REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

CRIMINAL APPEAL NO. 217 OF 2003

(From Original Conviction and Sentence in Criminal Case No. 1431 of 2002 of Principal Magistrate's Court at Kitui: M. N. Gicheru Esq. on 22.7.2003)

MAKAU KITHUKU :: APPELLANT

VERSUS

REPUBLIC :: RESPONDENT

J U D G E M E N T

The appellant Makau Kithuku was charged before Kitui Principal Magistrate's Court in Criminal Case 1431/2003 with an offence of attempted robbery with violence Contrary to Section 297 (2) of the Penal Code. After hearing the case the Magistrate found the appellant guilty of the offence of attempted robbery Contrary to section 297 (1) of the Penal Code, was convicted and sentenced to 4 years imprisonment and was to be under police supervision for a period of 5 years after the sentence was served. The appellant was dissatisfied with the said conviction and sentence and appeals. His petition of appeal consists of 4 grounds which were argued by counsel ant the appeal was opposed by the State.

A brief background of the case is that the complainant (P.W.1) was asleep in his house with his wife and family when they were attacked by a group of people. They raised alarm and members of public came to their rescue. Police came much later after about 1½ hours. Among the members of public who came to the aid of the complainant was P.W.3 Musulu Munywoki who met about 4 people running away from complainant's home. He flashed his torch and saw the appellant who was armed with a torch and panga and that the appellant shot at him. He managed to evade the shot and ran. He went to complainant's home and informed others present that one of the attackers had been the appellant. He gave a similar report to the police. P.W.3 later led the dog handler to the place where he met the group of people and the dog then led them to the appellants house where appellant was found with another. Both were arrested but later the other with appellant was released while the appellant was charged. In his defence the appellant said he had been working in the shamba after which he went to bath in the river, went home at 6.00 p.m. and never left and slept at 9.00 p.m. in the same house with David Musyoki who was D.W.2 and he never left till the police came and arrested him.

The first issue raised by the appellant is that he was not positively identified by P.W.3 as alleged as it was dark and the only light available was a torch and that P.W.3 could not have identified him since he was frightened. In his evidence in the lower court, P.W.3 told court that as he went to the complainant's home, he met four people. He flashed a torch at them and saw appellant. He was asked who he was and answered that he was Musulu and appellant abused him and that appellant shot at him with an arrow and

P.W.3 then ran off. Though the Magistrate found that the appellant was identified by P.W.3 I am of the view that the circumstances were not conducive to proper identification. The court was not told how long P.W.3 flashed the torch at appellant or how powerful the torch was to see one 30 metres away. Though P.W.3 says they talked, the court was only told of the abusive word 'kino' and that P.W.3 was asked what his name was. Such a short conversation of one or two words cannot be sufficient for one to identify another. Moreover P.W.3 never identified appellant's voice. P.W.3 then said that appellant carried a panga and torch but that he shot at him with an arrow. It is inconceivable how the appellant would have done that when carrying the torch and panga. It is possible that another person shot at him and not the one he believed to be appellant.

At page 27 of the record of appeal in the judgement the Magistrate disbelieved the alibi of the appellant that he did not venture out of his house that evening but believed evidence of P.W.5 and 6 that they had made enquiries and found that the appellant had left the house that evening. The people from whom P.W.5 and 6 enquired were not called as witnesses. The evidence of P.W.5 and 6 was therefore hearsay and should not have been relied upon by the Magistrate.

The Dog handler came to the scene after many people had visited complainant's house. P.W.3 then led the police and Dog handler to the place where he met the four people who shot at him and from there the dog led them to the appellant's house. The scene had been interfered with and the dog could not possibly track the invaders. The issue of P.W.3 leading the Dog to the place he met the four people and being present at the appellant's house casts doubts in the prosecution case as to whether the dog actually led to the house of appellant.

The appellant's defence was an alibi supported by evidence of D.W.2 that he never left the house that evening. Was this evidence rebutted? Whereas the appellant may be a prime suspect, but in the light of the weak evidence of the prosecutions that alibi is not rebutted.

Though this was not raised as a ground of appeal the court finds itself obliged to mention that though the Magistrate reduced the original charge to an offence under Section 297 (1) Penal Code, the evidence on record did not support the said charge. Section 297(1) Penal Code reads as follows:-

> *"Any person who assaults any person with intent to steal anything, and at or immediately before or immediately after the time of the 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 of a felony and is liable to imprisonment for 7 years."*

My understanding of this section is that there has to be an assault of person with intent to steal. In the present case the evidence is that the attackers merely damaged the complainant's property. They did not get to the complainant or his family and none of them was ever assaulted. The evidence did not support that charge.

The sum of this is that the identification of appellant by P.W.3 was not absolute. There was doubt at the close of the prosecution case and that doubt should have gone to the benefit of appellant and he should have been acquitted. For the above reasons the appeal must be allowed, conviction is hereby quashed, sentence set aside and appellant set at liberty unless otherwise lawfully held.

Dated, read and delivered at Machakos this 26th day of May, 2004.

R. V. WENDOH

JUDGE