REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 236 OF 2011

AS CONSOLIDATED WITH

CRIMINAL APPEAL NO. 235 OF 2011

(From original conviction and sentence in Criminal Case No. 2170 of 2010 of the Senior Principal Magistrate's Court at Naivasha, P. M. Mulwa, P. M.)

RICHARD ONGWENI BOSIRE.....1ST APPELLANT

DOMINIC MATATU NYAKUNDI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellants were on the Count I charged with the offence robbery with violence contrary to Section 296(2) of the Penal Code, *(Cap. 63, Laws of Kenya).* On Count II, the Appellants were charged with the offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code.

2. On Count I, the prosecution alleged that the appellants, on 21.08.2010 at Marula Farm jointly being armed with a dangerous weapon, namely, a pistol make Baretta – Serial Number 8741Z loaded with 12 rounds of 9 mm ammunition robbed Catherine Wanjiru Kambugura Ksh 268,942/= the property of Sunrise Company Limited and at or immediately before or immediately after the time of such robbery used actual violence to the said Catherine Wanjiru Kambugura.

3. On Count II, the prosecution alleged that on 21.08.2010 at Marula Farm in Naivasha Municipality within Nakuru County, jointly unlawfully assaulted JOHN MWAURA NDUNGU, thereby occasioning him actually bodily harm.

4. There was no evidence on this latter count, and the trial court quite rightly acquitted the Appellants on that Count II. The trial court however found overwhelming evidence on Count I, and found the Appellants guilty and convicted them of the offence of robbery with violence and were sentenced to the mandatory sentence of death as by law provided.

5. Aggrieved with both their conviction and sentence, the appellants came to this Court on Appeal and in their separate Amended Petitions of Appeal *(made under Section 350(2)(V)* of the Criminal Procedure Code *(Cap. 75, Laws of Kenya)*, the First Appellant, Richard Ongwenyi Bosire *(the 1st Appellant)*, contends -

1. *that learned trial magistrate made an error in both law and fact and misdirected himself by holding that the prosecution had proved each and every ingredient of the offence under Section 296(2) of the Penal Code, whereas the evidence adduced was apparent to the effect that the appellants ought to have been charged with the offence of attempted robbery contrary to Section 297(2) of the Penal Code, and hence the charge was defective, and that Section 214 of the Criminal Procedure Code was not complied with, thus causing a miscarriage of justice upon the appellant,*

2. *that the trial magistrate made an error in law and fact by passing a sentence of death on the appellant in failing to note and acknowledge that Section 297(2) and Section 389 of the Penal Code are contradicting each other as to the "sentence" in attempted felonies, hence such a sentence was illegal,*

3. *that the learned trial magistrate made an error in law and fact by convicting the Appellant in total disregard of the glaring contradictions and gaps in the prosecution's case, that crucial witnesses and evidence within the prosecution's reach was not availed before court.*

4. *that his arrest was neither satisfactory nor proved his participation in the commission of the offence charged and that the entire case of the prosecution was not proved to the required standard of beyond reasonable doubt.*

7. The Second Appellant likewise filed Amended Grounds of Appeal and cited five grounds of appeal -

1. *that the learned trial magistrate erred in law and fact in failing to hold that the charges against the appellant were materially defective,*
2. *that the learned trial magistrate erred in law and fact in failing to hold that the prosecution witnesses were not credible witnesses,*
3. *that the learned trial magistrate erred in law and fact in failing to hold that the Appellant was arrested unprocedurally, not as the law requires,*
4. *that the learned trial magistrate erred in law and fact in making judgment without proper recognition and indentification during the appellant's trial,*
5. *that the trial magistrate erred in law and fact in failing to hold the documents requested for by the appellant on 9.11.2010 and 25.11.2011 was of more importance over the fabrications which already has emerged from the proceedings.*

8. As the appeals herein *(No. 235 of 2011 (in respect of the 1st Appellant)* and No. 236 of 2011 *(in respect of the 2nd Appellant)* arose from the same conviction, they were, on the application of the Director of Public Prosecutions *(Respondent)* and consent of each of the Appellants consolidated by order of court made on 5.12.2013, and argued as one appeal. In addition to their amended grounds of the Petition of Appeal each of the Appellants submitted written submissions, upon which they each relied. We have considered each of the Appellant's grounds, and will set out our opinion thereon once we have considered the submissions of the learned Senior Assistant Director of Prosecutions, Mr. Omutelema who opposed the appeal by both Appellants.

