**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**
**AT NAKURU**
**CRIMINAL APPEAL NO.3 OF 2001**
**(From original conviction and sentence in Criminal Case No.945/2000 of the Senior Resident Magistrate's Court at MOLO - J. KIARIE (S.R.M.)**

**JOHN MURIASO OTEKO……..APPELLANT**

**VERSUS**

**REPUBLIC……RESPONDENT**

**J U D G M E N T**

The Appellant has appealed against both the conviction and sentence imposed upon him by the SRM, Molo. He had been charged with the offence of ATTEMPTED ROBBERY contrary to Section 297(1) of the Penal Code.

The brief facts of the prosecution case was that the Appellant attacked the Complainant, PW1, and her husband PW2 as they walked home from their business premises. That he and his co-accused waylaid them on the way home. That the appellant went straight for the Complainant who flashed her torch on him as did PW2. That the Appellant had a club which he held over the complainant. That his co-accused held the Complainant's husband, PW2 from behind. That when PW2 threatened to kill him, the co-accused immediately released him but after a struggle. In the meantime the Appellant ran away on hearing PW2's threats to kill leaving his shoe behind. The shoes was exh.1. The other shoe, exh.2, was recovered same day in the Appellant's house together with the clothes the Complainant described she saw him wearing. They were exh.3 and 4 and were hidden under his mattress.

The Appellant urged the court to release him because his coaccused who was the guilty person had admitted the charge and was later released.

The Learned Counsel does not support the conviction on grounds that the identifying witnesses PW1 and PW2 should have identified the Appellant in an identification parade before their evidence could be relied on. That PW3 identified the sandal as belonging to the Appellant which was not conclusive.

I beg to differ with the Learned State Counsel. The Appellant was identified by three people. The three, PW1 the Complainant, PW2 and PW3 all knew the Appellant before. PW3 had in fact been with him that very day and knew how he was dressed. Their evidence was that of recognition. The circumstances of identification were good. The Complainant and PW2 had flashed him with torches they each had as he approached them before he went for the Complainant. The Complainant was able to describe his clothes to the arresting officer following which the Officer searched and recovered similar clothes hidden under the Appellant's mattress in his house an hour or so later. PW3 who had been with the Appellant same evening had gone to the scene before the Appellant fled and he too was able to see him. He also identified the Appellant's sandal which he left at the scene as he fled.

If the circumstances of identification were found to be insufficient for positive recognition, there was the additional evidence of the Appellant's shoe. He abandoned one shoe, exh.1, at the scene and the corresponding shoe exh.2, was found under his bed. He did not have the complete pair of those shoes/sandals at the time of his arrest 30 minutes later. I find that this evidence corroborates the evidence of identity by recognition of the Complainant, PW2 and PW3. The recovery of clothes described by the Complainant to PW4 the arresting officer also adds to the evidence implicating the Appellant.

Section 297(1) of the Penal Code under which the Appellant is charged states:-

> ***"Any person who assaults any person with intent to seal 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, or to prevent or overcome resistance to its being stolen, is guilty of a felony and is liable to imprisonment for seven years together with corporal punishment not exceeding fourteen strokes."***

Issue is whether the offence or any offence was proved. In my considered view all the Complainant and the prosecution witnesses proved is that the Appellant menacingly walked up to Complainant, lifted a club he was carrying over her head, attempted to catch her then fled. His co-accused held PW2 from behind and "tried" to inspect his pockets according to PW2. There is insufficient evidence to show that the Appellant and his co-accused were together. The Complainant and PW2 were clear that they met with him coming from the opposite direction while his co-accused emerged from nearby. There was no evidence to connect the Appellant and his co-accused. The Appellant's act on meeting the Complainant and PW2 does not constitute any offence or attempted offence. He merely lifted his club over the Complainant then stopped without hitting her.

For the charge to be proved, there must have been assault committed against the Complainant as the very first ingredient of the offence. The charge is clear it does not say "attempts to assault" but **"any person who assaults any person…"**

The charge was clearly not proved as far as the particulars of "assault" was concerned. The intention the Appellant had could not be deduced from his conduct as their lacked an overt act from which the intention could be inferred.

Even though I have no doubt that the Appellant was at the scene, I do find that the offence was not proved. The conviction was therefore unwarranted and baseless,

Accordingly I will allow the Appellant, quash the conviction, set aside the sentence and order for the release of the Appellant unless he is otherwise lawfully held.

**Dated and delivered at Nakuru this 18th day of March, 2003.**

**JESSIE LESIIT**

**JUDGE**