IN THE COURT OF APPEAL

AT MOMBASA

CORAM: MAKHANDIA, OUKO & M'INOTI JJ.A.

CRIMINAL APPEAL NO. 17 OF 2015

BETWEEN

ERICK AMWATA ONONO……..……..……..……..APPELLANT

AND

REPUBLIC.……..…….……RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Mombasa, (Odero & Nzioka, JJ.) dated 9th November 2012

in

H.C.CR.A. NO. 315 OF 2010)

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JUDGMENT OF THE COURT

When he rose to present his response to this second appeal, ***Mr. Wamotsa,*** Senior Prosecutions Counsel conceded the appeal on the ground that the prosecution had not proved the offence of attempted robbery with violence against the appellant. Accordingly, he stated, the respondent did not support the appellant's conviction and the sentence of death confirmed by the High Court. It is to be noted too that during the hearing of the first appeal in the High Court (***Odero & Nzioka, JJ)*** where he was challenging his conviction and sentence to death by the Chief Magistrate's Court, Mombasa for the offence of robbery with violence, the respondent had similarly conceded the appeal but contended that the evidence disclosed ***"the lesser offence of attempted robbery with violence"***. The High Court agreed and substituted the conviction for robbery with violence with conviction for attempted robbery with violence and upheld the sentence of death imposed upon the appellant by the trial court.

The background to this appeal is fairly straightforward. The appellant was charged before the Chief Magistrate's Court, Mombasa, with the offence of robbery with violence contrary to ***section 296 (2***) of the ***Penal Code***. The particulars of the offence were that on 24th September 2009 at about 1.00 am at Vijiwani Village, Likoni Division of Mombasa District, jointly with others not before the court and while armed with dangerous weapons, to wit, *pangas* and iron bars, he robbed ***Rajab Hamisi*** of a wallet containing Kshs 60/- and a national identity card all valued at Kshs 300/- and at or immediately after the robbery, used actual violence on the said Rajab Hamisi.

Upon pleading not guilty to the charge, the prosecution called 6 witnesses to prove its case. The substance of the prosecution case was that on 23rd September 2009, the appellant went to the home of ***Sofia Bilali (PW3)*** at about 4.00 p.m., caused a raucous and threatened her and her children as he demanded to use the toilet. Later the next morning at about 1.00 a.m., the appellant and a group of other people, armed with stones, attacked PW1's house and broke down one of the doors.

PW3, who had seen the appellant earlier that day, identified him as one of the robbers. Similarly, ***Rajab Hamisi (PW1),*** a son of PW3 who the intruders allegedly robbed of his wallet and the contents thereof valued at Kshs 300/- also identified him as one of the robbers. In the course of the alleged robbery the intruders assaulted PW1, who according to ***Dr. Lawrence Ngone (PW5),*** suffered bruises on the right forehead, bruises on the middle and ring fingers of the right hand, which were classified as harm.

The identification of the appellant was aided by electric light at the door of PW1's house. The two courts below specifically addressed the condition of lighting prevailing at the time and were satisfied that it was conducive for positive and safe identification. After the appellant's arrest, Acting Inspector of Police, ***John Kiilu (PW4)*** conducted an identification parade on 8th October 2009 in which PW1 and PW3 picked the appellant as one of the robbers who had attacked PW1. The conduct of the identification parade was never seriously challenged.

It is common ground however that although the particulars of the charge alleged that the appellant had robbed PW1 of a wallet containing cash Kshs 60/- and a national identity card all valued at Kshs 300/-, the prosecution did not adduce any evidence of theft of property from PW1 in the course of the alleged robbery.

When put on his defence, the appellant denied any knowledge of the robbery in an unsworn statement and stated that he was arrested by the police for an unknown reason and charged with the offence.

While noting the prosecution did not adduce any evidence to prove that PW1 was robbed of any property, the trial magistrate held that nevertheless the offence of robbery with violence was proved beyond reasonable doubt. He expressed himself as follows on that issue:

> ***"It is alleged that 60/- and ID card and wallet were stolen. I have not seen anywhere in the evidence where PW1 has accede (sic) to that [piece] of evidence but a charge of robbery can be complete even when the issue of violence alone has been proved."***

Accordingly he convicted the appellant and sentenced him to death.

On his first appeal the appellant contended among other things, that the trial court had erred by convicting him of robbery with violence without any evidence that PW1 was robbed of any property. As we have already noted, the respondent conceded the appeal on that score but contended that the evidence adduced by the prosecution proved commission of "the lesser offence of attempted robbery with violence". In agreeing with the respondent that a charge of robbery with violence could not be sustained on the evidence adduced by the prosecution, the first appellate court stated:

> ***"However we note one major anomaly in this case which anomaly was also pointed out by the learned state counsel. The appellant was charged with the offence of robbery with violence and the particulars of the charge indicate that the compliant was robbed of "his wallet containing Kshs 60/- and national ID card all valued at Kshs 300/-". At no point in their evidence did either PW1 or PW2 mention that these items were stolen from them. No mention is made of theft of cash or an identity card. Without evidence of theft the offence of robbery cannot be found to have occurred…If one is charged with robbery then evidence must be adduced to prove that a theft occurred. Where there is no evidence of a theft, then the charge of robbery cannot be sustained. We find that the learned trial magistrate erred in proceeding to render a conviction on a charge of robbery with violence in the absence of proof that any item had been stolen."***

Regarding whether the evidence on record disclosed "a lesser charge of attempted robbery" with violence, the High Court expressed itself thus:

