REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 80 OF 2018

MBITHI WAMBUA NZIU..APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(*Being an appeal from the judgement, conviction and sentence of the Chief Magistrates Court at Machakos vide judgement delivered on 27.6.2018 by the Senior Principal Magistrate A. Lorot in Machakos CM Criminal Case 800 of 2016*)

JUDGEMENT

1. **MBITHI WAMBUA NZIU**, the appellant herein has filed this appeal against the judgement, conviction and sentence on a charge of attempted robbery contrary to Section 297 (2) of the Penal Code. The particulars of the offence were that the appellant on the 17th day of August, 2016 at around 0345 hours at Kyumbi township within Machakos County jointly with another not before court while armed with a dangerous weapon namely kitchen knife attempted to rob Penwick Kioko Nzioka of his household goods and at or immediately before the time of such attempted robbery used actual violence and wounded the said Penwick Kioko Nzioka. The appellant was sentences to seven years imprisonment.

2. The prosecution called six witnesses in support of the charges. **PW1, Penwick Kioko Nzioka**, the complainant herein testified that he is a businessman who sells construction materials and he is a landlord of 19 tenants in single rooms and he resides on the same plot. It was his testimony that he knew the appellant who was a neighbor and that on 17.8.2016 he received information that a person had broken into the sitting room. He told the court that he went to the sitting room where the man cut him on the left thumb and stabbed him on the shoulder blade. It was his testimony that he managed to cut the man on the head with a panga and who fell down and managed to escape but he was able to see him. He told the court that he reported to the village elder and informed him that the appellant had attacked him. He stated further that the appellant was arrested whereupon it was noted that he had a cut on his head. He testified that he was treated at Shalom Hospital and produced the P3 form, the knife that the appellant left behind and a blood stained T-shirt. It was his testimony on cross examination that he saw the appellant leaving his house.

3. Pw2 was Francisca Kavuu Mutua who told the court that the complainant is her husband and that she knew the appellant as a resident of Kyumbi. She told the court that on the material day she was informed that there was someone in her sitting room and her husband picked a panga and when he approached the entrance of the sitting room, she saw someone stab her husband on the ribs, hands and she also saw her husband cut the intruder on his head and he fell down. She testified that she knew the intruder as Mbithi and that the appellant was trailed through bloodstains that he left behind as he fled the scene and that he was about to be lynched when he was rescued and taken to Kyumbi Police station. On cross examination, she told the court that she knew the appellant as Mbithi Wambua.

4. Pw3 was Joshua Ndulusio Munyao who testified that the complainant is his landlord and that on the material day he was awoken by noises in Pw1’s house that sounded like padlock snapping. He told the court that he heard a scream by Pw2 calling “mwizi” and he came out and saw Pw1 fighting the intruder who later jumped into a tank and off into the perimeter fence. It was his testimony that at around 11.00 am word went round that the attacker had been found and who had been tracked through bloodstains then he later saw the appellant after he had been arrested and noted that he had an injury on his head. He told the court that the appellant was the person he had seen on the material night. On cross examination, he told the court that the mob that had gathered to lynch the appellant informed him that the appellant was part of a gang that had been terrorizing residents and breaking into houses and stealing.

5. Pw 4 was Benson Musyoka Musengi who told the court that he received a report of the incident and he issued instructions that if anyone spotted someone with fresh cut wounds then he be alerted. He told the court that he received information that there was a blood trail leading to the house of the appellant and immediately informed the OCS who swung into action together with his officers and had the appellant arrested.

6. Pw5 was Dr John Mutunga who testified of the examination that was conducted on Pw1 and the same noted that he had cut wounds on his chest and a cut wound on his left thumb. Pw1 was reported to have been attacked by a person known to him. He produced a P3 form in respect of Pw1.

7. Pw6 was Pc Samuel Wambogo who told the court that the complainant was attacked on 17.8.2016 and that he visited the scene and found that the appellant had been injured. He told the court that the appellant who was then bleeding on his head was rescued from being lynched. He established that the appellant had been injured by the complainant whilst trying to free himself during the robbery. It was his testimony that he recovered a knife and a brown marvin cap that belonged to the appellant and which was blood stained. On cross examination, he testified that Pw1 informed him that he cut the appellant on the head. The court found that a prima facie case had been established against the appellant and he was put on his defence.

