IN THE COURT OF APPEAL

AT NAIROBI

(CORAMA: MWERA, MWILU & MUSINGA JJA.)

CRIMINAL APPEAL NO. 319 OF 2008

BETWEEN

MORRIS MUTETI ……..…..……APPELLANT

AND

REPUBLIC……..……..……..RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Ojwang &Warsame, JJ) dated 15th October, 2008

in

H.C.CR.A. NO. 485 OF 2005)

****

JUDGMENT OF THE COURT

1. **MORRIS MUTETI** (appellant) was charged, tried and convicted of the offence of attempted robbery with violence contrary to the provisions of Section 297(2) of the Penal Code. He was, on 30.9.2005, sentenced to suffer death as by law prescribed. His first appeal to the High Court was dismissed as lacking in merit. He has now preferred a second appeal to this court and raises five (5) grounds of appeal as hereunder:-

"(a) THAT, the first appellate court judges erred in law by failing to find that ingredients of attempted robbery i.e assault and intent were not fully met as stipulated in section 297(2) of Penal Code.

a. **THAT, the learned superior court judges erred in law by failing to analyse and re-evaluate the trial record and drew *(sic)* their own conclusion as duty bound.**
b. **THAT, the learned High Court Judges erred in law by failing to find that prosecution did not prove their charge to the required legal standard.**
c. **THAT, the learned first appellate court judges erred in law by failing to find that the charge sheet is fatally defective.**
d. **THAT, the learned High Court Judges erred in law by failing to consider adequately my defence which was cogent and plausible to displace the prosecution case."**

2. The Supplementary Grounds of Appeal filed on 22.5.2013 were abandoned at the hearing of this

appeal before us. Instead Mr. Ongoya, learned counsel for the appellant, adopted the appellant's homegrown grounds of appeal in his arguments. On the ground that the High Court failed to consider whether or not the ingredients of the offence under **section 297(2) of the Penal Code** were satisfied, counsel submitted that none of the two courts below addressed themselves to that issue. He added that the adduced evidence did not go to support the charge as drawn. He saw what he called the failure of the courts below to address their minds to establishing the presence of the ingredients of the offence of attempted robbery with violence as a material error of law. Counsel added that assault and intent to steal and wound were not revealed. He added that it was for that precise failure that the state had conceded the Appeal before the High Court but that court never considered that concession.

3. There was submission that the High Court did not satisfy the legal obligation to analyse and evaluate the evidence, adding that had it done so then the court would have found that PW1 never left the scene and he never said he had never lost sight of the appellant. They would have considered the questions whether the appellant was a resident of the neighborhood and whether the attackers were 3 or 4, and that there could not be corroborative evidence because of the apparent contradictions.

4. Learned senior prosecution counsel Ms. Njeru opposing the appeal submitted that the ingredients of the offence the appellant faced were met as there were at least two other people with the appellant, the appellant was armed with a panga and used a torch to light the scene, the appellant broke the complainant's vehicle window and although there was no injury there was an attempt to injure. Counsel saw the fact of the appellant running away from the scene as an indication of guilt. Counsel did not agree that the High Court did not analyse the evidence on record.

5. This is a second appeal and as such this court is confined to considering points of law only as required of it by section 361 (1) of the Criminal Procedure Code.

*"**A party to an appeal from a subordinate court may, …..appeal against a decision of the High Court in its appellate jurisdiction on a matter of law…..**"*

There is a multitude of authorities on the point – suffice to refer only to that of - **NJOROGE V REPUBLIC [1982] KLR 388.** In the words of the learned Judges in the above authority:-

"On a second appeal, the Court of Appeal is only concerned with points of law. In such an appeal, the Court is bound by the concurrent finding of facts made by the lower courts unless they were not founded on evidence."