> ***"However we do agree with the learned state counsel that the facts do prove the lesser charge of attempted robbery with violence. The only reason six men would break into a house at 1.30 a.m. and proceed to beat up the occupants of that house, would be in furtherance of an intention to commit the felony of robbery. The appellant and his cohorts were only thwarted by the courageous actions of PW1 and PW3 in confronting and launching a counter-attack against the robbers. As such we do allow this appeal. We quash the appellant's conviction on a charge of robbery with violence contrary to section 296(2) of the Penal Code and in its place we substitute a conviction for the offence of attempted robbery with violence contrary to section 297(2) of the Penal Code. The death penalty imposed upon the appellant being the same penalty imposed by section 297(2) of the Penal Code is hereby upheld."***

The appellant's second appeal is based on some 7 grounds of appeal, the majority of which, with the advantage of re-evaluation and reappraisal of the evidence on record, have no basis. These include the grounds challenging the appellant's identification; the alleged contradictions in the prosecution case; the alleged violation of the appellant's constitutional rights (which was not raised in the two courts below); the alleged non-consideration of the appellant's purported alibi defence; the failure of the prosecution to call more or particular witnesses; and the shifting of the burden of proof to the appellant.

The substantial issue in this appeal and upon which it turns is, in our opinion, whether having properly found that there was no evidence upon which a conviction for robbery with violence could be sustained, the first appellate court erred in the circumstances of this appeal by substituting the appellant's conviction for robbery with violence with conviction for attempted robbery with violence.

On that central issue, ***Mr. Gathuku***, the appellant's learned counsel submitted that both the trial court and the first appellate court had properly found that the prosecution had not proved any theft when the alleged robbery with violence took place. Counsel further submitted that the prosecution had readily conceded the point in the High Court. In his view, in the circumstances of this appeal the appellant should not have been convicted of attempted robbery with violence because contrary to the holding of the High Court, it was not a lesser charge to that of robbery with violence since the two offences are punishable by death.

As we have already stated, Mr. Wamotsa readily, and rightly in our view, conceded this appeal on the above ground. However, as this Court stated in ***NORMAN AMBICH MIERO & ANOTHER V. REPUBLIC, CR APP. NO 279 OF 2005 (NYERI),*** while it is within the province of the respondent to concede the appeal, the Court is not bound by the respondent's views because it has a duty to reassess the case and reach its own findings whether or not the evidence presented before the trial court and confirmed by the first appellate court support the conviction of the appellant. Nevertheless, in so doing the Court will take into account the concession by the respondent. (See also ***GODFREY NGOTHO MUTISO V. REPUBLIC (CR APP. No 17 of 2008).***

It is axiomatic 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."***

In ***MONENI NGUMBAO MANGI V. REPUBLIC, CR APP No 141 of 2005 (Mombasa)*** 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".***

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 victim. In ***JOHANA NDUNGU V. REPUBLIC, CR. APP. NO. 116 OF 1995*** this Court extrapolated the position as follows:

> ***"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)…"*** *(Emphasis added).*
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> (See also ***OLUOCH V. REPUBLIC [1985] KLR 549*** and ***GANZI & 2 OTHERS V. REPUBLIC (2005) 1KLR 52).***

In the absence of any evidence proving the element of stealing, we agree with the appellant that he could not have been convicted of robbery with violence under section 296(2) of the Penal Code.

In the same vein, we are satisfied that the appellant could not either be convicted of the offence of attempted robbery with violence as the High Court did for two main reasons. Firstly, there was no evidence of an attempt to steal. The High Court's conclusion in that respect was, with greatest respect, not based on any evidence but on pure speculation that the only reason why six men would break into a house at 1.30 am is to further the intention of committing robbery. While it is possible that is what they intended to do, it is also possible they could have wanted to commit burglary, assault, gang rape, and a host of other criminal offences. This clearly is not the kind of evidence, which can prove a charge beyond reasonable doubt. As was stated in ***OKETHI OKALE & OTHERS V. REPUBLIC (1965) EA 555***, 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 affirmative proof required on the part of the prosecution. (See ***PARVIN SINGH DHALAY V. REPUBLIC, CR. APP. NO. 10 OF 1997).***

Secondly and perhaps more compelling is the question whether attempted robbery with violence is a minor offence to robbery with violence. Although the High Court did not advert to the provision under which it substituted the appellant's conviction from robbery with violence to attempted robbery with violence, there is no doubt that it must have been acting under section 179 of the Criminal Procedure Code. Under that provision, a person who is charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related or alike; of the same genus or species. (See ***ALI MOHAMMED HASSANI MPANDA V. REPUBLIC [1963] EA 294).*** To be a minor offence within the meaning of that provision, the offence must certainly attract a lesser sentence than the major offence.

In this case, the offence of attempted robbery with violence attracts a sentence of death, just as the offence of robbery with violence. We are satisfied that the High Court erred in treating attempted robbery with violence as a minor offence to robbery with violence. From the evidence that was adduced by the prosecution, the disclosed offence for which the appellant could have been convicted was assault causing actual bodily harm contrary to ***section 251*** of the Penal Code. Identification of the appellant was cogent and safe. There was also clear medical evidence of the injuries sustained by PW1, which were classified as harm. The prescribed sentence for that offence is imprisonment for a term of five years.

Taking into account all the circumstances of this appeal, we allow the same, quash the appellant's conviction for attempted robbery with violence and set aside the sentence of death. In lieu thereof, we substitute a conviction for assault causing actual bodily harm contrary to section 251 of the Penal Code and sentence the appellant to the period already served to the intent that he shall be set at liberty forthwith unless he is otherwise lawfully detained. It is so ordered.

Dated and delivered at Mombasa this 26th day of February, 2016.

ASIKE-MAKHANDIA

JUDGE OF APPEAL

W. OUKO

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR