



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA  
APPELLATE SIDE  
CRIMINAL APPEAL NO.474 OF 1999**

**(From Original Conviction and Sentence in Criminal Case No.550 of 1998 of the Senior Resident Magistrate's Court at Voi – Nduku Njuki, Esq., - S.R.M.)**

**JAMES KINYWA NKOROI.....APPELLANT**

**=V E R S U S=**

**REPUBLIC.....RESPONDENT**

**JUDGMENT OF COURT**

The Appellant James Kinywa Nkoroi alias Subarea, was charged with ten others with Robbery with Violence contrary to Section 296(2) of the Penal Code. He also was in one Count alone charged with the offence of Attempted Robbery with Violence contrary to Section 297(2) of the Penal Code. He was convicted of the same and sentenced to death. He appeals against both the conviction and sentence.

The Appellant, as stated above, was charged with several others in several counts. For example he was charged with attempted robbery with violence in count five and in count eight. The evidence adduced in respect of the two counts although given by the same witnesses could not, in the opinion of the trial Magistrate be sufficient to prove the charge in count five but it was enough to prove a similar charge in count eight.

It would appear from the evidence on the record that there were actually two incidents of robbery. One occurring on 8.6.98 and another on 24.7.98. On 1.8.98 the Appellant in a group of others had visited PW.3, Florence Mghoi's kiosk. It was after midnight and PW.3 was in her kiosk when the Appellant and his mob broke into the kiosk and supposedly took away Kshs.2,000/- in cash and food valued Kshs.1000/-. They insulted PW.3 but left without molesting her. They again allegedly visited her on 18.8.98 or 19.8.98 when they threatened her by telling her to say her last prayers. One Frank Ngeera who was finally not arrested cut PW.3 on the back of the head with a panga. He also cut two others. Appellant was with him and supporting him in the unlawful act. During this fray one of the attackers named above – Frank Ngeera – was cut with a panga by accident by one of his colleagues – Mutembe. Frank Ngeera was finally unable to flee when alarm was raised by neighbours and he ended up dying at the scene. From the record it would appear that when Frank Ngeera was physically attacking PW.3, Appellant and his other colleague Mutembe, were standing at the door of the kiosk. The time was 8 p.m. and a customer PW.3 called Patrick Chaema who was present, later had to join in the struggle to prevent the attackers, particularly Frank Ngeera from further injuring PW.3. Indeed it was him who was the target of Mutembe's panga blow, which, on Patrick Chaema's dodge, landed on Frank Ngeera who finally died from the injury inflicted.

It is further in the evidence that PW.3 knew Appellant well before the incident. She described him as a

member of a group then known as “Wangu Wangu” which was terrorizing those innocent workers in the mines at Mkuki Ranch and other mines around. PW.3 further clearly stated on the record that during the attack on the evening of 19.8.98, she recognized the voices of the attackers who also had been the same people who had visited her on 1.8.98 and had stolen Kshs.2000/- and foods valued Kshs.1000/-. This was before they entered the kiosk.

PW.3 was in the same night of the attack taken to Muthoni Kihara mines for first-aid treatment and was the next day taken to hospital. A report was made to the Police Post at Muthoni Kihara, one kilometer away.

It is further also in evidence, for what it is worth, that the Appellant had another time on 8.8.1998 visited PW.3’s kiosk aforementioned in PW.3’s absence and had in the presence of PW.3’s worker, Simion, eaten Ugali and meat and drunk all the tea that there was. The Appellant and whoever was in his company, had left a message that they would come back again. The worker had promptly reported the incident to PW.3 when she returned.

Patrick Chaema gave evidence at the lower court as PW.7. His description of the facts without much doubt strongly supported the story of PW.3 in material particulars, except that he believed that the attack took place on 18.8.1998 instead of 19.8.1998. The charge proved against the Appellant stated that the incident took place on 19.8.1998. The details included the date of death of Franck Ngeera which has not been disputed as having taken place not on 18.8.1998 but 19.8.1998. Under the circumstances, the lower court was correct to ignore the difference or the confusion by the witness of the date of occurrence of the attack.

In his evidence Patrick Chaema, PW.7 confirmed in details of the presence of Appellant at the kiosk of PW.3, his participation of the transaction which led to PW.3 being injured by Frank Ngeera who clearly was working in the fulfillment of a common intention with Appellant and Mutembei. Of the three who were identified by PW.7 and PW.3 that night, only Appellant was finally arrested and charged.

This court is entitled to make a finding of fact which the trial Magistrate should have made expressly although the Magistrate by implication made it when she convicted the Appellant. This is the fact that all through the unlawful attack by the Appellant and his colleagues Frank Ngeera and Mutembei, acted with the common intention to steal or rob or cause injury to PW.3 or those who were found in the kiosk. The three clearly aided and abetted one another throughout the unlawful transaction which brought their intention within the provisions of S.21 of the Penal Code. For the avoidance of doubts, the Section provides:-

***“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”***

In this case it was Frank Ngeera who injured PW.3 and PW.7. In accordance with the provision of S.21 above the other two present who include Appellant, could be convicted of assault or causing grievous harm if other facts related thereto were proved.

We have examined the totality of the evidence that the trial Magistrate relied on to convict the Appellant of the offence of attempted robbery with violence. We are satisfied that the evidence on record was inadequate to sustain the conviction. The relevant evidence related to the attack by Appellant’s gang on 19.8.1998 or 18.8.1998 do not show that the group intended a robbery on that particular day. Their intention is shown to have been to punish PW.3 on the suspected revealing of the gang’s unlawful activities to the Police. The attackers were on a mission of revenge. They were using any force to punish PW.3 and this they managed to accomplish by injuring PW.3. The degree of injury upon PW.3, Florence Mghoi, PW.7 Patrick Chaema and PW.4 Thomas Ndirangu, as attested by PW.25 No.48837, Cpl. Kipchirchir Bore, amounted to harm.

This court however believes that the evidence on record would clearly support, beyond a reasonable doubt, the charge or offence on Assault Causing Actual Bodily Harm contrary to Section 251 of the Penal Code. The State Counsel does not similarly support the conviction of attempted robbery with violence which finding the trial Magistrate had returned. Indeed Ms. Kwena urged this court to apply its appellate powers to make a fresh finding on the evidence on record. Section 354(3)(i) and (ii) of the Criminal Procedure Code empowers this court to reverse the finding of the trial Magistrate and acquit the Appellant of the charge upon which he was convicted. It can also alter the finding of the trial Magistrate and reduce the charge and convict of the reduced charge and also reduce the sentence to fit the reduced charge.

We accordingly quash the conviction of attempted robbery with violence and set aside the sentence of death against the Appellant. However, since the evidence on record is sufficient to sustain the offence of assault causing actual bodily harm we hereby reduce the charge and convict the Appellant of Assault Causing Actual Bodily Harm contrary to Section 251 of the Penal Code.

The Appellant was a first offender. He had pleaded for leniency and had indicated that he has a wife and children. The circumstances under which the offence was committed cannot however, be easily mitigated. Appellant had visited the mine camps more than three occasions, each time he either robbed or stole or committed some criminal offence. PW.3, PW.4 or PW.7 could easily have been maimed or killed was it not for some good luck or help from other people. The Appellant should count himself as very lucky to have escaped the death sentence. We sentence him to 4 1/2 years imprisonment to run from 29.11.99 together with four strokes of the cane.

He has a Right of Appeal within 14 days.

**Dated and Delivered at Mombasa the 6th day of December, 2001.**

**D. A. ONYANCHA**

**J U D G E**

**J. KHAMINWA**

**COMMISSIONER OF ASSIZE**