



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.76 OF 2016**

*(An Appeal arising out of the conviction and sentence of Hon. Onginjo – CM delivered on 5<sup>th</sup> April 2016 in Kibera CM. CR. Case No.5593 of 2014)*

**JAMLICK NJAU NJOGU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant Jamlick Njau Njogu was charged with the offence of **attempted robbery with violence** contrary to **Section 297(2)** of the **Penal Code**. The particulars of the offence were that on 9<sup>th</sup> December 2014, at Ongata Rongai Township, in Kajiado County, jointly with others not before court, the Appellant attempted to rob Evelyn Achieng of her motor vehicle Toyota Premio registration number KCA 247A valued at Ksh.1,000,000/-. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged. He was sentenced to death. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that his conviction was based on a defective charge sheet. He faulted the trial court for failing to acknowledge that the prosecution failed to establish the ownership of the motor vehicle, the subject matter of the robbery in the present appeal. He took issue with how the trial was conducted and asserted that he was not provided with witnesses' statements, which contravenes his constitutional rights. He was of the opinion that the prosecution had not proved its case to the required standard of proof beyond any reasonable doubt. He complained that the trial court did not consider his alibi defence in arriving at its decision. In the premises, the Appellant urged this court to allow his appeal.

During hearing of the appeal, the Appellant presented to court written submissions in support of his appeal. He urged the court to allow his appeal. Ms. Sigei for the State opposed the appeal. She made oral submissions to the effect that the ingredients of the charge against the Appellant were established by the prosecution. PW1 and PW2 narrated in detail the role the assailants played in the attempted robbery. The Appellant was trapped in the complainant's car. His accomplices managed to escape. She asserted that identification of the Appellant was watertight. She therefore urged this court to disregard the Appellant's appeal.

The facts of the case according to the prosecution are as follows. PW1, Everlyne Achieng Oketch, is the complainant. On the material day, she left her house located in Ongata Rongai at 8.00 p.m. She had gone to drop her husband at Jomo Kenyatta International Airport. On her way back, as she was about to get to her house, she texted her son and instructed him to open the gate. Her son opened the gate when she arrived. She drove into the compound. As her son was closing the gate, another motor vehicle suddenly entered the compound. Four men came out of the said vehicle. One of them ordered PW1 to get out of her car. He hit her on the head with a metallic object. He directed her to move to the rear passenger seat. Another man came and took over the driver's seat. Her son was also forced into the back seat.

They were driven out of the compound. The assailants' vehicle followed closely behind. They were driven for about 50 metres when the car stalled. The cut out had not been disengaged. The vehicle slowed down and eventually stopped. The two assailants in the front seats of the vehicle got out of the car and escaped. They drove off in the car that was trailing them. The assailant who was at the rear passenger seat was unable to get out. The door at the rear passenger seat of the car had a child safety lock which was engaged. PW1's son struggled with him and managed to overpower him. PW1 moved to the driver's seat. She drove to the main road where she found motor bike riders. She raised an alarm and informed them of her ordeal. They removed the assailant from the rear passenger seat and started beating him up. The assailant at the rear passenger seat was the Appellant. Police officers who were on patrol rescued the Appellant. They arrested him and took him to Ongata Rongai Police Station.

PW2, Brian Ouko Mboya, is the complainant's son. He stated that on the material day, his mother drove to the airport. At about 10.50 p.m., she texted him and instructed him to open the gate. He opened the gate. She drove into the compound. Before he could close the gate, another

car drove into the compound. Three men came out of the said car. Three others were left inside the car. One of the assailants held him by his neck and ordered him not to raise alarm. Another went to the house. The third man went to PW1's car and ordered her to get out of the car. She moved to the rear passenger seat. He took over the driver's seat. PW2 was also forced into the rear passenger seat. The assailants drove the two cars out of the compound. The assailants had not disengaged the foot brake pedal on PW1's car. After driving a few metres, the vehicle stalled. The two assailants seated on the front seats escaped. The assailant at the back seat was trapped. The back seat door failed to open due to a child safety lock mechanism which was engaged. PW2 struggled with him and overpowered him. PW2 directed her mum to jump to the driver's seat. They drove to Total Petrol Station where they found motor bicycle riders. PW1 raised alarm. They informed the riders of their ordeal. The riders started beating the assailant. The Appellant was the said assailant. Police officers rescued him. They took him to the police station. PW1 and PW2 recorded their statements.

