REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL APPEL NO. 439 OF 2002
(From Original Conviction and Sentence in Criminal Case No. 2139 of 2001 of the Chief Magistrate's Court at Nairobi)

JOSEPH MUTURA WAINAINA……..……APPLICANT

VERSUS

REPUBLIC……..…….RESPONDENT

JUDGMENT

The appellant, **JOSEPH MUTURA WAINAINA,** was charged with **ATTEMPTED ROBBERY WITH VIOLENCE,** contrary to section 297 (2) of the Penal Code. He was also charged with **BEING IN POSSESSION OF A FIREARM WITHOUT A FIREARM CERTIFICATE** contrary to section 3(3) of the Firearm Act. Following the trial, in which there were two other accused persons, the appellant was sentenced to death on count 1:, while on count 2, he was sentenced to 7 years imprisonment.

The Appellant then filed this appeal against both conviction and sentence. He set out four grounds of appeal, which can be summarized as follows:

1. The fact that he was identified at the scene of crime was not an issue, as he had explained in detail his reasons for being there.

2. The circumstantial evidence adduced by the prosecutor was not conclusive.

3. The prosecution did not prove the charges beyond any reasonable doubt.

4. The Appellant's defence was wrongly rejected by the trial court.

In response to the appeal, learned State Counsel, Mr. Mukura, submitted that he was conceding the appeal against the appellant's conviction on count 1. However, he was certainly supporting the appellant's conviction and sentence on count 2.

The reason advanced by the respondent for conceding the appeal on count 1 was that the prosecution did not prove that any of the prosecution witnes ses had been assaulted. As far as the respondent was concerned, assault was a prime ingredient of the offence of attempted robbery with violence. Therefore, once the prosecution failed to prove assault, the respondent feels that the conviction on count 1 cannot be sustained.

Section 297(1) spells out the offence of Attempted Robbery 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 seven years."

It is thus clear that for an accused person to be convicted for Attempted Robbery, he ought to have assaulted a person.

Subsection (2) of the S. 297 spells out the offence of Attempted Robbery with violence, in the following words;

"If the offender is armed with any dangerous or offensive weapon or instrument, or is in the 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 he shall be sentenced to death".

Once again, it is clear that assault is an essential ingredient of the offence under S. 297(2) of the Penal Code.

Therefore Mr. Mukura, learned State Counsel was correct to have conceded the appeal against conviction on Count 1.

As regards count 2, the appellant submitted that he was not in possession of the alleged toy pistol. He contends that the prosecution evidence was so inconsistent as to be wholly unworthy of belief. To illustrate his point, the appellant compared the evidence of PW2 and PW5, regarding the manner in which the firearm was recovered. We too have given due consideration to the said evidence.

PW2, Joash Aliongo Ombunga, testified that he is an employee of Vickys Wear shop, where the offence was committed. He said that at the time the incident started, he was outside the shop. He arrived to find PW1 calling for help. Meanwhile;

"a customer was struggling with someone who was armed with a toy pistol. I assisted him. The manager called for help. People came and assisted in snatching the pistol (toy) from the person."

On his part, PW5, Paul Mweu Ndeto, testified that he is an instructor for the Directorate of Civil Aviation. On the material day, he was a customer at Vickys Wear, Shop. He was at the counter, awaiting his change.

At that point in time, some thugs entered the shop and ordered the staff and shoppers to lie down. One thug went into the counter to collect money, whilst one remained outside the counter, armed with a pistol. A third one was by the door.

PW5 noticed that the pistol did not appear genuine. He therefore snatched it from the thug, and shouted for assistance. The other two thugs made good their escape, but PW5 pinned down the one who had a gun. People came to assist PW5, and he eventually placed the pistol on the counter.

In our reading of the evidence of PW2 and PW5, we are unable to find the inconsistency which the appellant is complaining about. If anything, both witnesses are in agreement that PW5 was struggling with the appellant, and that he shouted for help. The two witnesses are also in agreement that there was only one pistol, which PW5 assisted in recovering from the appellant. To that extent, the evidence of the two witnesses corroborated each other. We therefore find no merit in the applicant's contention that the evidence of PW2 and that of PW5 were materially inconsistent.

In his defence, the appellant conceded that he was at the shop where the offence was committed. However, he said that he was on an innocent mission, of checking on the price of **"another item."** He said that he had no idea that there had been a robbery at the shop, earlier. He was nonetheless arrested by

the police.

In his judgment, the learned trial magistrate set out the appellant's defence. He made a finding of fact, that the appellant was arrested at the shop, after he had been subdued by PW5. The trial court also found that the appellant was not a customer, as he had asserted in his defence.

When re-evaluating the evidence on record, we note that PW1 told the appellant;

> **"The shop is open to any customer but not to people with firearms ordering people to lie down. You had the toy pistol. You were not lying down."**

When it is borne in mind that the shoppers, save for P5 had been ordered to lie down, the appellant cannot have been a customer. But even if it were to be assumed that he was customer, he must have been a very strange customer, as he was not only armed with a toy pistol, but also ordered people inside the shop, to lie down.

PW5 corroborated the evidence of PW2, to the effect that the appellant had a pistol and also ordered the staff and shoppers to lie down.

In the light of the evidence of PW2 and PW5, we find that there cannot be any doubt that the appellant was in possession of the toy pistol. Therefore the learned trial Magistrate had every reason to reject the appellant's defence in relation to count 2.

In conclusion, we find no merit in the appeal against conviction on count 2. We therefore uphold the conviction and sentence, in that regard.

However, as earlier stated, the appeal against conviction on count 1 is successful; the conviction in that regard is quashed, and the death sentence set aside. It is only to that extent that this appeal is successful.

It is so ordered.

Dated at Nairobi this 7th of December, 2004

J. LESIIT

JUDGE

FRED A. OCHIENG

AG. JUDGE

Appellant in person present

Mr. Muya/Odero Court clerks