REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 37 OF 2018

CHARLES KALO SITIABAI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(from the original conviction and sentence by E.W. Maleka, SRM, in Hamisi SRMC Criminal Case No. 822 of 2013 dated 3/12/2014)

JUDGEMENT

1. The appellant was facing a charge of robbery with violence contrary to

Section 296(2) of the Penal Code. The trial court did not find evidence to prove the said offence but found the appellant guilty of attempted robbery contrary to Section 297(2) of the penal code and sentenced him to suffer death as provided by the law. The appellant was aggrieved by the conviction and the sentence and filed the instant appeal.

2. The grounds of appeal are in summary that:

1. The trial magistrate erred in law and in fact in holding that the appellant was identified as the person who committed the offence.

2. The trial magistrate erred in law and fact in convicting the appellant in reliance of insufficient evidence.

3. The trial magistrate erred in law and in fact in convicting the appellant in reliance of the evidence of a single identifying witness.

4. The trial magistrate erred in law and in fact in failing to comply with Sections 324 and 329 of the Criminal Procedure Code.

5. The trial magistrate erred in law and in fact in imposing a sentence that was manifestly excessive.

3. The state opposed the appeal.

4. The particulars of the against the appellant were that on the 10th day of December 2013 at Cheptulu village, Cheptulu sub location Shaviringa location in Hamisi District within Vihiga County, jointly while being armed with a dangerous weapon namely panga robbed Vitalis Mulwale (herein referred to as the complainant) of a motor cycle Registration No. KMDC 737N valued at Ksh. 120,000/= and at or immediately before the time of such robbery threatened to use actual violence to the said Vitalis Mulwale.

Case for Prosecution -

5. The case for the prosecution was that the complainant (who was PW1 in the case) is a motor cycle taxi (boda boda) operator at Cheptulu. That on the material evening at around 8 p.m. he was at Cheptulu market when two people approached him and hired him to take them to Mululu. He knew one of them called Geoffrey. He did not know his colleague. He charged them Ksh. 200/=. They set off on their journey. When they got to Kaimosi Forest it was raining. They told him to stop. He did so. Geoffrey told his colleague to give the complainant money. Geoffrey's colleague pulled out a panga and gave it to Geoffrey who hit the complainant with it on the back. The complainant pulled out the ignition key from the motor cycle and ran into the forest. He phoned his friends who came and they started to look for the people. They did not get them. He went to the scene and found the motor cycle.

6. Meanwhile at 9 p.m. Corporal Gilbert Ekirapa PW2 of Cheptulu police patrol base received a phone call from a member of public that there was an attempted robbery on a motor cycle operator. He was directed to the scene of the incident. He met with two young men with a motor bike. One of them told him that he was the one whom some people had attempted to rob and that he knew one of the suspects and his home. They went to the home of the suspect but they did not find him. On their way back they met with two people. The complainant

identified them as the people who had attempted to rob him. The people took into a run. They chased them and managed to arrest one of them, the appellant, whom the complainant identified as the colleague to Geofrey during the robbery. The complainant told P.C. Ekirapa that the appellant had pulled out a knife and threatened him with it if he did not handover the motor cycle to them. The appellant was taken to the police station. Later he was charged with the offence. During the hearing P.C. Ekirapa produced the motor cycle in court as exhibit, P. Exh 1.

Defence Case -

7. When placed to his defence the appellant gave an unsworn statement in which he stated that on the material day he left his home to go and see his aunt. He boarded a motor vehicle and alighted at Cheptulu. That at Cheptulu two people who were on a boda boda offered to take him to a place called Mabati. He boarded the motor cycle. They left for Mabati. When they got there, the two people started to quarrel. He alighted from the motor cycle. The rider removed the ignition key from the motorcycle and ran away. He stood there. People then came and arrested him. He was later charged.

Submissions -

8. The appellant submitted that the record does not indicate that section 211 of the Criminal Procedure Code was explained to him. That in the premises he was denied the right to choose what defence to give in the case. He was thereby not accorded a fair trial.

9. The appellant submitted that the judgement of the trial magistrate is not dated as required by the law. That failure to do so is a breach of the appellant's right and is hence fatal to the case.

10. He further submitted that the investigating officer did not testify in the case. That he was not found with the panga when he was arrested. That the complainant had not received any injury that could prove that violence was used on him. That there was no attempted robbery proved as the motorcycle was not taken away from the scene. That the trial magistrate did not warn himself of the danger of convicting the appellant on reliance of the evidence of a single witness.

11. While opposing the appeal the prosecution counsel, **Mr. Ng'etich,** submitted that the appellant and his colleague threatened the complainant. That they did not manage to rob the complainant as the complainant ran away with the ignition key to the motor cycle. That the offence of attempted robbery was proved. He urged the court to dismiss the appeal.

Analysis and Determination -

12. This being a first appeal the duty of the court was as stated in **Kiilu & Another -Vs- Republic (2005) IKLR 174** that:-

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."***

13. The appellant submitted that the provisions of Section 211 (1) of the Criminal Procedure Code were not explained to him. Indeed the trial record does not indicate whether the magistrate explained to the appellant his rights under the provisions of Section 211 (1) of the Criminal Procedure Code to the effect that he could give evidence on oath, give unsworn statement or he could exercise his right of remaining silent as stipulated by article 50 (i) of the Constitution. The appellant in this case gave an unsworn statement. For the appellant to have given unsworn evidence implies that his rights under Section 211 (1) of the Criminal Code were explained to him. Otherwise he cannot have selected to give an unsworn statement if the rights were not explained to him. The failure by the trial magistrate to record that the provisions of section 211 (1) CPC were complied with did not occasion a failure of justice on the appellant. The omission is curable by the provisions of Section 382 of the Criminal Procedure Code.

14. Section 169 (1) of the Criminal Procedure Code requires for every judgment to be dated and signed by the presiding officer in open court at the time of pronouncing it. The certified judgment annexed to the record of appeal is not dated. I have however perused the original judgment in the court record. I find that the same is signed and dated 3/12/2014. There is then no defect in the judgment.

15. The appellant challenged his identification during the robbery. He submitted that the offence took place at night and in the forest. That the conditions were not conducive for positive identification.

16. The appellant in his defence admitted that he had boarded the complainant's motor cycle at the time that the incident took place. He confirmed that the complainant ran away with the ignition key to the motor cycle. He admitted that he was arrested in the same vicinity as testified by the complainant and the arresting officer, PW 2. It is then clear that the appellant in his own evidence placed himself at the scene of the incident. He narrated a similar account to that given by the complainant safe that the complainant was attacked with a panga. It is therefore my finding that the complainant's evidence on identification taken together with the appellant's defence confirmed his presence at the scene of the incident.

17. Having come to the conclusion that the appellant was placed at the scene of the incident, the question was whether the appellant had committed the offence charged and if not whether the trial court erred in substituting the offence to attempted robbery contrary to Section 297 (2) of the Penal Code.

18. The ingredients of robbery with violence were stated by the Court of Appeal in **Johana Ndung'u -Vs- Republic Criminal Appeal No.**

116 of 1995 (unreported) as cited in **Charles Ndegwa Njeri –Vs- Republic (2015) eKLR** to be as follows:

> ***"(i) If the offender is armed with any dangerous weapon or instrument; or***
>
> ***(ii) If he is in the company with one or more other person or persons; or***
>
> ***(iii) If at or immediately after the time of the robbery, he wounds, beats, strikes or uses violence to any person."***

It is trite law that proof of any one of the above ingredients of robbery with violence is enough to sustain a conviction under Section 296(2) of the Penal Code.

19. The prosecution evidence was that the appellant and his colleague hit the complainant with a panga upon which the complainant removed the ignition key to the motor cycle and ran away. Later the complainant found the motor cycle at the scene of the attack. His attackers then had not taken away the motor cycle. There was thereby no stealing of the motor cycle. There was no offence of robbery with violence committed. The trial court correctly found that there was no offence of robbery with violence committed. Could the court then substitute the offence of robbery with violence to attempted robbery?

