



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & OTIENO-ODEK, JJ.A)

CRIMINAL APPEAL NO. 4 OF 2015

BETWEEN

IBRAHIM OMONDI OKUMU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an Appeal against the Judgment of the High Court of Kenya at Busia (D.A. Onyancha and F. N. Muchemi, JJ.) dated 29th June, 2011

in

HCCRA No. 44 of 2005)

JUDGMENT OF THE COURT

The appellant, **Ibrahim Omondi Okumu** was charged before the Principal Magistrate's Court, Busia with the offence of attempted robbery with violence contrary to section 297 (2) of the Penal Code. The particulars were that on 26th July, 2003 at Omeri estate in Busia Township location, jointly with others not before Court and being armed with dangerous and offensive weapons namely pangas, iron bars attempted to rob Adan Ismael Yusuf of his property and used violence in the course of the attempted robbery. The appellant denied the charge and soon thereafter his trial ensued. The prosecution in a bid to advance its case against the appellant called a total of six witnesses.

The facts of the case as seen through the lens of the complainant (**PW1**), **Faisal Abdi (PW2)**, **P.C. Abdurahaman Sugo (PW4)** and **P.C. Alfred Lagicha (PW6)**, were that on 26th July, 2003 at about 1.00am the complainant and his companion, (PW2) were walking home from Kampala area within Busia town.. On reaching Ujamii Estate junction, they parted ways each going his way. The complainant was then suddenly attacked from behind by four men armed with a rungu, panga and whip. One of the attackers put a bicycle tube around his neck and another hit him with a piece of timber on the shoulders. He screamed for help while running towards the junction and PW2 heard him and came to his rescue together with two police officers **PW4** and **PW6** who were on patrol duties that night. A chase ensued between the police officers and the attackers. One of the attackers who had the bicycle tube was chased into a nearby kiosk and arrested. He was thereafter placed in custody and later charged. The complainant was able to identify him as the appellant even though he had never seen him before. The attackers did not steal anything from the complainant, nor did they attempt to do so. Due to the injuries sustained in the attack, the complainant was taken to hospital, treated and discharged. Subsequent thereafter he was issued with a P3 form which was filled by **Nathan Mbwabi (PW3)**, a clinical officer who assessed the degree of injury as harm.

Put on his defence, the appellant stated on oath that on the material night he left work and went to have a drink. He was then stopped by police officers on patrol who asked for his identity card. When he failed to produce the same, he was arrested and charged three days later with the offence of attempted robbery with violence which he did not commit.

The trial Court however held that the appellant was arrested immediately after the attempted robbery and the fact that he had the tube that had been used against the complainant was proof that he was among the robbers. The appellant's defence was discounted as having not created any doubts or adverse inference in the prosecution case. Accordingly, the appellant was convicted and sentenced to death.

Dissatisfied with the conviction and sentence by the trial Court, the appellant filed a first appeal before the High Court. The learned Judges (**Onyancha & Muchemi, JJ.**) upon re-evaluation of the evidence before the trial Court came to the conclusion that all the three weapons mentioned by the complainant were dangerous weapons and the fact that the charge sheet left out rungu and whips was not fatal to the prosecution case. That one weapon sufficed for purposes of being armed with a dangerous weapon. The complainant may or may not have

been armed with any of the three weapons but what mattered according to the Judges was that the appellant was in the company of three men who were armed and that the four men were out to execute a common purpose. That it was not a requirement of law that there be an independent witness in a case of this nature. One witness whom the court finds credible suffices provided that the court warns itself of the dangers of relying on such evidence as required by the law. That no miscarriage of justice was occasioned by failure of **P.C. Msandu** to testify. With regard to identification, the learned Judges held that the witnesses never lost sight of the appellant as they pursued and or chased him. Further, there was lighting from the Ministry of Works offices nearby. There was no possibility of mistaken identity and therefore no need of holding of a police identification parade. The learned Judges were satisfied that the trial Court was right in holding that all the ingredients of the offence had been proved and subsequently dismissed the appellant's appeal for lack of merit.

Aggrieved by the upholding of his conviction and sentence by the High court, the appellant filed this 2nd and perhaps last appeal and raised the following grounds of appeal to wit; that the trial magistrate and learned Judges of the High Court erred in law by failing to consider the provisions of Article 50 (2) (p) of the Constitution and section 389 of the Penal Code when sentencing him to death yet there were other less punitive sentences available for the said charge; sentencing the appellant to death without exploring other avenues of punishment; and failing to note that the circumstances obtaining at the scene of crime could not have amounted to an offence of attempted robbery with violence but that of assault only.

When the appeal came up for hearing, **Mr. Taremwa**, learned counsel holding brief for **Mr. Mauwa**, learned counsel appeared for the appellant while **Mr. Ketoo**, senior prosecution counsel was present for the respondent. The appellant's counsel relied on his written submissions and opted not to highlight whereas the prosecution counsel submitted orally.

The appellant submitted that the prosecution failed to prove its case against him for attempted robbery with violence and only managed to prove a case of assault. The prosecution did not show that the appellant had the intent to steal from the complainant which is the main ingredient of attempted robbery with violence. That at no given time did the complainant claim that the attackers tried to steal from him or had stolen from him anything and therefore the Court erred in making a presumption that the attack was with the intent to steal from the complainant.

The appellant further submitted that the Court erred in sentencing him to death upon conviction of the offence. That the Court should have taken sections 297 (2) and 389 of the Penal Code into account. That section 297 (2) does not set out the degree of aggravation to warrant a person convicted of committing the offence of attempted robbery with violence to face the ultimate punishment of death. The appellant further sought leniency and requested for re-sentencing in line with the Supreme Court decision in **Francis Karioko Muruatetu & another v Republic (2016) eKLR**, (the Muruatetu's case), on the mandatory aspect of the death sentence.

Opposing the appeal, Mr. Ketoo submitted that the ingredients for the offence of attempted robbery with violence were not met. Though the robbers were four, nothing was stolen or an attempt to steal was demonstrated by evidence. He submitted further that the evidence disclosed the offence of assault. On these grounds, he conceded the appeal. With regard to sentence, he chose to leave it to court.

We have carefully considered the record of appeal, the submissions by counsel, authorities and the law and the main issue that warrants our determination is whether the prosecution proved their case of attempted robbery with violence beyond reasonable doubt.

This being a second appeal, we revert to Section 361(1) of the Criminal Procedure Code which provides that a second appeal to this court can only be on matters of law. This Court will not normally interfere with concurrent findings of fact of the two Courts below unless the said Courts considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole, they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law. In **Njoroge v Republic (1982) KLR 388** this court held:

“..On this second appeal, we are only concerned with the points of law and consider ourselves bound by the concurrent findings of fact arrived at in the courts below, unless shown to be based on no evidence...”

The appellant submitted that the evidence on record did not disclose any intent to steal or rob the complainant. It is trite that for a crime of attempted robbery with violence to be committed, there must be the intention, preparation and actual commission of the crime. If the attempt is successful, then the crime is complete. If the attempt fails, the crime is not complete. An attempt is made punishable because every attempt, although it fails, must create an alarm, which, of itself, is an injury, and the moral guilt of the offender is the same as if he had succeeded. Section 388 of the Penal Code states as follows:

“(1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.

(2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfillment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.

(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.”

Section 297(2) is a replica of Section 296(2) of the Penal Code. There is no difference between the offence of robbery with violence and that of attempted robbery with violence. It is the only offence which provides for the same sentence for both the full act of robbery with violence and the unfulfilled act of attempted robbery with violence.

In the present case, nothing was taken away or stolen from the complainant by the appellant. The complainant did not testify that his

attackers attempted steal or stole from him anything. Although the record supports the finding that at the time of committing the offence, the appellant was armed with a bicycle tube which he used to strangle the complainant thereby causing him harm, we agree with the appellant's submission that the main element of stealing from the complainant was not proved. In **Moneni Ngumbao Mangi v Republic (2006) eKLR**, this Court stated that:

“The word “robbed” is a term of art and connotes not simply a theft but a theft preceded, accompanied or followed by the use of threat or use of actual violence to any person or property in order to obtain or retain stolen property”.

The learned Senior Prosecution Counsel on the above premises readily conceded to the appeal. Even with the said concession, we are not as a Court bound to accept as we have a duty to reassess the matter and arrive at our own findings but in so doing we will take into account the concession as was held in in **Norman Ambich Miero & another v Republic (2012) eKLR**, that:

“We restate that this Court is not bound by the views of the State Counsel as we have a duty to reassess the matter and make our own findings on whether or not the evidence presented before the trial court which was confirmed by the High Court support the conviction of the appellants”.

As earlier stated, the offence of attempted robbery with violence is really the same as the offence of robbery with violence, only that in the attempted robbery with violence the act is incomplete. It is manifest that in considering the offence of robbery with violence under section 296 (2) of the Penal Code, regard must be heard to section 295 of the Code which defines robbery in the following terms:

“295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.”

Therefore, to prove the offence of robbery with violence, the element of stealing must be proved coupled with one or all of the other elements set out in section 296(2), namely that the offender was armed with a dangerous or offensive weapon or instrument; was in the company of one or more others; or immediately before or immediately after the time of the robbery he wounded, beat, struck or used other personal violence on the complainant. This position was expounded further by this Court in the case of **Johana Ndungu v Republic (1996) eKLR**, where it was stated thus:

“In order to appreciate properly as to what acts constitute an offence under section 296(2) one must consider the sub-section in conjunction with s. 295 of the Penal Code. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in s. 296(2)...”

It is our view therefore, that in the absence of any evidence to prove the element of stealing, the appellant could not have been rightfully convicted of attempted robbery with violence under section 297(2) of the Penal Code. The conclusion in that respect was, with utmost respect to the learned Judges, not based on any evidence but on pure speculation and suspicion that the only reason why four men would set upon and attack a man at 1:00am was with the intention of committing a robbery. Whereas there is a possibility that, that is what they intended to do, it is also possible that they could have wanted to commit other offences other than rob the complainant. This alone casts doubt in the evidence adduced by the prosecution with regard to the offence charged. It is clearly not the kind of evidence which can prove a charge of attempted robbery with violence beyond reasonable doubt. In **Okethi Okale & Others v Republic (1965) EA 555**, Carbbe J.A., stated that 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 credible proof required on the part of the prosecution.

From the foregoing, we find that the prosecution's case was not proved beyond reasonable doubt. That being our finding we need not address the appellant's concerns with regard to section 389 of the Penal Code.

Certainly the appellant committed an assault on the complainant. According to PW3, he assessed the degree of injury as maim. The appellant ought therefore to have been charged with the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code. That offence upon conviction attracts a sentence of upto five years. We note that the appellant was convicted and sentenced on 7th October, 2005. He has therefore been behind prison bars for a period of 15 years. Though invited by the respondent to reduce the charge to one of assault we resist the temptation for the reason that the appellant has been sufficiently punished.

In the upshot the appeal is allowed, the conviction quashed and sentence of death imposed set aside. The appellant shall forthwith be set at liberty unless otherwise lawfully held.

Dated and delivered at Kisumu this 31st day of July, 2019.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this isa true copy of the original.

DEPUTY REGISTRAR.