IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CRIMINAL APPEAL NO. 451 OF 2010
BETWEEN

PHILIP MUSYIMI NDETI

MAINGI KIETI.....APPELLANTS

AND

REPUBLIC .....RESPONDENT

(An Appeal from a Judgment of the High Court of Kenya at Machakos (Lenaola & Warsame, JJ.) dated 19th August, 2009.

in

H. C. Cr. A. No. 75 & 76 of2003)

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JUDGMENT OF THE COURT

At about 9.00 p.m. on 29th December, 2002, Muthusi Mbondo (PW2) and his wife, Beatrice Muthusi (PW3) were having dinner in their house at Mamiloki village, Masii Division of Machakos District. The house was lit by electricity and solar lamps. Suddenly, two men armed with pangas burst through the back door which was not locked. Two others followed behind. They started attacking PW2 and PW3 asking for money but the two fought back while screaming for help. Some neighbours, including PW4, arrived and found one of the invaders struggling with PW3 who would not let go. PW4 disabled the invader and other neighbours apprehended him. He was the 1st appellant before us. As they did so, PW2 was struggling with another invader who was wearing a cap which fell down. He recognized him as his neighbour and former employee. But the invader took off leaving the cap at the scene and was joined by the other two who also escaped. The second invader was the 2nd appellant before us.

PW2 was taken to Masii Health Centre where the clinical officer on duty, (PW1) examined and treated him. She recorded a history of PW2 having been assaulted by thugs who had pangas and she completed a P3 form determining the injuries as having been caused by a sharp object.

A report of the incident was immediately made to (PW5), the duty officer at Masii Police post. He was informed that a robbery had been committed at Mamiloki village and that a suspect who had been apprehended at the scene was being injured by members of the public. He and his colleagues proceeded to the scene and were able to rescue the 1st appellant whom they rearrested and took to the hospital. According to PW5, some weapons and a cap were found at the scene of crime. The 2nd appellant was arrested the following day by members of the public and taken to the police where he was rearrested.

The two appellants seem to have been charged separately at first. The 1st appellant appears to have been charged alone with two counts which he denied when he first appeared in court on 6th January, 2003. We are unable to verify the nature of those counts because there is no record of the original charge sheet. The hearing date was set for 4th February, 2003 but the prosecution applied to substitute the charge with one of attempted robbery with violence contrary to Section 297 (2) of the Penal Code, stating as follows:

> **"On the night of 29th December, 2002 at Mamiloki Village Masii, Machakos District, jointly with others not before the court while armed with offensive weapons, namely pangas, attempted to rob Muthusi Mbondo of money and house hold goods and immediately after the time of such attempted robbery used actual violence to the said Muthusi Mbondo ".**

As the 1st appellant did not object, the charge was substituted and he pleaded not guilty, whereupon the hearing date was set for 25th

February, 2003. On that date, the prosecution sought, and was allowed, to consolidate the case of the 1st appellant with that of the 2nd appellant (Cr. C. 309 of 2003). Again, we are unable to verify the nature of the first charge facing the 2nd appellant as there is none on record. After consolidation, the charge reproduced above was read and explained to the two appellants and they denied the offence, whereupon the prosecution called five witnesses to prove it.

In his defence, the 1st appellant simply said in his unsworn statement that he was implicated for nothing. He stated that on the material day, he was at Kaani market and boarded a matatu back home. At some point the matatu ran out of fuel prompting him to walk home as it was not far. On his way, he was stopped by a group of five men who apprehended him and told him that he had committed an offence. The 2nd appellant also denied the offence and stated that on the material date he was at home herding cattle. The following day, he was called by a group of people who asked him to accompany them to the police station. It is then that he was locked in the cells for some days before being released on 5th January, 2003 and asked to report to the police station after some days. He was later arrested and charged on 4th February, 2003.

