



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 124 Of 2017.

BETWEEN

DAVID WAIRAGU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara Cr. Case No. 981 of 2015 delivered by Hon. E. Kanyiri, SRM on 19<sup>th</sup> July.)*

JUDGMENT.

Background.

1. David Wairagu, hereafter the Appellant, was charged with the offence of attempted robbery with violence contrary to Section 297 of the Penal Code. The particulars of the charge were that on 21<sup>st</sup> March, 2015 at Baricho Road in Industrial Area within Nairobi County, while armed with a dangerous weapon, namely a knife, attempted to rob Rose Njoki of her handbag containing her phone and a skirt and immediately before the time of such an attempt used actual violence to the said Rose Njoki. The Appellant was arraigned in court and at the conclusion of his trial found guilty and sentenced to life imprisonment. He was dissatisfied with the conviction against which he lodged the instant appeal.

2. He relied on amended grounds of appeal filed contemporaneously with written submissions on 24<sup>th</sup> May, 2018. In summary, he was dissatisfied that the ingredients of the offence were not sufficiently proved, that he was convicted notwithstanding the absence of medical evidence that the prosecution failed to prove that he was in possession of a weapon, that the prosecution evidence was riddled with contradictions and that it was never proved how he was arrested.

Submissions.

3. The Appellant submitted that the prosecution failed to prove existence of the intention to steal, a crucial element of the offence of attempted robbery with violence. He submitted that the evidence of the complainant pointed to an assault and not a robbery. He was of the view that he lacked the *mens rea* to rob the complainant. He submitted that another crucial element that had to be established was that he was in possession of a dangerous or offensive weapon. He submitted that what constitutes possession was aptly set out in **Peter Mugo Ndegwa - v- Republic [2007]eKLR** but in the present case while it was alleged that he was armed with a dangerous weapon, a knife, his possession of the knife was not proved by the prosecution's evidence.

4. He then poked holes on his mode of arrest. He submitted that while the evidence was that he attacked the complainant and was caught in the act, the fact was that after his confrontation with the complainant nobody bothered to take him to the police station. Further, that his arrest was contradicted by the witnesses with PW1 testifying that he took himself to the station and PW2 stating that a mob escorted him to the police station. He questioned the fact that no police officer testified to confirm his manner of arrest.

5. Ms. Sigei, for the Respondent opposed the appeal. She submitted that the Appellant hit the complainant causing her to drop the items she was carrying before he fell on her and produced a knife which he threatened to stab her with. She screamed which led members of public to come to her rescue. She added that PW3 witnessed the incident and got hold of the knife and took it away from the Appellant. Further, that the Appellant who had been arrested by members of the public was re-arrested by the police. She submitted that although a doctor did not testify, a P3 form was identified which showed that the complainant was hurt. That the electric lights at the scene enabled the Appellant to be easily identified as he was also known around the area. She submitted that the conviction was safe and all the elements of the offence were established proving that the Appellant was a threat to the community if he were to be released. She urged the court to dismiss the appeal.

6. In reply, the Appellant submitted that he never threatened the complainant with a knife but only slapped her.

#### **Evidence.**

7. **PW1, Lucy Njeri Theuri** the complainant recalled that on 21<sup>st</sup> March, 2016, at around 7.00 p.m., she had crossed from Nairobi West to Toyota Kenya Offices side when the Appellant appeared and hit her on the right hand side of her neck with his hand. She fell down and started screaming at which point the Appellant produced a knife and tried to stab him. However, a member of public snatched the knife from him. Her mother who worked at a nearby restaurant came but found she had gone to report the matter at the police station. Her mother arrived at the station later with the sword knife. She recorded her statement on the following day. She sustained injuries to her neck and left leg when she fell down during the incident. She recalled that the lights at Toyota Kenya enabled her to see the accused clearly and she recognized him as she used to see him at the nearby bus stage severally. She was aided by the bright electricity lighting emanating from the Toyota Kenya Company offices.

8. **PW2, Jane Njeri**, the mother to PW1 was called by some parking boys to the scene. On arrival she found the Appellant and her daughter surrounded by people. The Appellant was holding a knife but was disarmed by the members of public. PW2 took the knife and proceeded to the police Station to report where she and PW1 recorded statements. Both witnesses testified that they recognized the Appellant who loitered around the nearby stage. According to PW1 she visited her mother's place of work frequently hence his acquaintance with him.