9. Counsel submitted that there was evidence to sustain the conviction of the Appellants for the offence of robbery with violence contrary to Section 296(2) of the Penal Code. Firstly both Appellants were arrested at the scene of the crime. The Appellants were overpowered by their victims.The chain of events of the commission of offence and arrest of the appellants was attested to by the evidence of PW1 & PW2, PW3 and PW4 as it was happening. Counsel submitted that the evidence was overwhelming, a firearm was found with the Second Appellant, Mr. Nyakundi.

10. Counsel submitted that the Defence of frame-up was not tenable.The trial court found that the offence was committed in broad daylight. Counsel rejected the claim by the Appellants of mistaken identification. The Appellants were caught in the course of the crime, and identification was not in issue; and the same submission applies to the question of arrest. The Appellants were caught in the act, there was no contradiction in the prosecution's evidence, the evidence was overwhelming, that the Second Appellant, Dominic Matatu Nyakundi, was the person wielding the firearm, that the Appellants were not framed-up, nor were the charges defective, and that the evidence was firm and consistent, and that the appeal should be dismissed.

11. The issues which both the appeal and the opposition thereto raises may be summed up in one issue, whether there was evidence to convict the appellants of the offence of robbery with violence contrary to Section 296(2), or whether such evidence as there was proved attempted robbery with violence contrary to Section 297(2) of the Penal Code, and what are the consequences of such evidence on the appellant's conviction and sentence.

12. To answer these issues, this court is bound both as its statutory duty and command of precedent as a first appellate court, to consider and re-evaluate afresh, the evidence adduced before the trial magistrate, always holding the caveat that we neither saw nor observed the demeanor of any of the witnesses who testified before the trial court.

13. In this regard therefore we have perused and carefully reviewed the evidence before the trial court. We have also considered the Appellants' submissions as well as the submissions by Mr. Omutelema Senior Assistant Director of Public Prosecutions.

14. The first issue raised by the Appellants is whether the evidence adduced by the prosecution disclosed an offence of robbery with violence contrary to Section 296(2) of the Penal Code, or whether that evidence merely established a case of attempted robbery.

15. Perhaps knowingly or perhaps unwittingly the Appellants are saying that if we committed any offence on the material day, the evidence foots the bill of attempted robbery with violence, and not robbery with violence.

16. Though the submission was that of the Second Appellant it equally applies to the first Appellant citing South Hogan's CRIMINAL LAW, Cases and Materials, 7th Edn 1999, the learned author says at p. 614 - *"Robbery with violence, is essentially aggravated stealing, so proof of theft is essential to a conviction."*

17. The evidence of the star witnesses, PW1 and PW3 was clear. They had been deputed by their employer Sunripe Company Ltd to take and pay salaries to their fellow employees who worked at a farm called *Savanna Fields.* PW1 a cashier was carrying Ksh 268,942/= and being driven by PW3 in the company's vehicle Nissan Pick-up Registration No. KAT 017N. To reach their destination, PW1 and PW3 had to negotiate a treacherous stretch of an earth road, and slowed down at a bend on the road. At that stage the appellants sprang on them.

18. Her passenger door was hit and jerked open, and when she looked on the driver's side, she saw a person pointing a gun at the driver (PW3). Gathering what some might call Dutch courage, *(the Dutch live below sea-level),* she got hold of the pistol by the barrel and struggled with the Second Appellant, who had the pistol. In that struggle she lost control of the money bag, and the First Appellant grabbed it from below the seat while she was struggling with the gunman.

19. As fate would have it, PW3 seized the opportunity forced his door open and charged at the other attacker, the Second Appellant and pinned him to the ground while all the time shouting for help - "thief thief". At that stage the other farm workers, the beneficiaries of the salaries PW1 and PW3 were carrying, run to their rescue, and subdued the two attackers, the Appellants herein. The Appellants could easily have become past tense if it were not for some members of the ASTU Police who rescued them from the hands of the irate workers who wanted to lynch them.

