



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 245 & 246 OF 2018**

**PATRICK WAMBUA VETELO.....1<sup>ST</sup> APPELLANT**

**RABAN MATHEKA SILA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(An Appeal arising out of the conviction and sentence of Hon. E. Kanyiri SRM delivered on 10<sup>th</sup> September 2018 in Makadara CM CR. Case No.3587 of 2015)***

**JUDGMENT**

The 1<sup>st</sup> Appellant, Patrick Wambua Vetelo and the 2<sup>nd</sup> Appellant, Raban Matheka Sila, were jointly 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 4<sup>th</sup> December 2015 along Mombasa Road in Embakasi within Nairobi County, the Appellants, jointly with others not before court, while armed with an offensive weapon namely pistol, attempted to rob Joseph Wachira Munyororo of a motor vehicle registration number KD11201-0028694 valued at Kshs.2,200,000/- and at the time of such attempted robbery threatened to use actual violence to the said Joseph Wachira Munyororo. When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charge. After full trial, they were convicted as charged and were each sentenced to serve ten (10) years imprisonment. The Appellants were aggrieved by their conviction and sentence. They have each filed a separate appeal to this court.

In their petitions of appeal, the 1<sup>st</sup> and 2<sup>nd</sup> Appellants raised more or less similar grounds of appeal challenging their conviction and sentence. They faulted the trial magistrate for allowing photographs of the alleged stolen motor vehicle in evidence yet the said motor vehicle was not produced as an exhibit in court. They were aggrieved that their conviction was based on a defective charge sheet since the motor vehicle stated in the charge sheet did not match the motor vehicle in the photographs produced in evidence. They were further aggrieved that the trial court relied on contradictory evidence of PW4 and PW1 with regard to the make of the alleged stolen vehicle. They took issue with the fact that the prosecution failed to produce in evidence the alleged gun that was used in the robbery. They asserted that no evidence was adduced to prove that a gun was used during the alleged robbery. They were of the view that their identification was unsafe since the prosecution witnesses failed to state the source of light that assisted them to identify the assailants. They were aggrieved that their respective defences had not been taken into consideration before the trial court reached the impugned decision. Finally, they asserted that the prosecution failed to prove the ingredients of the charge of attempted robbery with violence to the required standard of proof beyond any reasonable doubt.

The two separate appeals were consolidated and heard together as one for the purpose of this appeal. During hearing of the Appeal, the Appellants presented to court written submission in support of their appeals. They urged this court to allow their appeals. Ms. Akunja for the State opposed the appeals. She made oral submissions to the effect that the evidence adduced by the prosecution witnesses was sufficient to sustain a conviction. She asserted that PW1, PW2 and PW3 gave a detailed narration of how the Appellants together with their accomplices tried to carjack them. They had offered a young man a lift. The young man made several phone calls on their way to Nairobi. He used Kamba language. When he alighted at Mlolongo, three men emerged from the side of the road. One of the men gave the young man a pistol. They ordered the occupants of the vehicle to alight from the car. Luckily, PW4, a police officer who was on patrol noticed the robbery as it was happening. Two of the assailants made good their escape. The two Appellants were however arrested. Learned State Counsel averred that the ingredients of the offence were established. In the premises therefore, she urged this court to dismiss the Appellants' appeals.

The facts of the case according to the prosecution are as follows: PW2, Moses Maina imported the motor vehicle that is the subject matter of the present appeal. The motor vehicle was of the make Toyota Hiace. He was to pick the vehicle from Mombasa. He requested PW1, Joseph Wachira and PW3, Peter Ndungu to accompany him to Mombasa to pick the vehicle. They arrived at Mombasa on 3<sup>rd</sup> December 2015. They picked the vehicle and at about 2.00 p.m., they departed for Nairobi. PW1 was driving the vehicle. PW2 sat at the co-driver's seat while PW3 sat at the rear passenger seat. When they reached Voi, they met a young man who was travelling to Nairobi. They offered him a lift. The

young man sat at the co-driver's seat between PW1 and PW2. They stopped at Mtito Andei to get some food. At Mtito Andei, they met an old man whom they also offered a lift.

They left Mtito Andei and continued with the journey to Nairobi. On the way, the young man made several phone calls. He spoke in Kamba language. None of them understood what he was saying. The young man informed them that he would alight at Mlolongo. They arrived at Mlolongo at about 1.30 a.m. PW2 got out of the car so that the young man who was seated between him and PW1 could alight from the motor vehicle. Suddenly, three men emerged from a nearby bush. One of the men approached the driver while the other two came to the rear passenger door. The robber who approached the driver (PW1) gave the young man who they offered a lift a gun.

The young man ordered PW1, (the driver) to get out of the vehicle. PW1 got out of the vehicle. The two assailants who came to the rear passenger door ordered PW3 and the old man to get out of the vehicle. Suddenly police officers emerged and inquired if there was any problem. The young man and the robber who was at the driver's side managed to escape. The police officers shot in the air and ordered everyone to lie down. The two assailants who were at the rear passenger door were arrested. One of them was arrested hiding inside the vehicle while the other one was arrested outside the vehicle. The 1<sup>st</sup> Appellant was the one who was arrested inside the vehicle. The 2<sup>nd</sup> Appellant was arrested outside the vehicle. He was lying on the ground after the police shot in the air. They were all escorted to Embakasi Police Station where they recorded their statements.