9. **PW3, Martin Mwangi** worked at Toyota Kenya as a motorcyclist and he knew PW1 who used to be his customer. His testimony was that on 21<sup>st</sup> March, 2015 at around 7.00 p.m. he was at the stage waiting for clients when he saw PW1 approaching from Nairobi West carrying a paper bag walking towards Baricho Road. He then saw the Appellant coming towards Securicor offices very fast and he crossed to the Toyota Kenya side. The next thing he saw was PW1 and the Appellant pulling each other and the complainant fell down. He ran towards the scene and when he got there he saw the Appellant pull a knife from his waist and the complainant begun screaming. He got hold of the knife and took it from the Appellant at which point a mob formed including PW2. He gave PW2 the knife to keep. He recalled that the knife was in its sheath and due to the tussle its cover got lost. He left soon thereafter but heard that the Appellant was arrested and taken to Industrial Area Police Station. In cross examination, he stated that he did not know what was stolen from the complainant.

10. **PW4, CPL Dorcas Meme** of Industrial Area Police Station investigated the case. She confirmed that the incident was reported on the same date of the incident. She interrogated PW1 and received the knife from PW2. She added that PW1 complained of a headache and knee injury. She issued her with a P3 Form which was filled by a doctor.

11. The Appellant gave a sworn statement of defence in which he denied committing the offence. He testified that he was employed at Sita Hito Sacco which dealt with public transport. He said he was stationed at the Toyota Kenya stage where he organized the matatus. He recalled that at the material time, PW1 was a passenger in a matatu he supervised. She complained about a hike in bus fare. An argument between the two ensued. Since he was drunk he slapped her. Members of public intervened and they were taken aside. They talked the matter over and the issue was resolved. Later that evening at around 8.00 p.m., while heading home, he passed outside Industrial Area Police Station where he ran into PW1 and PW2 leaving the station. The two then reported that he had beaten PW1 and was arrest. In cross examination, he confirmed that he hit PW1 and that he did not have a knife on him. He testified that the witnesses were all lying.

#### **Determination.**

12. I have now considered the respective rival submissions and the evidence on record and concluded that the only issue arising for determination is whether the case was proved beyond a reasonable doubt. Before I delve into this, I have noted that the charge sheet was amended on 18<sup>th</sup> August, 2016. The amended charge sheet does not appear on the original trial file. It is clear that the trial court did not rely on the amended charge sheet as the particulars set out in its judgment conform to the original charge sheet in which the complainant's name is indicated as Rose Njoki whereas the amendment supposedly changed the name to Lucy Njeri Theuri. The absence of the charge sheet on which the plea was taken is a serious issue and the fact that the trial magistrate was also not privy to the charge sheet in question arouses doubts whether the amended charge sheet was ever placed on record. This is also buttressed by the fact that the amendment was purportedly effected after PW1 was sworn in and gave her name as Lucy Njeri Theuri. At that point the prosecutor sought leave to have the investigating officer identify the complainant. The investigating officer identified the witness as the complainant and submitted that there was an error in the name in the charge sheet. Consequently, a prayer to amend the charge sheet so as to effect the correct name of the complainant was made. The court then ordered as follows:

#### **Court :**

***Charge sheet amended as requested. Accused to be read charge afresh and cautioned of death penalty offence carries.***

The record following the order is set out below:

#### **Court:**

***Substance of the charge read out to the accused in a language he understands which is Kiswahili and he responds.***

***Accused in response – NI uongo***

#### **Court:**

***Plea of not guilty entered.***

13. The court then proceeded to take the evidence of PW1. In the absence of the physical amended charge sheet it begs against which charge sheet the Appellant took the fresh plea. Furthermore, at no point did the prosecutor inform the court that he already had a copy of an amended charge sheet. The court neither adjourned to allow the drafting of a new charge sheet. Again, neither the prosecutor nor the investigating officer was aware that the witness would give a differing name. This leads me to conclude that, probably out of ignorance, the court merely pronounced an amendment without the actual amendment taking place.

14. The error calls into question the propriety of the whole trial. It vitiated the trial rendering it a nullity because clearly the person who testified is not one and the same person who was named in the charge sheet. Consequently, the plea was taken on a non-existent charge sheet. The failure therefore to amend the charge sheet rendered the charge sheet defective and heavily prejudiced the Appellant who was not seized of information material to enable him to conduct his defence. Suffice it to state then, the Appellant's right to a fair trial was violated. It is a case in my view that cannot be corrected by ordering a retrial as doing so would be to aid the prosecution to fill up gaps in its case. I say because even if the Appellant stated that he had a confrontation with the complainant, the wrong person having testified means that the evidence that was adduced was likely concocted. This is a case therefore that must succeed. Justice can only be met by setting the Appellant free.

15. In the end, I quash the conviction, set aside the sentence and order that the Appellant be forthwith set free unless otherwise lawfully held. It is so ordered.

**DATED and DELIVERED this 18<sup>th</sup> day of July, 2018**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. Appellant in person.
2. Miss Sigei for the Respondent.