20. The evidence of PW2 established that the sum of Ksh 268,942/= was part of a larger sum of Ksh 582,573/= which had been drawn as the employees weekly wages.

21. PW4 was the first person to respond to the screams *"thief thief"* and together with other workers helped PW1 and PW3 to subdue the appellants. Though the Appellants complained that they were not identified, their identity was blown away by the evidence of PW4 who knew them both as former workers at the same farms before. The first appellant worked as a guard at Marula Farm, and the Second Appellant as a gate guard in the said Sunripe/Savanah Farm.

22. PW6 corroborated the evidence of PW4. PW5 described how he had left his motor vehicle along with the keys, to be washed by the First Appellant whom he had employed as a night watchman. The First Appellant had however opened the glove closet and removed PW5's Baretta Pistol Serial No. 8741Z, which he used in robbery. That pistol was identified by PW4 as a firearm with twelve rounds of ammunition. PW7 had put all this evidence together.

23. When put to their defence both Appellants gave unsworn statements in their defence. The first Appellant told the court that he had gone to look for maize at Marula Farm when he was stopped on his way by some people and handed over to the Police. The Second Appellant likewise testified that he was a loader and had gone to search for work and was plucking some cabbages when he was accosted by the Farm's security and was arrested and handed over to Naivasha Police Station.

24. The learned trial magistrate rejected the Appellants' version of events as sham, found them guilty of the offence of robbery with violence and sentenced them to death.

25. In light of the very clear and watertight evidence of the prosecution, the learned trial magistrate was quite right to reject the Appellants' defence. It was in our view quite spurious.

26. Having found that the trial court was correct in finding the appellants guilty, the question raised by the appellants themselves is whether they were guilty of the offence of robbery with violence, or some other offence akin to aggravated stealing. The ingredients for the felony of robbery with violence under Section 296(2) are -

(a) being armed with a dangerous or offensive weapon,

(b) being in the company of one or more persons,

(c) immediately before or after the time of the robbery, wounds, beats, strikes or use of any other personal violence.

27. In this case, the Appellants were certainly in company with each other. The second appellant was certainly armed with a Beretta Pistol with 12 rounds of ammunition, a firearm is a dangerous weapon. The learned magistrate was quite right to lament that he was not charged with an offence under the Firearms Act, *(Cap. 114, Laws of Kenya).* Be as it may, PW1 and PW3 had the presence of mind not to allow the Appellants to beat, strike, wound or use any other personal violence against them. The offence of robbery with violence does not foot the evidence.

28. In our view what the evidence reveals is an offence of attempted robbery with violence contrary to Section 297(1) of the Penal Code. The Appellants, who were former guards with the complainant company, certainly threatened PW1 and PW3 with actual violence. They were armed with a dangerous and offensive weapon, a firearm. They intended to steal the money being carried by PW1 and PW3 to pay fellow workers. Having been fellow guards in the company, they were well aware of the routine of weekly payments to farm workers.The alertness of PW1 in particular by risking her own safety by holding on to the barrel of the pistol being wielded by the Second Appellant prevented injury. Equal to the occasion was the spirit of PW3 who hanged at the First Appellant who had grabbed the bag containing the money from below the floor of the passenger seat and wrestled him before the alarmed workers came to their rescue, and subdued the Appellants. PW1 and PW3 were not injured in the struggle. It is the

Appellants who got a beating from the workers. They lost the money they intended to steal. The act of robbery with violence was not complete.

29. In the circumstances it was unsafe to convict them of the offence of robbery with violence contrary to Section 296(2) of the Penal Code, and to sentence them to death.We therefore quash the Appellants' conviction under the said section, and also set aside the sentence of death.

30. Section 180 of the Criminal Procedure Code *(Cap. 75, Laws of Kenya)* 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.

31. The evidence herein clearly shows an attempted robbery.We therefore find the Appellants guilty of the offence of attempted robbery contrary to Section 297(1) of the Penal Code, and we convict them accordingly.

32. The punishment for attempted robbery is imprisonment for seven years. We accordingly convict the Appellants to seven years imprisonment to run from the date of their conviction by the lower court. The appeal is dismissed.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 13th day of March, 2014

M. J. ANYARA EMUKULE

JUDGE

H. A. OMONDI

JUDGE