This case was investigated by PW4, CP Nicholas Waros based at Embakasi Police Station. He told the court that on 4<sup>th</sup> December 2015 at about 1.30 a.m., he was on patrol duty along Mombasa Road. He was with two other officers, PC Mwema and PC Thiga. He spotted the motor vehicle subject matter of the present appeal on Mombasa Road. Due to the high crime rate in the area involving theft of motor vehicles, PW4 decided to trail the motor vehicle. The police patrol vehicle was about 10 meters behind the complainant's vehicle. After about 10 minutes, the complainant's vehicle stopped. PW4 stated that he saw the front passenger door open and a man alighted. Suddenly, three men emerged from a nearby bush and approached the vehicle. One of the men went straight to the co-driver's side while the remaining two men went to the rear passenger door. The rear passenger door was opened and two men who were inside the motor vehicle alighted.

As PW4 and his colleagues witnessed these events unfold, they realized that the owners of the vehicle were being robbed. They were able to see them using their motor vehicle lights. PW4 approached the vehicle and asked them what was going on. He suddenly heard a gunshot. PW4 responded by firing in the air. He ordered everyone to lie down. The two men who were seated at the driver and co-driver seats ran towards a bush and made good their escape. He inquired from the remaining people who the driver of the vehicle was. PW1 stood up. PW1 identified PW2, PW3 and the old man as the people he was travelling with. PW4 arrested the two assailants who did not manage to escape.

PW1 explained how they offered a young man a lift at Voi. They also picked up the old man at Mtito Andei. The young man informed them that he would alight at Mlolongo. PW1 told him that the young man and the three assailants tried to rob them of the motor vehicle. PW4 and the other officers escorted the two assailants to the police station and charged them with the present offences. He produced ownership documents as well as photographs of the motor vehicle into evidence.

When the 1<sup>st</sup> Appellant was put to his defence, he stated that he was at work on the material day of 3<sup>rd</sup> December 2015. He operated an electronics shop at Mukuru Kwa Njenga. His customer by the name Maureen called him at about 5.30 p.m. She needed him to fix some electronic equipment at her house in Mlolongo. He went to her house and fixed the said equipment. He left her house at about 12.20 a.m. He went to the bus stop near the weighing bridge at Mlolongo. A matatu approached the bus stop, followed by a private car. He heard a voice asking what was going on. Everyone was ordered to lie down. He was then arrested and escorted to the police station. He denied participating in the attempted robbery. He told the court that he did not know the 2<sup>nd</sup> Appellant. He only met him at the police station. The trial magistrate inquired whether the 1<sup>st</sup> Appellant was able to call the said Maureen as a witness. He however stated that he did not have her number.

In his sworn statement, the 2<sup>nd</sup> Appellant stated that he left his house at Pipeline on 3<sup>rd</sup> December 2015 at about 8.00 p.m. He was going to Mlolongo for a *chama* (meeting) at Cyrus Kilonzi's (DW3) house. They were having an end of year party for their *chama*. He left DW3's house at about 12.30 a.m. He went to a bus stop that was close to the Weighing Bridge at Mlolongo. While at the bus stop, a matatu, a private vehicle and a Subaru stopped at the bus stop. He heard someone order everyone to lie down. He then heard gun shots. As he was lying down, he heard the driver of the private vehicle being asked who he was with in his vehicle. The said driver pointed at the 2<sup>nd</sup> Appellant and stated that he was not with him in his vehicle. He was arrested and escorted to the police station. He denied committing the present offence. He stated that the 1<sup>st</sup> Appellant was not known to him.

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 Appellants. 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.

It was evident from the facts of the case that the prosecution relied on direct evidence of identification and the immediate arrest of the Appellants at the scene of crime to secure the conviction of the Appellants. PW1 was the driver of the vehicle. He told the court that he was not able to identify the three assailants at the scene. He only saw the Appellants after the police arrived. He stated that when the police arrived, everyone was ordered to lie down. One of the assailants who had a gun and the young man they offered a lift ran away and escaped. He testified that after the two assailants ran away, there were only six people, including himself, at the scene when the police ordered everyone to lie down. Three of those people travelled with him in the vehicle *i.e.* PW2, PW3 and the old man. The remaining two people were the Appellants.