20. Section 179 of the Criminal Procedure Code provides that:-

> ***"(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.***
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> ***(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."***

21. Section 180 of the Criminal Procedure Code provides that:-

> "***When a person is charged with an offence, he may be convicted of having attempted to commit that offence although he was not charged with the attempt."***

21. These two sections were interpreted by Khamoni J and Okwengu J (as they then were) in the case of **John Kariuki Murera –Vs- Republic (2002) eKLR** where they held that:-

> ***"…….moreover, Section 180 of the Criminal Procedure Code is intended to be used where the attempt charge is of a less serious offence than the main offence from which the attempt charge has come. With regard to the charge of robbery with violence under Section 296 (2) of the Penal Code, the Legislature intentionally made its attempt charge to be equally serious as the robbery with violence itself. That is why both Sections 296 (2) and Section 297 (2) have the death penalty. The two offences being equally serious, it means Section 180 of the Criminal Procedure Code is not applicable and the court therefore has no power to interchange the charges the way the learned trial magistrate did in this matter. It was up to the prosecution, after seeing the evidence, to amend the charge from Section 296 (2) to Section 297 (2). The prosecution having taken no such a step up to the end the court had no power on its own motion to change the charge from Section 296 (2) to Section 297 (2) of the Penal Code."***

22. The same was reiterated by the Court of Appeal in **Erick Amwata Onono V Republic [2016] eKLR,** where court held that:-

> ***"In the absence of any evidence proving the element of stealing, we agree with the appellant that he could not have been convicted of robbery with violence under section 296(2) of the Penal Code.***
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> ***In the same vein, we are satisfied that the appellant could not either be convicted of the offence of attempted robbery with violence as the High Court did for two main reasons. Firstly, there was no evidence of an attempt to steal. The High Court's conclusion in that respect was, with greatest respect, not based on any evidence but on pure speculation that the only reason why six men would break into a house at 1.30 am is to further the intention of committing robbery. While it is possible that is what they intended to do, it is also possible they could have wanted to commit burglary, assault, gang rape, and a host of other criminal offences. This clearly is not the kind of evidence, which can prove a charge beyond reasonable doubt. As was stated in OKETHI OKALE & OTHERS V. REPUBLIC (1965) EA 555, a conviction must only be based on the weight of the actual evidence adduced and that it is dangerous and inadvisable for a trial judge to put forward theories not supported by evidence. In addition, suspicion, however strong it may be, cannot take the place of solid and affirmative proof required on the part of the prosecution. (See PARVIN SINGH DHALAY V. REPUBLIC, CR. APP. NO. 10 OF 1997).***
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> ***Secondly and perhaps more compelling is the question whether attempted robbery with violence is a minor offence to robbery with violence. Although the High Court did not advert to the provision under which it substituted the appellant's conviction from robbery with violence to attempted robbery with violence, there is no doubt that it must have been acting under section 179 of the Criminal Procedure Code. Under that provision, a person who is charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related or alike; of the same genus or species. (See ALI MOHAMMED HASSANI MPANDA V. REPUBLIC [1963] EA 294). To be a minor offence within the meaning of that provision, the offence must certainly attract a lesser sentence than the major offence.***

In this case, the offence of attempted robbery with violence attracts a sentence of death, just as the offence of robbery with violence. We are satisfied that the High Court erred in treating attempted robbery with violence as a minor offence to robbery with violence."

23. In the instant case the complainant did not say whether the people made any attempt to rob him of the motor cycle. They did not tell him whether it is the motor cycle that they wanted or whether they just wanted to beat him up for some unknown reason. The intention of the people in attacking the complainant was thereby not proved. There was thereby no attempted robbery on the complainant.

24. It is clear from the above cited authorities that the offence of attempted robbery is not a lesser offence to the offence of robbery with violence. The offence of attempted robbery with violence cannot be substituted for the offence of robbery with violence. Even if there would have been evidence to prove attempted robbery against the appellant, the offence could not be substituted under the provisions of Section 180 of the Criminal Procedure Code. The trial court therefore erred in convicting the appellant of the offence of attempted robbery contrary to Section 297 (2) of the Penal Code.

25. The upshot is that the appellant was wrongly convicted of the offence of attempted robbery contrary to Section 297 (2) of the Penal Code. The conviction is thereby quashed and the sentence set aside. The appellant is set at liberty forthwith unless lawfully held.

Dated, signed and delivered at Kakamega this 11th day of July, 2019.

J NJAGI

JUDGE

In the presence of:-

Mr. Juma for state

Appellant - present

Court Assistant - George

14 days Right of Appeal.