PW3, Sgt. George Odhiambo, stated that he was attached at Ongata Rongai Police Station. On 11<sup>th</sup> December 2014, he was instructed by his superior to take photographs of a motor vehicle that was at the station. It was a white Toyota Premio, registration number KCA 247A. He produced the said photographs in court as prosecution exhibits.

PW4, P.C Joseph Mengich, was the investigating officer. On the material day, he was on duty at Ongata Rongai Police Station. They received a call that a suspect was being beaten by members of the public. The suspect was said to have robbed the complainant's motor vehicle. PW4 in the company of other police officers, rushed to the scene which was near Laiser Hill area. They rescued the suspect from the irate mob. PW1 narrated to them how the Appellant, in the company of the other robbers, had tried to carjack them. They took him to Nairobi Women's Hospital where he was treated. He was later discharged and taken to Ongata Rongai Police Station where he was charged with the present offence.

The Appellant was put to his defence. He stated that he resided in Ongata Rongai. On the material day, he left his place of business at Kawangware. It was at about 7.00 p.m. He proceeded to Ongata Rongai. He arrived at Ongata Rongai at 7.30 p.m. He went to a pub to unwind. At about 10.00 p.m., he hired a motor bike rider to take him home. When they got to Total Petrol Station, the rider stated that he wanted to fuel the motor bike. He requested the Appellant to give Ksh.100/-. A quarrel ensued between them. Police officers came and arrested him. He was thereafter charged with the present offence. He denied attempting to rob the complainant.

As the first appellate court, it is the duty of this court to subject the evidence adduced before the trial court to fresh scrutiny and re-evaluation, before reaching its own independent determination whether or not to uphold the conviction and sentence of the Appellant. In doing so, this court is required to bear in mind that it neither saw nor heard the witnesses as they testified and cannot therefore make a comment regarding the demeanour of the witnesses (See Okeno vs Republic [1972] EA 32). In the present appeal, the issue for determination is whether the prosecution established the charge of **attempted robbery** with violence contrary to **Section 297(2) of the Penal Code** to the required standard of proof beyond any reasonable doubt.

PW1 and PW2 narrated to the court how the Appellant, in the company of others not before court, attempted to rob PW1 of her motor vehicle. PW1 was parking her motor vehicle in her compound. A car being driven by the assailants drove into the compound, before PW2 could close the gate. They stated that the compound was well lit with security lights. They were therefore able to see the assailants. Three men emerged as others remained in the said car. One of the men confronted the son, while another went to check the house and the third man attacked PW1. PW1 and PW2 were forced into the rear passenger seat of PW1's car. One of the assailants sat at the driver's seat and another at the co-driver's seat.

The Appellant sat at the rear passenger seat with PW1 and PW2. The three assailants drove PW1's car out of the compound. The assailants' car followed closely behind. The assailants failed to disengage the cut out in PW1's car. Subsequently thereafter, the said motor vehicle stalled a few meters from PW1's house. The two assailants seated on the driver's seat and the co-driver's seat managed to escape. The Appellant was unable to make good his escape as the door of the rear passenger seat had a child safety lock which was engaged. PW2 struggled with the Appellant and managed to overpower him. PW1 took over the driver's seat. They drove to the nearby Total Petrol Station where they found motor bike riders. PW1 raised an alarm. They informed the riders of the incident. The Appellant was removed from the car. The riders started beating the Appellant. Police officers came and rescued him. They took him to the police station.