PW2 sat at the co-driver's seat. The young man who they had offered a lift sat between him and PW1. When they got to Mlolongo, PW2 got out of the vehicle so that he could let the young man who wanted to alight from the vehicle pass. He stated that the assailants were three men

plus the young man who had travelled with them from Voi. He told the court that he was able to identify the Appellants. He narrated in detail the role played by each Appellant in the attempted robbery. One of the assailants who had a gun approached the driver. The two Appellants came to the rear passenger door that was next to him and ordered PW3 and the old man to get out of the vehicle. The 1<sup>st</sup> Appellant entered the vehicle so that he could force PW3 and the old man out of the vehicle. The 2<sup>nd</sup> Appellant remained outside the vehicle. The police arrived at this point and ordered everyone to lie down. The assailant who had the gun and the young man managed to escape. The 1<sup>st</sup> Appellant was arrested inside the complainant's vehicle while the 2<sup>nd</sup> Appellant was arrested outside the vehicle. He was lying down as ordered by the police.

PW3 corroborated PW1's and PW2's evidence. He told the court that three assailants accosted them when they stopped the vehicle at Mlolongo. The two Appellants were among the three men. One of the assailants had a gun. The young man who they had travelled with was working with the robbers. He testified that the 1<sup>st</sup> Appellant entered the motor vehicle through the passenger door and ordered him and the old man to get out. The police arrived, shot in the air and ordered everyone to lie down. The 2<sup>nd</sup> Appellant was lying down next to him and the old man. The 1<sup>st</sup> Appellant was arrested inside the complainant's vehicle. He told the court that when the police officers arrived, nobody else was at the scene of the robbery aside from him, PW1, PW2, the old man, and the two Appellants. The assailant who had a gun and the young man managed to escape when the police officers confronted them.

This court is of the considered view that PW2 and PW3 were able to identify the Appellants when they accosted them due to the close proximity during the attempted robbery. There was sufficient light illuminating the scene of the robbery. In addition, the three witnesses testified that the only people at the scene of crime when the police officers arrived were PW1, PW2, PW3, the old man, the young man they travelled with and the three men who confronted them. The young man was working with the robbers.

PW4, PC Nicholas Warui was the investigating officer. He told the court that he witnessed the robbery. He was trailing the complainant's motor vehicle. He was about 10 meters from the complainant's vehicle. When the said vehicle stopped at Mlolongo, he saw three men emerge from a nearby bush. One went to the front passenger door while two of the men went to the rear passenger door. He saw the driver alight from the vehicle with his hands raised. After realizing a robbery was in progress, PW4 approached them and asked what was going on. One of the assailants fired a shot. PW4 fired in the air and ordered everyone to lie down. Two of the assailants escaped into the thicket. He stated that after the two escaped, there were only six people at the scene *i.e.* PW1, PW2, PW3, the old man and the two Appellants. The two Appellants did not manage to escape.

It is evident from these facts that the prosecution witnesses did not lose sight of the Appellants until they were apprehended by PW4. The 1<sup>st</sup> Appellant was arrested in the complainant's car. The 2<sup>nd</sup> Appellant was lying on the ground next to PW3. They did not manage to escape after PW4 shot in the air and ordered everyone to lie down. They were arrested at the scene of crime as they tried to rob the complainant. They were caught red-handed as they committed the offence. The evidence of the prosecution witnesses was corroborative in all material respects. All the prosecution witnesses were eye witnesses to the attempted robbery. Nobody else was at the scene of crime during the robbery. This court has taken judicial notice of the fact that at the time of the night *i.e.* 1.00 a.m., there is usually no people walking about. Therefore, there can be no case of mistaken identity as the Appellants did not leave the sight of the witnesses until they were arrested by police officers.

The Appellants' defence was not plausible and the same was dismissed by the trial court as self-serving. In addition, the trial magistrate who had the opportunity to see the witnesses as they testified noted that the Appellants were not credible witnesses as they seemed to be lying. The Appellants were not known to the complainant prior to the attempted robbery. There was therefore no reason for the complainant to frame the Appellants. The Appellants were arrested at the scene of crime as they attempted to rob the complainant. The Appellants' defence does not raise any doubt to dent the otherwise strong culpatory evidence that was adduced by the prosecution. This court is of the view that the Appellants' guilt was established to the required standard of proof beyond any reasonable doubt.

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 were either armed with offensive weapons or the offenders were more than one. In the present appeal, the evidence of the prosecution witnesses established that the assailants were armed with a pistol. In addition, they were more than one in number. The ingredients of the offence were therefore established.

The Appellants argued that the charge sheet as presented by the prosecution was defective. They submitted that the particulars of the motor vehicle as presented in the charge did not match the evidence of PW4. This was untrue as the ownership documents produced by the complainant matched the details of the vehicle as particularized in the charge sheet. In any case Toyota Hiace and Toyota Shark refer to the same make of vehicle.

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 Appellants' appeal on conviction lacks merit and is hereby dismissed

With regards to the sentence, the Appellants were each sentenced to serve ten (10) years imprisonment. The trial magistrate took into consideration the recent decision of the Supreme Court in **Francis Karioko Muruatetu & Another vs Republic [2017] eKLR**, the Appellants' mitigation as well as the time they had spent in custody during the trial. The Appellants' appeal on sentence is similarly dismissed. The punishment fitted the crime. It is so ordered.

**DATED AT NAIROBI THIS 4<sup>TH</sup> DAY OF JULY 2019**

**L. KIMARU**

**JUDGE**