



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL APPEAL NO. 37 OF 2018

ABDI KALAMSO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from Original Conviction and Sentence in Mutomo Principal Magistrate's

Court Criminal Case No. 422 of 2017 by Hon. Z. J. Nyakundi (SPM) on 17/05/18)

J U D G M E N T

1. **Abdi Kalamzo**, the Appellant, was charged with the offence of **Attempted Robbery** contrary to **Section 295** as read with **Section 297(2)** of the **Penal Code**. Particulars of the offence were that on the **14th day of December, 2017** at **Kalalani Village** in **Mutha Location, Kitui County**, while armed with an offensive weapon namely knife, attempted to rob **John Muoki Nzuki** of **Kshs. 50,000/=** and at the time of such attempted robbery threatened to use actual violence against the said **John Muoki Nzuki**.
2. He was taken through full trial, found guilty, convicted and sentenced to death.
3. Aggrieved he appeals on the grounds that: The charge was defective; the death sentence imposed was unlawful; he was not granted sufficient time to prepare questions to be asked; relying on identification evidence was erroneous and he was not granted sufficient time to prepare for his defence.
4. Facts of the case were that on the **14th December, 2017** at **2.00 p.m.**, PW1 **John Muoki Nzuki**, a driver of a lorry who was in company of his loaders, PW2 **Douglas Katando Mutuki** and PW3 **Ngome Mwangongo** were within **Kalalani Area** where they had gone to collect charcoal. They gave one **Kalume Kshs. 500/=**. The Appellant followed them and demanded for **Kshs. 50,000/=**. He did so having removed a knife. PW2 however hit the knife which fell down. They tied him up and took him to **Enyale Police Station** where he was arrested and subsequently charged.
5. Upon being put on his defence, the Appellant remained silent.
6. The learned trial Magistrate considered evidence adduced and reached a finding that the Appellant attempted to commit robbery with violence, found him guilty, convicted and sentenced him to suffer death.
7. At the hearing of the Appeal the Appellant urged that the Prosecution failed to prove the critical elements of the offence; he was not given an opportunity to defend himself and the sentence passed had been declared unconstitutional.
8. The State/Respondent through learned Counsel, **Mr. Mamba** opposed the Appeal. He argued that evidence adduced pointed to the fact that the Appellant attempted to rob the Complainant when he demanded for **Kshs. 50,000/=** while armed with a knife.
9. This being a first Appellate Court, I am duty bound to re-evaluate the evidence that was adduced before the trial Court and come to my own conclusion bearing in mind that I never saw or heard the witnesses who testified. **(See Okeno vs. Republic (1972) EA 32)**.
10. It is urged that the charge was defective as per the charge sheet the offence alleged to have been committed was contrary to **Section 295** as read with **Section 297(2)** of the **Penal Code**. In this regard, the case of **Joseph Kaberia and 11 Others vs. Attorney General (2016) eKLR** was cited where a three Judge Bench stated thus:

“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.”

11. Section 295 of the Penal Code provides thus:

“Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.”

Section 297(1)(2) of the Penal Code provides thus:

“(1) 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 any person or property in order to obtain the thing intended to be stolen, or to prevent or overcome resistance to its being stolen, is guilty of a felony and is liable to imprisonment for seven years.

(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.”

12. The offence of attempted robbery is defined satisfactorily in **Section 297**. Charging the Appellant pursuant to the provisions of **Section 295** as read with **Section 297(2)** of the **Penal Code** was indeed confusing because he could not have known whether he was being accused of robbery or the attempt to commit the offence of robbery. Indeed, it was prejudicial to the Appellant who seemed to have been inhibited when it came to cross examination and even defending himself. He hardly put questions to witnesses and upon being put on his defence he did not have anything to state. In the premises the trial was not fair.

13. Evidence adduced did not suggest that the Appellant assaulted the Complainant which is a requirement in the charge of attempted robbery as envisaged by the provisions of **Section 297** of the **Penal Code**. The intent to steal (take without consent without an intention to return it) was absent. PW1 stated that when the Appellant went and demanded money from him he promised to give him after collecting charcoal and after they loaded 10 bags of charcoal as they were leaving the Appellant hanged on the lorry and went on to remove a knife demanding for **Kshs. 50,000/=**.

14. PW2 and PW3 introduced in evidence the presence of a village elder known as **Kalume** who was given **Kshs. 500/=** and when the Appellant demanded for money, **Kalume** told the witnesses to leave him alone.

15. The issue the trial Court should have interrogated was whether some money was being paid that the Appellant may have demanded. What facts in the case disclosed was the fact that the Appellant demanded money and attempted to intimidate the Complainant to hand it over as he held a knife an act that was thwarted by the conductor of the motor-vehicle.

16. What transpired which was tantamount to acting in a manner to create some disturbance did not amount to attempted robbery with violence as envisaged by the provisions of **Section 297(2)** of the **Penal Code**.

17. Therefore, the Appeal is meritorious and is allowed. Consequently, I quash the conviction and set aside the sentence meted out. The Appellant shall be released forthwith unless otherwise lawfully held.

18. It is so ordered.

Dated, Signed and Delivered at Kitui this 7th day of May, 2019.

L. N. MUTENDE

JUDGE