6. We propose to firstly dispose of the point whether or not the High Court analysed and evaluated the evidence on record. We have carefully perused the judgment by the High Court and found that pages six through to ten involved the analysis and evaluation of the evidence on record. We find that the court sufficiently evaluated the evidence and found no material to support the appeal at that stage and gave reasons for its rejection. Indeed the court arrived at its own determination hence rejected the State's concession of the appeal. We do not find fault with that court's handling of the evidence on record, consequently grounds 2, 3 and 5 of the appeal are rejected.

7. It is true that there were inconsistencies in evidence. One such inconsistency was whether there were three or four attackers as stated by PW1 and PW3. That is an inconsistency of minor import considering that all that section 297(2) requires for the offence to be completed is the presence of more than one person, that is to say, the accused (appellant in our case) and one or more other persons. Whether or not it was PW1 or other witness that said that they did not lose sight of the appellant is similarly inconsequential because even the appellant himself admitted that he was at the scene, even if the reasons for his presence were contrary to those of the prosecution witnesses. This then brings us to the considered conclusion that such inconsistencies as are evident above are of a minor effect and not fatal to the prosecution case.

8. The appellant faced a charge of attempted robbery with violence contrary to the provisions of section 297 (2) of the Penal Code. That section provides as follows:-

"297(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 its being stolen, is guilty of a felony and is liable to imprisonment for seven years

297 (2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

9. The above will be of material consideration because if the ingredients of the offence of attempted robbery are missing then the appeal must succeed. There was submission that the two courts below did not address themselves to the presence or otherwise of assault and intent to steal and there was no evidence that anyone was wounded.

What is evident is that PW3's evidence was that the window of his Mazda pickup vehicle was smashed with a panga by someone whom he identified as the appellant. Further evidence by the eye witnesses, to wit, PW1 and PW3 was that there were 3 or 4 attackers at the scene of crime. We have already dealt earlier in this judgment with the probative value of the number of persons present at the scene and are satisfied that it was enough to constitute an ingredient of the offence under **section 297(2)** that the appellant was not alone at the time of smashing PW3's vehicle window. The evidence that the road had been obstructed with boulders is a clear indication of criminal intent. Violence was proved by the smashing with a panga, itself decidedly a dangerous weapon, the window of the motor vehicle PW3 drove. There was no evidence to disprove the prosecution evidence that the appellant was armed with the panga that was produced in evidence in court.

10. Assault, which is stated in **section 297(2) of the Penal Code**, is an aggravated state of the assault that is first mentioned in **section 250 of the Penal Code**. Both sections and several others of the Penal Code do not define assault specifically. We have sought recourse to BLACK'S LAW DICTIONARY, NINTH EDITION and therein assault is defined, inter alia, as:

"The threat or use of force on another that causes that person to have a reasonable apprehension of imminent harmful or offensive contact; the act of putting another person in reasonable fear or apprehension of an immediate battery by means of an act amounting to an attempt or threat to commit a battery."

Assault is explained therein, not necessarily as a physical harmful contact but is enough that a show of force raising an apprehension in the mind of the victim is exhibited. And the smashing of the window of the vehicle in which PW1, 3 and others were, is sufficient show of force raising an apprehension of imminent battery. This disabuses the argument that since no one was wounded then therefore there was no assault, a major ingredient of the offence the appellant faced.

The smashing of the window of the vehicle belonging to PW3 was an assault with a criminal intent, committed at night on a road obstructed with boulders and such smashing of the window with a panga which is an offensive weapon fits the description of assault ascribed to it by Blacks Law dictionary above.

11. We do not find that the learned judges of the High Court misdirected themselves on any point of law, on the contrary we are satisfied that they correctly appraised the evidence on record, correctly ignored the concession by the state and rightfully upheld the conviction of the appellant of the charge of attempted robbery with violence contrary to the provisions of section 297(2) of the Penal Code. In the premises the appeal under consideration is dismissed as lacking in merit.

It is so ordered.

Dated at Nairobi this 4th day of April, 2014.

J. W. MWERA

……..

JUDGE OF APPEAL

P. M. MWILU

…….

JUDGE OF APPEAL

D. MUSINGA

……

JUDGE OF APPEAL

I certify that this is atrue copy of the original.

REGISTRAR