



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**APPELLATE SIDE**

**CRIMINAL APPEAL NO.111 OF 2000**

(Being an Appeal from Original Conviction and Sentence in Criminal Case No.808 of 1999 of the Resident Magistrate's Court at Voi –E.N. Maina, SRM)

**NATHAN MWAKONDI DICKSON ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGEMENT**

The Appellant was charged with the offence of Attempted Robbery contrary to Section 297(2) of the Penal Code. He was convicted and sentenced to death. He appeals against both the conviction and sentence.

The facts of the case are that on 29.7.1999 at about 3.00 p.m. the complainant PW.1 was walking to the Kenya Commercial Bank Ltd Voi, carrying an envelop containing KShs.89,780/- which he intended to bank. On his way near Jambo House he was attacked by two people one of who held him by the neck tightly from behind, while the other went in to snatch the envelop carrying the money. He found himself knocked down as one of the attackers continued trying to take away the envelop. He held him by his jacket as he shouted "thief, thief".The attackers fled as PW.2 who came to help arrived and separated the complainant from one of the attackers later to be identified as the appellant. It is claimed in evidence that as the appellant was fleeing, he was accosted by members of the public, in particular, PW.3 who having heard some commotion at the Bus stage, saw the appellant hurrying away. He followed him, caught up with him and arrested him believing that he was one of the attackers, after hearing and getting information to that end. The appellant was escorted to Kenya Commercial Bank Voi where PW.1 identified him to be one of the attackers. He was handed over to the Police who were working at the Bank.

The evidence of PW.1, PW.2, and PW.3 is consistent. PW.1 noticed the clothes the attacker wore as he tried to snatch the envelop from the complainant's hand. The appellant run away and was later noticed running away by PW.3 who arrested him with the help of other members of the public. They took him straight to the bank where complainant identified the appellant only a few minutes after the attack. The likelihood of the complainant making a mistake was very slim indeed. He was the appellant wearing the jacket that the attacker who was trying to snatch the envelop had noticed.He saw his face once again within a very short period. The attack took place during day light. The attackers concentrated on getting the envelop without using violence. The honourable trial magistrate made a finding that no dangerous

weapon was used and that the complainant was not injured despite the production into evidence of a P3. We accordingly find that the honourable trial magistrate made no error in concluding that the evidence on record would sufficiently support the charge of attempted robbery beyond a reasonable doubt.

The learned State Counsel however, observed during the prosecution of this appeal that the facts do not support the offence of attempted robbery with violence under Section 297(2) of the Penal Code. He believed that the appellant should have been charged under sub-section (1) of Section 297 which states as follows:-

*“Any person who assaults any person with intent to steal anything, and, at or immediately before or immediately after the time of the assault, uses or threatens to use actual violence to the person or property in order to obtain the thing intended to be stolen, or to prevent or overcome the 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”.*

There is no credible evidence on the record that the appellant acted in concert with any other person or persons, although the complainant suggested so. PW.2 did not find two or more attackers when he arrived at the scene of crime to rescue the complainant. The appellant did not wound, beat, strike or use any other notable personal violence to the complainant and the Honourable trial Magistrate so concluded and we agree with her. The facts would then tend to clearly remove the offence committed from under Section 297(2) of Penal Code.

It is our view therefore that the right charge should have been founded on sub-section (1) of Section 297, rather than under sub-section (2) of the same. Since the State Counsel is in agreement with this view, we quash the lower court’s conviction under Section 297(2) and proceed to substitute the same with a conviction under Section 297(1)

The maximum sentence under sub-section (1) aforementioned is 7 years with corporal punishment not exceeding 14 strokes of a cane.

We sentence the appellant to a prison sentence of 4½ years to run from the original date of sentence at the lower court. The appellant at the same time to receive 3 strokes of the cane.

It is so ordered.

**Dated and Delivered at Mombasa on the 8th Day of May, 2002.**

**D.A. ONYANCHA**

**JUDGE**

**J. KHAMINWA**

**COMMISSIONER OF ASSIZE**