenced them.

Being dissatisfied with the conviction and sentence, the appellants on 10th August, 2000 individually filed these appeals. In their grounds of appeal the appellants state that:-

1. The learned trial Magistrate erred in Law and fact in holding that the appellants were properly identified.

2. The learned trial Magistrate erred in law and fact in admitting a repudiated confes sion without looking for corroboration.

3. The Learned trial Magistrate misapplied the doctrine of recent possession.

4. The learned trial Magistrate erred in law and fact in not attaching any weight to the appellants' alibi.

At the hearing of these appeals, the order for consolidation was made and both appeals were heard as one. The appellants who had prepared written submission in support of the appeal were allowed to hand them in.

Mr. Monda, Learned State Counsel who appeared for the respondent commenced his submissions by stating that the State was not supporting the conviction and sentence on the offence of attempted robbery with violence. However, he urged us to find that there was sufficient evidence against the appellants on the offence of handling stolen goods contrary to Section 322(2) of the Penal Code, convict them of the same and accordingly sentence them. Mr. Monda advanced the following reasons as to why the state was not supporting the conviction and sentence on the initial count that faced the appellants.

1. *There was no identification of the appellants at all. That there*

was an interval after the attempted robbery, when the appellants

stopped at Pangani shopping center and left the motor vehicle.

Later on two people were again seen en tering the same motor

vehicle. In the absence of any identification of any of the appellants

it cannot be assumed that the appellants were the ones who had earlier

on attempted to rob the complainant.

2. That in the circumstances there was reasonable dou bt created

which ought to have been resolved in favour of the appellants.

3. That however when the appellants were arrested they were in

actual possession and control of the motor vehicle suspected to have been stolen.

We are aware that an appellant on first appeal is entitled to having the evidence as a whole submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court is enjoined to weigh and evaluate the evidence and draw its own conclusions. This is a task that we have scrupulously undertaken in this appeal.

We are aware that attempted robbery with violence is a serious charge for it carries a mandatory death penalty. So that for any person to be convicted and sentenced, the trial court must be satisfied beyond reasonable doubt on the evidence. In the event that the trial court entertains any doubt regarding any of

the evidence adduced, such doubt must of necessity be resolved in favour of the accused person. In cases of this nature, identification is very critical. The trial Court was duty bound to find out whether the appellants were the ones who had earlier on attempted to rob the Complainant of her motor vehicle. The Complainant in her testimony stated that she was not in position to identify the appellants during the incident. She did not even know the make and or colour of the motor vehicle that blocked her way; nor the number of occupants in the said motor vehicle. Similarly the evidence PW6 is of little value in so far as the identification of the appellants is concerned. He stated that he did not know who robbed him of his motor vehicle and although he remained in the custody of the robbers for a long time, he was never in a position to identify them or any of them. Indeed he does not even know which other motor vehicle was involved in the string of robberies. He had absolutely no idea as to how the attempted robbery on the complainant occurred. All he knew was that when he was eventually abandoned at Pangani shopping center the robbers took off in another motor vehicle. Later on two other people whom he did not know emerged entered the matatu and drove it away. From the foregoing, it is quite clear that the appellants were at no time ever identified by any of the witnesses as the perpetrators of the crime. It was therefore a misdirection on the part of the trial Magistrate to hold that the two accused persons were part of the gang that had attempted to rob the complainant.

There is evidence that when PW6's vehicle was abandoned at Pangani shopping centre, two people whom he did not know came in and drove the motor vehicle away. Were these people the same as those who had earlier attempted to rob the complainant? The witnesses could not tell. If they were part of the gang under what circumstances would they have managed to reach Pangani shopping center ahead of the subject matatu and the gangsters therein? We think that there is doubt as to whether these other two people who emerged and drove off the abandoned matatu were the same people who earlier on had attempted to rob the complainant of her motor vehicle. This doubt ought to have been resolved in favour of the appellants and we so hold.

From the foregoing, we are convinced that the convictions of the appellants on the offence of attempted robbery with violence was not safe. We are therefore in agreement with the Learned State Counsel and consequently quash the conviction. It is common ground that the appellants when arrested were in possession and control of a motor vehicle that had earlier on in the day been reported as having been stolen. The stolen Nissan matatu was soon spotted by PW3 and PW4, members of Pangani based Anti-Motor Vehicle Theft Unit. A chase ensued of about 150 metres between the police officers and the occupants of the Nissan matatu. They were challenged to stop but they refused. The police officers were forced to shoot at the rear tyre of the Nissan matatu to immobilize it. The appellants were then arrested

. The appellants were arrested in a motor vehicle which they did not claim ownership. The said motor vehicle reported earlier to have been stolen. We are satisfied that the ingredients of the offence of handling stolen goods were proved. We convict each of the appellants of the said charge. The appellants were 1st offenders. They have been in custody since 4. 1. 2000. The offence of handling stolen goods attracts a jail term of 14 years. Taking all the circumstances into account we sentence each appellant to serve a term of seven (7) years imprisonment effective from 3rd August, 2000.

Dated and delivered at Nairobi this……....day of…..……2004.

M. S. A. MAKHANDIA

AG. JUDGE

L. K. KIMARU

Ag. JUDGE