8. When put on his defence, the appellant gave a sworn testimony in which he denied the offence. He stated that on 17.8.2016 he was at home and was arrested at 12pm. He denied knowledge of Pw1 and Pw2 and told the court that the injury on his right finger was as a result of skinning a goat and the injury on the head was a result of him having slipped on a wooden plank at a site he was building on 7.7.2006. He presented an x-ray film in respect of injury though there are no copies of the same on the court record. He told the court that he was arrested on 18.8.2016 after having quarreled with a man called John over a place to tether goats. On cross examination, he told the court that on 17.8.2016 he was at Kyumbi and he had an injury on his head but he was injured in 2006 but did not have treatment notes.

9. Dw2 was Lydia Mbeneka Nziu who testified that she was the mother of the appellant and that the appellant was at home on 17.8.16 and that he was injured on his hands whilst skinning goats and that he also fell at his place of work and was seen and referred to Kenyatta National Hospital but did not have treatment notes.

10. In a judgment delivered on 27.6.2018, the appellant was convicted and sentenced to seven years imprisonment for the offence of attempted robbery.

11. The conviction and sentence provoked this appeal. In his grounds of appeal filed on 26.7.2019 and amended grounds that are on the court record, the appellant raised a total of 15 grounds of appeal which I have summarized into 5 grounds as follows: -

1) ***He was not properly identified***

2) ***That the prosecution case was not proved beyond reasonable doubt***

3) ***That his defence was not considered***

4) ***He was not given a fair trial***

5) ***The prosecution evidence was contradictory***

12. The appeal was canvassed vide written submissions. The appellant submitted that the trail of events by the prosecution never happened. He submitted that there was no proper identification of him and reliance was placed on the case of **Maitanyi v R (1986) KLR 198**. He assailed the investigating officer for failing to conduct an investigation parade. The respondent submitted that the appellant was proven to be a person well known to Pw1 and Pw2 and that the knife which was recovered is a dangerous weapon. It was submitted that the ingredients of the offence that the appellant was charged with had been proven. On the issue of contradictions, counsel submitted that there was no contradictions on the identification of the appellant and that in any event such discrepancies are curable under Section 382 of the Criminal Procedure Code as the same are not fundamental as to cause prejudice to the appellant and are inconsequential to the conviction and sentence. On the issue of fair trial, counsel submitted that the appellant took plea on 19.8.2016 and statements were supplied to his defence counsel and he never raised any such issue during trial and therefore this ground lacked merit.

13. This being a court of first appeal, it has the duty to re-evaluate the evidence, look at the manner in which the plea and evidence was taken and the procedure used, look at the preferred charges and ingredients thereof, and finally consider whether the trial magistrate applied the law to the facts properly before arriving at the decision.

14. In other words, the appellate court is more concerned with the propriety, legality and regularity of the legal process during the trial. I am guided by the legal principles laid down in the cases of **Pandya v R (1957) EA 336 and Okeno v R (1972) EA 32**.

15. The judicial appellate system is indeed akin to the post mortem process where the pathologists comb the entire body looking for the cause of death. In the judicial process, the appellate court combs the lower court record looking for the alleged legal errors and omission that are stated to have caused a miscarriage of justice to the appellant. The appellate court may, depending on its findings, quash, or uphold the decision of the lower court, come up with its own decision, address legal issues of unfairness or irregularity that are not contained in the memorandum but are glaring on the record which resulted into a miscarriage of justice and or order for a retrial in the interest of justice, bearing in mind that litigation whether civil or criminal must come to an end.

16. It is also trite that even where court has erred, the Appellate court interferes with the decision of the lower court only where there has been a miscarriage of justice to any of the parties in the proceedings. The presumption of innocence of an accused person, the burden of proof resting on the prosecution and standard of proof in criminal cases being beyond reasonable doubt.(see **Woolmington v DDP (1936) AC 462**).

