



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.157 OF 2000

**From original conviction and sentence in Criminal
Case No.307/2000 of the Senior Principal Magistrate's
Court at NAIVASHA - M.M. MUYA 9S.P.M.)**

JOSEPH NGIGE GAITUNGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellant was charged with ATTEMPTED ROBBERY WITH VIOLENCE contrary to Section 297(2) of the Penal Code But convicted of the charge under Section 297(1) of the Penal Code.

The facts of the case were that on 5/2/2000 the Appellant paid a second visit to the Complainant's shop at Njabini. He met the Complainant's wife PW2. He wanted to see the Complainant and just then the Complainant emerged from behind his shop. The Appellant then showed him photographs of people he did not know saying they had sent him to kill the Complainant. The Complainant resisted to give the Appellant fare to go back to Naivasha. That is when the Appellant produced a pistol, later discovered to be a toy, and threatened to shoot him. He had armed himself with a panga but he ran out screaming. Members of public came to his aid. They apprehended the appellant who had tried to run away. The Appellant produced the same pistol and threatened to kill everybody but he was overpowered.

The Appellant in his own defence says he had left his father after he refused to give him bus fare when he met a mob that interrogated and arrested him. The Appellant argued on appeal that he did not commit the offence for which he was charged. He said the Complainant did not identify him in court and that it was a mob, not the Complainant who arrested him.

The Learned State Counsel supported this conviction. He submitted that the Appellant had gone to the Complainant and pretended that he knew people who wanted to kill the Complainant. That he demanded money to go and get them and when he was not given he produced a pistol. He ran away when the Complainant armed himself with a panga but was arrested by a mob.

The issue the Appellant raises is a pertinent one, whether there is evidence that he committed the offence charged. Section 297(1) of the Penal Code gives the elements that constitute a charge of

Attempted Robbery as:-

- (i) Assault
- (ii) Intention to steal
- (iii) Use or threat to use violence to either
 - (a) obtain thing intended to be stolen or
 - (b) to prevent or overcome resistance.

The Complainant's evidence was never that the Appellant assaulted him or intended to steal from him. There was no evidence that the Appellant used or threatened to use force either to procure something he intended to steal or prevent or overcome resistance to the intended theft. All the Complainant said was that first the Appellant had photographs of people he said wanted the Complainant dead. Second he asked for fare to go back to Naivasha where he alleged he had come from as he had no intention to kill the Complainant. At that point, when the Complainant refused to part with money, the Appellant produced a pistol. He threatened to kill them but ran away instead. There was never a point that the Appellant assaulted the Complainant or anyone. There was never a point the Appellant demonstrated an intention to steal. He did not use or threaten to use violence. The three elements of this charge go hand in hand and not in isolation of each other. Clearly the Appellant did not commit the offence he was charged with and neither was that he was convicted of proved

In **Mugambi -v- Rep** 1980 KLR 73 the Court of Appeal set aside a conviction of Robbery with Violence where only the element of Stealing and not that of Violence was proved. In the instant case none of the elements of the offence he was convicted of proved.

Accordingly I find that the conviction cannot stand. I quash the conviction, set aside the sentence and direct that the Appellant be set at liberty unless otherwise lawfully held.

Dated and delivered at Nakuru this 27th day of March, 2003.

JESSIE LESIIT

JUDGE