In the end, both appellants were convicted of the offence as charged by J. R. Karanja, SPM, (as he then was) and sentenced to death on 25th March, 2003. The trial court reasoned as follows:

> **"Although the 1st accused denied the offence and implied that he was apprehended by a group of people while innocently walking to his home, the evidence of identification against him is not only overwhelming but also credible and corroborative. This is forfeited by the single fact that he was caught in the act. His defence is thus unsustainable. He was indeed positively identified as having been part of the invaders...**
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> **The second accused was not apprehended at the scene. He was apprehended on the following day since he had been seen and recognized by the complainant's wife as having been among the offenders. His identification by the complainant's wife was credible and corroborative and was made easier by the existing favourable conditions for identification the adequate opportunity for identification since the offence lasted for bout fifteen minutes accordingly to the complainant's wife and the most single important fact is that the 2nd accused was not stranger to the complainant. "**

Their first appeal to the High Court (Lenaola & Warsame, JJ. (as they then were)) was dismissed on 19th August, 2009, after the court re-examined the case in the manner of a retrial and concluded that the defences put forward by the appellants were mere afterthoughts and their denials were hollow. In respect of the 1st appellant, the Court held:

> "In this case, all the ingredients were in place. The question that we must answer is whether the appellants were part of the gang of the robbers and whether there was sufficient evidence to prove the charge against them beyond reasonable doubt. Regarding the case against the 1st appellant two matters quickly come to mind,
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> **i. that he had been apprehended at the scene and**
>
> **ii. that both PW2, PW3 and PW4 were categorical that he was at the scene.**
>
> **It is difficult to fault his conviction. "**

As for the 2nd appellant, it held:-

> **"We have elsewhere above reproduced the evidence of PW2 and PW3. Each of them had known the 2nd appellant before because he was their former employee and also a neighbour. This was a case of recognition and not mere identification. PW2 and PW3 were eating supper in a house lit with electric light. A neighbour and former employee well known to them walks in and engages PW2 in an attack. Both PW2 and PW3 gave evidence that the said person had a woolen cap which fell down during the attack and it was later found and given to PW5. Although he fled the scene, the next day he was apprehended and taken to the police station. Although he denied that he was involved in the incident, we are convinced that recognition by the two witnesses cannot be faulted and all the conditions were favourable for such recognition. PW2's evidence that he was hurt by his former employee attacking him is telling of the fact that he clearly knew him. It has been said time and time again that recognition is more satisfactory more assuring and more reliable than the identification of a stranger. See Anjononi & Others vs Republic (1980) KLR 56. "**

The appellants were aggrieved by those findings and are now before us on their second and final appeaI. In their home-made memorandums of appeal, the 1st appellant listed 10 grounds while the 2nd appellant listed 9 grounds. Learned counsel for them, however, Mr. A. L. Kariu urged only one ground which, in his view was the main issue of law. The thrust of the submissions was that the offence for which the appellants were convicted was not supported by the evidence on record. There was also a mix up of charges such that the appellants did not understand which offence they were called upon to answer. The entire trial was therefore, according to counsel, a miscarriage of justice.

To illustrate his submissions, counsel referred us to the record of appeal which shows, as related above, that the 1st appellant was charged alone with the offence of assault, only for the prosecution to purport to substitute it with attempted robbery. According to counsel, there was no evidence to show that the appellants went into the house of the complainant with intent to commit a robbery properly so defined under Section 297 of the Penal Code. PW2 and PW3, who were the victims, did not so testify and that is why the prosecution settled for the offence of assault which the medical evidence also supported. The offence of assault with intent to steal is spelt out in Section 298 of the Penal Code and that is the offence the prosecution set out to prove. The charge of attempted robbery was thus misplaced.

As for the 2nd appellant, counsel wondered why he was arrested by members of the public if he was involved in an offence of robbery and was recognized at the scene of the crime. According to counsel, the first charge sheet on this appellant was also on the offence of assault and the purported substitution and consolidation of the charges after three months of the original charges left the appellant confused and in the dark.

Opposing the appeal, learned Assistant Director of Public Prosecutions, Ms. Mary Wangele submitted that there was no basis for complaining about the charge sheet upon which the appellants were tried and convicted. That is because, although there was a holding charge of assault filed against the appellants, it was properly substituted with the charge of attempted robbery on which the plea was taken from both appellants and the prosecution led evidence on it. The first charge was no longer material. In counsel's view, all the ingredients of the offence charged were proved, hence the conviction. There was nothing on record to show that the appellants, together with their two accomplices, merely invaded the complainant's house for assault only. They demanded money and property. Counsel finally supported all the concurrent findings of fact made by the two courts and asked us to dismiss the appeal.