17. In dealing with this appeal, I will address the five grounds summarized above as follows: -

Was the appellant properly identified?

18. The appellant submitted that he was not properly identified as the attacker. The evidence on record was that he was seen leaving Pw1's house; he was attacked on the head and he bled; he was found with injury on his head and he was tracked through blood that led to his house. He gave no evidence to challenge the fact that he was injured during the ordeal. He averred that he was injured at work and whilst skinning a goat and that was all to it. The evidence that was available was that of a single identifying witness as well as circumstantial evidence that was corroborative and could infer guilt on his part.

19. The law governing corroboration was stated in the land mark case of **R v Baskerville (1916)2 KB 658** where Lord Reading CJ stated that: "we hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him that is which confirms in some material particular not only the evidence that the crime has been committed, but also the prisoner committed it".

20. It is necessary before drawing the inference of the accused's responsibility for the offence from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference (see **Simon Musoke v. R [1958]).**

21. The circumstantial evidence available on record was that the assailant was attacked on the head and he bled and the officer who visited the scene testified that he found the appellant with injury on his head and Pw4 and Pw6 told the court that the appellant was tracked through blood that led to his house. I am convinced that there is a connection between the head injury and the incident that occurred at Pw1's house and there is nothing or no other evidence on record from the appellant to convince me otherwise. The evidence is corroborated by independent evidence that join dots to connect the appellant with the offence and I am unable to agree that the appellant was not identified as the perpetrator. The appellant was arrested soon after the incident as blood trail led to his house and the injury corroborated the complainant's evidence that he had managed to cut the attacker on the head as he struggled to ward him off and raised alarm and gave the name of the appellant whom he later identified as the one who attempted to rob him. The appellant's claim that he had been injured while at work in 2006 is not convincing in view of the fact that the injury could not have been fresh from 2006 to 2016. The defence evidence did not shake that of the prosecution.

22. The appellant has assailed the police officers for failing to conduct an identification parade. In the case of **Maitanyi v Republic (1986) KLR at page 198** the Court of Appeal held:

> **"There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made…if a witness receives a very strong impression of feature of an assailant; the witness will usually be able to give some description."**

23. I opine that an identification parade will serve no useful purpose because the evidence on identification cannot disqualify and disconnect the appellant from the wrongful act. There was sufficient evidence that enabled the court to find that the appellant was the perpetrator.

24. The appellant raised the defence of alibi and assailed the trial magistrate for failing to consider it. The law on alibi is now well settled. It is that a prisoner who puts forward an alibi as an answer to a charge does not assume any burden of proving it. The burden remains on the prosecution to disprove it. If evidence adduced in support of an alibi raises a reasonable doubt as to the guilt of an accused person it is sufficient to secure an acquittal. (see ***Leonard Aniseth v. Republic*** (1963) EA 206).

25. To counter this defence, the prosecution was required to adduce direct or circumstantial evidence proving that the appellant was the perpetrator of the unlawful actions. This was proved by the testimony of the prosecution evidence as analyzed above. In this case, the prosecution's evidence largely rests on the accounts of P.W.1 and that of Pw2 that placed the appellant at the scene of the crime; the circumstantial evidence presented through Pw1 and Pw4 and Pw6 further strengthened the prosecution's case. I have examined closely the identification evidence of Pw1, 2, 4 and Pw6 and found it to be free from the possibility of mistake or error since Pw1 and Pw2 knew the appellant before and the events Pw1, Pw4 and Pw6 narrated enabled them to correctly identify the appellant. In light of that evidence, I reject the appellant's alibi. I am satisfied that there was ample evidence which put him at the scene of crime.

Was the prosecution case proven beyond reasonable doubt?