It was evident from these facts that PW1 and PW2 did not lose sight of the Appellant until he was apprehended by the said police officers. The Appellant was trapped in PW1's car. He did not manage to escape. He was arrested immediately after the attempted robbery. PW4 corroborated PW1 and PW2's testimony. He stated that he rescued the Appellant from the irate mob at the said petrol station. Therefore, there can be no case of mistaken identity as the Appellant did not leave the sight of PW1 and PW2 until he was arrested by police officers. The testimony of the two eye witnesses (PW1 and PW2) was consistent. The Appellant's defence that he was arrested at the said petrol station after an argument with a rider does not hold water. The Appellant was not known to the complainant prior to the attempted robbery. There was therefore no reason for the complainant to frame the Appellant. The Appellant's defence does not raise reasonable doubt to dent the otherwise strong evidence adduced by the prosecution. This court is of the view that circumstances favouring positive identification were present in this case, and that the Appellant was positively identified and placed on the scene of crime.

The Appellant argued that the charge sheet as presented by the prosecution was defective. He submitted that there was no indication in the particulars of the charge sheet that the Appellant used any dangerous or offensive weapon. The offence of attempted robbery with violence as described under *Section 297 (2) of the Penal Code* may be complete with or without use of violence; as long as there was intent to steal and the offenders are either armed with offensive weapons or the offenders were more than one. In the present appeal, the particulars of the charge are very clear. The Appellant was in the company of other people not before this court at the time the attempted robbery was committed. This fact was established by direct evidence of PW1 and PW2. This court therefore holds that the particulars of the offence provided in this case supported the charge as was preferred.

The Appellant also contended that he was not provided with witness statements and the investigation diary, prior to commencement of the trial. This court has perused the proceedings of the trial court. On 5<sup>th</sup> of May 2015, the Appellant requested for witnesses' statements. On 12<sup>th</sup> May 2015, the trial court confirmed that the same had been provided to the Appellant. None of the witnesses had testified at that point. PW1 testified on 14<sup>th</sup> September 2015. The court directed that the investigation diary be provided to the Appellant on the same date. The

Appellant thereafter recalled PW1 for further cross-examination. There was therefore no prejudice occasioned on the Appellant with regards to being accorded his right to a fair trial.

The Appellant submitted that the complainant failed to avail proof of ownership of the **motor vehicle**. The motor vehicle, subject matter of the robbery, was properly described in the charge sheet as Toyota Premio Registration No. KCA 247A. PW3 took photographs of the motor vehicle at the police station and produced them in evidence as **Exhibit 1**. PW4 testified that the said motor vehicle was released to the owner. The owner was the complainant. The Appellant at the trial never challenged the ownership of the said motor vehicle. It follows that the evidence adduced by the prosecution is deemed to be credible and reliable to enable the court reach a just determination. This ground of appeal was clearly an afterthought on the Appellant's part. The same must fail.

From the above analysis of the evidence, this court is of the view that the prosecution established its case on the charge of **attempted robbery with violence** contrary to **Section 297(2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt. The upshot of the above reasons is that the Appellant's appeal on conviction lacks merit and is hereby dismissed

With regards to the sentence, following the recent decision of the Supreme Court in **Francis Karioko Muruatetu & Another -vs- Republic [2017] eKLR**, this court has discretion to re-sentence the Appellant on the basis of severity of the offence. In the present appeal, whereas it was established that the Appellant attempted to rob the complainant, the complainant was not injured. The motor vehicle was also recovered as the planned robbery failed. In the premises, this court sets aside the death sentence meted by the trial court. The same is substituted with a sentence of ten (10) years imprisonment to run from the date when the Appellant was convicted and sentenced in the trial court *i.e* 15<sup>th</sup> April 2016. This court has taken into account the period that the Appellant was in custody during trial. It is so ordered.

**DATED AT NAIROBI THIS 13<sup>TH</sup> DAY OF MARCH 2019**

**L. KIMARU**

**JUDGE**