



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL APPEAL NO. 1097 OF 2001
PAUL KINGOO MAKENZI APPELLANT
VERSUS
REPUBLIC RESPONDENT

(From the conviction and sentence of H.A. Omondi S.P.M. in Thika Criminal case no. 328 of 2001)

JUDGMENT OF COURT

The appellant Paul Kingoo Makenzi was charged with the offence of Attempted Robbery with violence contrary to section 297 (2) of the Penal Code. He was convicted and sentenced to suffer death as provided by the law. He appealed against the conviction and sentence. When the appeal came up for prosecution, the appellant indicated that he would abandon the appeal in favour of the Republic agreeing to reduce the charge and conviction from under section 297(2) of the Penal Code to that under section 297(1) of the Penal Code. Mr. Monda had apparently considered the evidence on the record and formed an opinion that the appellant assaulted the complainant but stole nothing from the complainant. He therefore felt that the trial magistrate erred in convicting the appellant with attempted robbery instead of simple assault. He therefore submitted that this was a suitable case in which this court could use its powers to reduce the charge and also the sentence accordingly.

The facts behind the case are as follows: -

PW1, Isaaka Nzalai Nzioka, was on 7.5.2001 at 5.00 p.m. sent to the shop to buy some items, by his father, Nzioka Nzalai. Isaaka met the appellant on the way. The appellant kicked Isaaka Nzioka and ordered him to release the said purchased items to the appellant but Isaaka Nzioka refused. The appellant continued to assault the said Isaaka who screamed for help. He was soon rescued by PW3 Ndolo Nduva whereupon the appellant is said to have fled. Apparently the appellant did not try to violently take away any of the items the complainant Isaaka was carrying. He was later arrested and charged with this offence.

We have carefully considered the evidence, which was before the trial magistrate. Apart from the fact that the complainant included in his testimony that appellant had demanded that he, the complainant surrenders the purchased items to him the appellant, there is no other evidence that the appellant tried to violently take away the items from the complainant. However there is evidence on the record that the appellant inflicted some injuries on the complainant who was later found to have a cut on the forehead, the lips and the elbow. PW7, Ferir Musyoki confirmed that he medically treated the complainant, who he found with the three injuries, which he classified as harm. It is our view and finding, therefore, that while the appellant without doubt assaulted the complainant, he did not try to rob him of what he was carrying.

The trial magistrate should have considered convicting the appellant of a minor offence under section 179 of the Criminal Procedure Code. Since we have similar powers to do so, we are inclined to reduce the charge. The State Counsel indicated that he would be satisfied if the appellant is found guilty of an offence under section 297 (1) of the Penal Code. The evidence we find on the record supports only an assault causing actual bodily harm contrary to section 251 of the Penal Code.

We accordingly quash the conviction on attempted Robbery with violence contrary to section 297 (2) of the Penal Code and set aside the sentence of death. We reduce the charge to that of Assault causing Actual Bodily Harm contrary to section 251 of the Penal Code in respect of which we hereby convict him.

The maximum sentence provided is 5 years. The appellant has been in custody for about 2 years although he has so far served a sentence of about 20 months. He was a first offender. It is on the record that he was quite drunk when he committed the offence. It is our view that the sentence he has so far served is adequate. We order that his sentence be reduced to the period he has so far served. He should accordingly be set at liberty forthwith unless lawfully held in prison. It is so ordered.

Dated and delivered at Nairobi this 20th day of May 2003.

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T. MBALUTO

JUDGE

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D.A. ONYANCHA

JUDGE