26. The essential ingredients of an attempt to commit an offence have been laid down in the following words.

> ***"In every crime, there is first intention to commit it, secondly, preparation to commit it, thirdly to commit it. If the third, that is, attempt is successful, then the crime is complete. If the attempt fails, the crime is not complete but the law punishes the act. An 'attempt' is made punishable because every attempt, although it fails of success, must create an alarm, which, of itself, is an injury, and the moral guilt of the offender is the same as if he had succeeded"***

27. Thus, for there to be an attempt to commit an offence by a person, that person must: -

> **a.** ***Intend to commit the offence;***
>
> ***b. Begin to put his intention to commit the offence into execution by means which are adapted to its fulfilment. This means that the accused begins to carry out his intention to commit the offence in a way suitable to bring about what he intends to achieve;***
>
> ***c. Do some overt act which manifests his intention; that is, the accused performs an act which is capable of being observed by***

another (although it may not have been) and which in itself makes clear his intention to commit the offence.

28. The evidence tendered by PW1, 2, Pw4, 5 and 6 is to the effect that the appellant who was armed with a knife broke into Pw1's house and entered and was intercepted by Pw1 who cut him on the head and the appellant managed to escape. However Pw1 was left with injuries on his head as evidenced by the P3 form.

29. From the foregoing, I find that there is overwhelming evidence against the appellant as he had an intention to rob the complainant in his house. The Appellant begun to put his intention to commit the offence into execution by forcefully entering Pw1's house but for his interception from PW1 and his mission only failed after he was injured on his head. Contrary to the appellant's submission, the evidence on record undoubtedly discloses the offence of attempted robbery.

Was the appellant's defence considered?

30. I find that the appellant's defence was rightfully rejected by the trial court for the reason that it did not create any doubt on the well corroborated prosecution case. As analyzed above, the prosecution evidence placed the appellant at the scene of crime and I am not convinced by the appellant's defence and this ground of appeal lacks merit and is dismissed.

Contradictions in evidence and right to fair trial

31. The appellant has not pointed out to court how he was denied a fair trial. I find he was represented by counsel; he participated in trial together with his counsel. Hence I find no merit in this ground and dismiss the same.

32. With regard to contradictions, I am unable to find contradictions in the identification of the appellant as the perpetrator from the fact that the complainant was injured in the process. The identity of the appellant was relayed by the complainant who gave out his name whereupon members of public followed the blood trail leading to his arrest. Hence I equally dismiss this ground for lack of merit.

33. With regard to the sentence for attempted robbery section 389 of the Penal Code requires that in offences of attempt to commit a felony, the sentence should not exceed seven years' imprisonment. The Section 389 states as follows:

> **"Any person who attempts to commit a felony or a misdemeanour is guilty of an offence and is liable, if no other punishment is provided, to one-half of such punishment as may be provided for the offence attempted, but so that if that offence is one punishable by death or life imprisonment he shall not be liable to imprisonment for a term exceeding seven years."**

> **And section 297(2) provides:**

> > **(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.**

34. A three Judge bench of the High Court in ***Nairobi Petition No.618 of 2010, Joseph Kaberia Kahinga and 11 others v Attorney General [2016] eKLR*** found that there is an apparent conflict that exists between **Section 297(2)** and **Section 389** of the **Penal Code** in regard to the punishment to be given upon a person found guilty of committing an inchoate offence of attempted robbery with violence.

35. The court made various observations and in one of its holdings stated: -

> ***"We hereby declare that section 295, 296(1), 296(2), 297(1) and 297(2) of the Penal Code do not meet the constitutional threshold of setting out in sufficient precision, distinctively clarifying and differentiating the degrees of aggravation of the offence of robbery and attempted robbery with such particularity as to enable those accused to adequately answer to the charges and prepare their defences".***

36. Similarly, in this appeal, I find merit in the appeal against sentence raised by the appellant and quash the sentence of 14 years imprisonment imposed on him on the count of attempted robbery and substitute it with a sentence of seven years.

37. The upshot is that the appeal against conviction is dismissed for lack of merit. The appeal however succeeds on sentence. I substitute therefore the sentence of 14 years with a sentence of imprisonment for a term of 7 years. As the appellant remained in custody throughout the trial, I order the sentence to run from the date of arrest namely 18.8.2016.

Orders accordingly.

Dated and delivered at **Machakos** this **16th** day of **January, 2020.**

D. K. Kemei

Judge