REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL NO.352 OF 2000
(From original conviction and sentence
in Criminal Case No.3125/99 of the S.R.M'S
Court at MOLO - J. KIARIE(S.R.M.)

SAMMY MAINA KARANJA……..APPELLANT

VERSUS

REPUBLIC……RESPONDENT

J U D G M E N T

The Appellant was convicted of an offence of ATTEMPTED ROBBERY WITH VIOLENCE contrary to Section 297(2) of the Penal Code and sentenced to death. The prosecution evidence was that the Appellant boarded a 'Matatu' registration No.KAJ 152V Peugeot 505 Station Wagon driven by PW1, Samuel Mbugua. Mbugua told the court that the Appellant was in company of two others. That they indicated to him that there were 8 women at Happy Church near the Forest who desired to be taken to Nakuru. The Appellant was to identify them to Mbugua. That on reaching near the Church, Mbugua asked why the said women were not waiting near the road and he was informed that one of them was old. He was then hit on the side of his head by the Appellant with a clan hammer. That he immediately held the Appellant and screamed for help. The other two with the Appellant ran away. The Appellant was searched by PW4 and a knife recovered from his trousers.

The Appellant had in his defence claimed that he was a passenger in the said vehicle and that he protested when the vehicle diverted from its normal route. Upon protesting, he claimed he was beaten. That on threatening to go to th police, he was entised back to the matatu, beaten up and then taken to the police station. H was later charged.

One key ground of appeal argued by the Appellant's advocate was that the conviction was based on the wrong principle of law. She argued that no words were spoken nor were there overt acts committee by the Appellant to show an intention to commit robbery. She also submitted that by relying on the evidence of PW4 a police officer not present at the time the alleged offence took place. The court had strayed into extraneous matters.

The Learned State Counsel did not support the conviction. In his submission, he emphasized that to succeed, the act alleged to have been committed must form part of a series of acts which would constitute the actual offence with no interruption. He submitted that the evidence of PW1 of what the Appellant had done did not constitute an attempt of the offence of Robbery. The Learned State Counsel was therefore in agreement on principle with the Appellant's advocate's Submission that the act allegedly committed by the Appellant did not constitute an offence of Attempted Robbery. However, none of the Counsels stated what constituted the offence. The issue then is what constitutes the offence of Attempted Robbery? Section 297(1) of the Penal Code provides what constitutes this offence as:-

(i) Assault and;

(ii) Intention to steal and;

(iii) Use or threat to use violence at or immediately before or immediately after the time of the assault in order to

(a) obtain the thing intended to be stolen or;

(b) to prevent or overcome resistance to its being stolen.

The Attempted Robbery fails under Sub-Section (2), which the Appellant was charged with, if the offender in addition to those other ingredients of the offence,

(i) was armed with any dangerous or offensive weapon or instrument or.

(ii) 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.

The evidence before the court by the Complainant, PW1 was clearly that the Appellant hit her on the head with an instrument and immediately after so doing, he, the Complainant held him and shouted for assistance. Members of public helped to arrest the Appellant. By that time the Appellant had not done anything else.

To constitute an Attempted Robbery, the Appellant must be shown to have assaulted the Complainant and specifically with the intention to steal something and that at or immediately before or immediately after the said assault he used or threatened to use violence in order either to obtain the thing intended to be stolen or to prevent or overcome resistance to its being stolen. No intention to steal was proved before th court and neither was there proof of the use or threat to use violence.

Accordingly the Appellant was not proved guilty of the charge facing him. We set aside the conviction. The Learned Counsel for the State has urged us to find that the Learned Trial Magistrate should have convicted the Appellant of the charge of assault contrary to Section 251 of the Penal Code. Invoking Section 179 of the Criminal Procedure Code the Appellant's advocate in reply urged the court to find that Section 179 of the Criminal Procedure Code was applicable in a situation where there are a combination of several offences and to find that it was not the case in the instant case.

The question is whether this court has jurisdiction to impose a substituted conviction for a minor offence; and if so, for what offence. We have already quoted Section 297(1) and (2) of the Penal Code to show what constitutes a charge of Attempted Robbery which is

(i) Assault, (ii) intention to steal and (iii) Use or threat to use violence immediately before or immediately after the asault have also found that there was no evidence to prove either intention to steal and use or threat of use of violence.

Section 179(2) of the Criminal Procedure Code reads:-

"When a peson is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."

In **Ali Mohamed Hassan Mpan do –v- Rep** the 1963 EA 294, Spy, J. held after consideration of the relevant East African authorities, that for the Subsection to apply the sustituted conviction must be for an offence which is both minor and cognete to the offence charged.

In Mugambi -v- Rep 1980 KLR 75 Law, Miller and Potter, JJA., held:-

> "The offene of Robbery is constituted by two elements, Stealing and the use of violence at or immediately before or immediately after the time of stealing."

They went further to hold that:-

> "Stealing is a minor offence to Robbery, and in our opinion it is cognete to robbery, being one of the two constituent elements of that offence."

Using the same argument, it is our opinion that assault is a minor and cognete offence to attempted robbery. It is also our view that it is open to us to substitute a conviction of assault invoking the provisions of Section 179(2) of the Criminal Procedure Code as well As Section 354(3)(a)(ii) of the Criminal Procedure Code. Accordingly we substitute a conviction of assault causing actual bodily harm contrary to Section 251 of the Penal Code which was fully proved by the prosecution.

As for the sentence we note that the Appellant has been in custody since his arrest and arraignment in court on 23/12/1999. We are of the opinion that the period he has remained in custody is sufficient punishment for the offence of assault.

Accordingly we sentence him to a term of imprisonment already served and order that he be released forthwith unless otherwise he is lawfully held.

Orders accordingly.

Dated and delivered at Nakuru this 26th day of March, 2003.

MUGA APONDI

JUDGE

JESSIE LESIIT

JUDGE