REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

Criminal Appeal 1329 of 2002

(From original conviction(s) and Sentence(s) in Criminal case No. 16942 of 2004 of the Chief Magistrate's Court at Makadara (Muga Apondi – C.M.)

JAMES MAINA THAIRU…….…….……..…..APPELLANT

VERSUS

REPUBLIC…… ……....RESPONDENT

J U D G M E N T

The Appellant, **JAMES MAINA THAIRU** was found guilty and convicted of the offence of **ATTEMPTED ROBBERY WITH VIOLENCE** contrary to Section 297(2) of the **Penal Code.** He was sentenced to death. He was aggrieved by both the conviction and sentence and so lodged this appeal.

The facts of the prosecution case was that the Complainant, **FRED MANOA SALANO,** PW1 parked his vehicle registration number KAB 509H an Isuzu Trooper outside his house and went in for tea after 6.00 a.m. When the Complainant went back to his vehicle, he found two people standing outside the vehicle and one person inside. The two outside fled. The Complainant went to his vehicle whereupon the man inside produced a knife and threatened him with it. The Complainant grabbed the hand and in the ensuing struggle, he managed to apprehend the man with the help of members of public. The knife, exhibit 1 and 14 keys exhibit 2 were recovered from the man whom the Complainant identified as the Appellant.

The Appellant's first ground of appeal is that the charge was defective in that the evidence adduced did not support the offence charged. **MISS OKUMU,** learned counsel for the State seemed to agree with the Appellant. **MISS OKUMU** submitted that the evidence adduced supported the offence of **ATTEMPTED THEFT OF MOTOR VEHICLE** contrary to Section 278A of the Penal Code.

We have re-evaluated the evidence adduced before the trial court. An offence of **ATTEMPTED ROBBERY WITH VIOLENCE** contrary to Section 292(2) of the Penal Code is proved where the prosecution proves that the offender assaulted any person with intent to steal something and in addition that the said offender;

(i) either is armed with any dangerous or offensive weapon or instrument; or

(ii)is in company with one or more other person or persons; or

(iii) immediately before or immediately after the time of the assault, he wounds, beats, strikes or uses any other personal violence to any persons;

The prosecution has shown that the Appellant was found in inside the Complainant's vehicle. When the Complainant went to the vehicle, the Appellant produced a knife and both struggled before the Appellant was disarmed and overpowered. The first ingredient of the offence under **Section 297(2)** is assault. No evidence of assault was adduced and no attempt to prove that an assault had been committed was made. All the prosecution proved is that the Appellant had gone into the vehicle. He had a bunch of keys. The fact that the Appellant had entered into the vehicle with a bunch of keys is sufficient prove that the Appellant had an intention to steal the vehicle. However, that evidence did not support the offence charged and for that reason we agree with the Appellant that the charge was not proved.

Before we consider **MISS OKUMU'**s suggestion that we should substitute the offence with that of **ATTEMPTED THEFT OF MOTOR VEHICLE,** we shall first consider the Appellant's second and final ground of appeal. It was the Appellant's contention that his defence was not given due consideration. In his defence, the Appellant stated that he met with the Complainant at **TENA ESTATE** who asked him whether he had seen two boys. That when he said he had not, the Appellant grabbed him and dragged him into the house before calling the police.

MISS OKUMU submitted that the Appellant was arrested at the scene of crime and that there was no possibility of mistaken identity.

We have perused the judgment of the learned trial magistrate. The trial magistrate considered the Appellant's defence at length. The learned trial magistrate even analyzed the defence as well as the prosecution case and gave reasons why he found the charge proved against the Appellant. The learned trial magistrate's conclusions that the Appellant was arrested red-handed inside the Complainant's vehicle and having in his possession master keys cannot be faulted. The learned trial magistrate's finding that the Complainant had no grudge against the Appellant and therefore had no reason to fabricate him with the offence can also not be faulted. Nothing turns on the Appellant's second ground of appeal.

Going back to **MISS OKUMU's** submission that by invoking **Section 354(3) (a) (ii)** of the **Criminal Procedure Code** this Court can substitute the sentence. The section provides: -

> ***"354 (3) the Court may then if it considers that there is no sufficient ground for interfering dismiss the appeal may –***
>
> ***(a) in an appeal from a conviction***
>
> ***(ii) alter the finding, maintaining the sentence, or with or without altering the finding, reduce or increase the sentence…"***

No doubt this Court has power to substitute the offence charged as requested by the State. However the exercise of that jurisdiction must be within the provisions of Part IV of the Criminal Procedure Code under the Heading;

> ***"Convictions for offences other than those charged."***
>
> ***Section 179(2) of Criminal Procedure Code provides;***
>
> ***"179(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."***

We have already shown that the evidence adduced before the Court was sufficient to prove as required the offence of attempted theft of a motor vehicle contrary to **Section 278(A**) as read with **Section 389** of the Penal Code. We exercise our discretion by virtue of the powers conferred by **Section 354 (3) (a) (ii)** as read with **Section 179(2)** of the Criminal Procedure Code to set aside conviction for the offence of **ATTEMPTED ROBBERY WITH VIOLENCE** contrary to **Section 297(2)** of the Penal Code and substitute it with a conviction for the offence of Attempted theft of a motor vehicle. We also set aside the

sentence of death imposed against the Appellant. The Appellant has been in confinement for 2½ years. The sentence for the substituted offence is half the sentence provided for the offence of theft of motor vehicle which is seven years. Half of 7 years is 3½ years. Even if the Appellant were to be sentenced to the maximum sentence, he would have served more than half that sentence and therefore a substantive portion of it. In order not to prejudice the Appellant we shall order that his sentence is reduced to the period already served. We order that the Appellant be set at liberty unless he is otherwise lawfully held.

Dated at Nairobi this 5th day of July 2005.

…….. **……..**

LESIIT, J. **M.S.A. MAKHANDIA**

JUDGE **JUDGE**

Read, signed and delivered in the presence of;

…….. **……..**

LESIIT, J. **M.S.A. MAKHANDIA**

JUDGE **JUDGE**