



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NO.1213 OF 1998**

**(From Original Conviction and Sentence in Criminal Case No.3244 of 1997  
of the Chief Magistrate's Court at Kisii).**

**EDWARD LONGOROT CHOI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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

The appellant was convicted of attempted Robbery with Violence contrary to section 297(2), P.C. and sentenced to death on 25th August, 1998.

It was not in dispute that two robbers attempted to rob the complainant, PW1 of his motor vehicle, Reg. No.KTN 099, Peugeot 504 Pick up on 12/12/97 at about 8 p.m. at Oyugi's shopping center. One of the robbers had a gun which he pointed at the complainant's wife (PW6) at the time. The complainant struggled with the tug who had the gun and snatched the gun from him and pushed him out of the vehicle. Both robbers ran away as a result and disappeared.

Neither the complainant nor his wife was able to identify the robbers.

According to both of them the robber with the gun was of a slim built as the appellant.

The evidence on which the learned lady magistrate relied upon in convicting the appellant related to the gun.

The appellant was attached at Kisumu Police Station as a Police Corporal. P.C. Chepkok (PW5) had issued the gun in question to the appellant at about 6 p.m. on the material day, ie. 12/12/97. The appellant and P.C. Richard Mwamu (PW3), who was also issued with a gun, were assigned on night duty to guard the police lines at the Kisumu Police Station.

The appellant has not disputed this fact.

In his unsworn defence the appellant stated that he performed his night duty on 12/12/97 until 9 p.m. when he became sick and PW3, P.C. Mwamu (wrongly typed as P.C. Mwaniki) helped him to his house. He added that he left his gun with PW3.

Evidence of PW3 was that the appellant never told him that he was sick nor did he leave the gun with

him. He (PW3) said that after reporting on duty at 6 p.m. the appellant, who was wearing a black Police coat upon a local shirt, long trouser and shoes, told him that he had not eaten, wanting to go to eat and return. He did not return.

PW3 did not speak about 9 p.m. or escorting the appellant to his house nor did the appellant cross examined him on them. Further it be noted that the attempted robbery took place at about 8 p.m. and that too far away at Oyugis in which the gun issued to the appellant at 6 p.m. that day was used.

The appellant did not return to duty the whole night.

PW7 (wrongly typed as PW8), P.C. John shared the house with the appellant at the police lines. He said that on the night in question at about mid night he checked for the appellant in his room but did not find him.

P.C. Okumu, PW9 (wrongly typed as PW10) also did not find the appellant in his room at night when he returned to the house.

The learned Magistrate considered the evidence for the prosecution and the appellant's defence with utmost care. She accepted the prosecution evidence as true and rejected the defence as false. We agree with her.

We have given careful consideration to the entire evidence on record together with the grounds of the appeal. We find no merits in any of the grounds raised. The appellant never handed over the gun to his colleague PW3 on the night in question. It was used for the conviction of the present offence at about 8 p.m. at Oyugis on 12/12/97 as found by the court below.

The appellant's involvement in the offence was all there.

We now turn to consider whether this is a proper case for the substitution of the conviction for attempted robbery, contrary to section 297(1), P.C.

We note that no one was at all injured during the course of the attempted robbery.

We find this to be a suitable case to substitute the conviction for attempted robbery, contrary to section 297(1), P.C.

The appellant had no previous conviction. He was in remand for about eight months before the conviction. The sentence was passed on 25/8/98. there is no remission for attempted robbery sentence. The appellant gained nothing and lost his job.

Order:

We substitute the conviction for Attempted Robbery, contrary to section 297(1), P.C. and set aside the death sentence. We sentence the appellant to six years imprisonment with effect from 25/8/98 plus two strokes.

Dated and delivered this 20th February, 2002.

**V.V. PATEL**

**JUDGE**

**W.K. TUIYOT**

**JUDGE**