Second appeals to this Court lie only on issues of law by dint of Section 361 of the Criminal Procedure Code. As this Court stated in the case of M'Riungu vs Republic [1983] KLR 455:

> **"Where a right of appeal is confined to questions of law an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat the findings of fact as holdings of law or mixed finding offact and law and it should not interfere with the decision of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law."**

We have considered the sole issue of law raised by the appellants. In essence it questions the propriety of the charge of attempted robbery upon which the appellants were tried as against the evidence which supported the offence of assault with intent to steal. Both the offences of 'attempted robbery' and 'assault with intent to steal' appear in Chapter XXVIII of the Penal Code under the heading "ROBBERY AND EXTORTION". As the predecessor of this Court held in the case of Opoya vs Uganda [1967] E. A. 752:

> **"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. "**

Section 295 defines robbery in the following terms:

> **"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."**

The clear elements of the offence are thus: (i) the act of stealing, and (ii) use of or threat to use actual violence to any person or property immediately before or immediately after stealing intended to obtain or retain the stolen item or prevent or overcome resistance to the stealing. As for attempted robbery under Section 297, the definition is as follows:

> **"(1) Any person who assaults any person with intent to steal anything, and, at or immediately before or immediately after the time of the assault, uses or threatens to use actual violence to any person or property in order to obtain the thing intended to be stolen, or to prevent or overcome resistance to it being stolen, is guilty of a felony and is liable to imprisonment for seven years.**
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> **(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more person or persons, or if, at or immediately before or immediately after the time of assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death. [Emphasis added].**

Expounding on that provision in the case of Ndirangu Nderitu Mureithi & Another vs Republic [2006] eKLR, this Court stated thus:

> **"Mr Githui is, with the greatest respect to him, wrong in thinking that the offence of attempted robbery is defined in section 297(1) and section 297(2) merely provides the penalty for the offence created by section 297(1). Those are separate and distinct offences, each carrying its own penalty. Section 297(2) defines what constitutes an attempted robbery with violence which is punishable by death while section 297(1) defines a non-capital attempted robbery."**

It is also trite law that proof of any one ingredient in the offence under Section 297 (2) that (a) the offender is armed with any dangerous and offensive weapon or instrument or (b) the offender is accompanied by one or more other person or persons or (c) at or immediately before or immediately after the time of robbery the offender wounds beats or uses other personal violence to any person, is sufficient to establish the offence of attempted robbery which is punishable by death.

As for 'assault with intent to steal' under Section 298, it is a lesser and cognate offence, the section simply providing that:

> **"Any person who assaults any person with intent to steal anything is guilty of a felony and is liable to imprisonment for five years."**

It is true as contended by the appellants, and conceded by the respondent, that the appellants were at first charged with the offences of assault. But they were never tried on those charges. On application made to the court, which was not objected to, the charges were substituted and consolidated under one charge of attempted robbery. That is the charge on which the plea was taken and evidence adduced when it was

denied. We think the prosecution was entitled to choose, on the basis of the facts and circumstances surrounding a particular case, which offence to charge. The trial court would then assess whether that charge was proved beyond reasonable doubt on the evidence tendered. We have no reason to either fault the prosecution for substituting the charge or, as invited by the appellants, to find that the appellants did not know the offence they were facing.

At all events, it is our finding that the defect in the charge as put forward by the appellants did not prejudice them and was curable under Section 382 of the Criminal Procedure Code. In the case of Peter Sabem Leitu vs R, Cr. A No. 482 of2007 (UR) this Court held thus:

> **"The question therefore is, did this defect prejudice the appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial? We think not. The charge sheet was clearly read out to the appellant and he responded. As such he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet made clear reference to the offence of robbery with violence as well as the date the offence is alleged to have occurred. These particulars were also read out to the appellant on the date of taking plea. The fact that PW1 was not personally robbed and did not also witness the robbery did not in any way prejudice the appellant. "**

In the instant case, it is clear that although the appellants were initially charged with the offence of assault, the same was substituted with the offence of attempted robbery with violence, which was read out to them and they pleaded not guilty to the same. They knew what they were being charged with. They heard the evidence from PW2 and PW3 proving the elements of the offence that on the material night, there were four invaders who were armed with pangas. They demanded money and property from their victims. They heard PW1 confirm the injuries on PW2 as having been caused by 'a sharp object. Such evidence was accepted by the two courts below. With respect, the complaint about defects in the charge sheet is a non-issue and the same fails.

Overall, it is our view that there was consistent and credible evidence to support the charge laid against the appellants. The appellants were also accorded a fair trial and we find no basis to interfere with the conviction. The appeal is lacking in merit and we order that it be and is hereby dismissed.

Dated and delivered at Nairobi this 7th day of December, 2018.

P. N. WAKI

JUDGE OF APPEAL

R. N. NAMBUYE

JUDGE OF APPEAL

P. O. KIAGE

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR