



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: VISRAM, KOOME & OTIENO-ODEK, JJ.A.)**

**CRIMINAL APPEAL NO.98 OF 2013**

**BETWEEN**

**STANLEY MURIITHI NJERU ..... APPELLANT**

**AND**

**REPUBLIC..... RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Embu*

*( Ong’udi & Musyoka JJ.) dated 14<sup>th</sup> March, 2010*

*in*

***H.C.CR.A No. 28 of 2010***

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**JUDGMENT OF THE COURT**

1. STANLEY MURIITHI NJERU was charged with attempted robbery with violence contrary to **Section 297 (2)** of the **Penal Code**. The particulars are that on the night of 22<sup>nd</sup> April, 2009, at about 10.00 pm at Total Petrol Station, Runyenyes Town in Embu East District within Eastern Province jointly with others not before court, while armed with dangerous weapons namely pangas, axes, toy pistol and iron bars attempted to rob Simon Gathereru Gatoru of money and at or immediately before or immediately after the time of such attempted robbery with violence used actual violence to the said Simon Gathereru Gatoru.

2. The facts in support of the prosecution case was given by PW1 Simon Gathereru Gatoru. He testified as follows:

***“I work at Runyenyes Petrol Station as a petrol attendant. I am employed by Beatrice Wangari. I do recall on the night of 22<sup>nd</sup> and 23<sup>rd</sup> April, 2009. On 22<sup>nd</sup> April, 2009, I reported to work at 4.00 pm. I took over from those who were working during daytime. I relieved one Peter Maina Chege. We came to work at night up to 8.00 am the next morning. Normally at night we are two attendants. I was with Edward Mbugua (PW2) who is also a petrol attendant. At 10.00 pm on 22<sup>nd</sup> April, 2009, it started to rain. Four people came to the petrol station while armed. The four came from Embu direction. We thought they were coming to shield themselves from being rained on. They went towards the service bay. They were standing next to the entrance to the***

*office. I was with Mbugua. After a short while, a customer came in a motor bike. Mbugua left to serve the motor bike rider. I was left at the entrance. I started counting the money to keep as we had been instructed to keep the same in a safe inside the office. We dropped the money in the safe after tying the same and putting a note with my name. I counted Ksh. 2,500/=. I managed to drop the Ksh. 2,500/= in the safe. Immediately I dropped the money a person hit the door to the safe. He ordered me "toa pesa yote". I told him I had dropped the money in the safe. He again ordered me to remove all the money. He was holding a panga. He cut me on the hand. I held his hand and we started struggling. We struggled up to outside the strong room, I screamed and called Mbugua's name. As we were struggling, I saw 3 other men. Mbugua approached asking what the problem was. I told him some people were demanding money. Mbugua also started screaming. Other people came after hearing the screams. Mbugua ran to call others who were nearby. The 3 men ran and escaped through the fence. I continued holding on to the man I had held. He was struggling to free himself but I held on. Other people including Mbugua came and helped me arrest the man I had held. Most of the people who came were from a bar nearby. Mbugua called our employer. Our boss told us she will call the police. Members of the public started assaulting the man. The police came within a short time and arrested the man we had arrested. By the time the police came, the man only had his trouser and the left side of his shoes. The police took him and I accompanied them to Runyenyes Police Station. The police came to the petrol station against at 9.00 am on 23<sup>rd</sup> April, 2009. I took the police to the scene where we had been struggling. At the scene, the police picked an axe, one right side of sport shoes resembling the one the man we had arrested had, a panga and a jacket. The police searched the jacket and I saw them retrieve a toy pistol. The police went away with the items. The man I struggled with is in the dock as the accused person".*

3. PW2 Edward Junior Mbugua testified as follows:

*"I work as a petrol attendant at Runyenyes. I do recall on the 22<sup>nd</sup> April, 2009, I reported to work at 4.00 pm as I was working at night shift. I was to work until 8.00 am of the next morning. I was with Simon Gathereru on the night shift. At 10.00 pm of 22<sup>nd</sup> April, 2009, my colleague Simon counted money and left to keep the same in a safe. At that time, a motor cycle came and I went to see the customer. It was raining. Initially some 4 men had got into the station and I thought they had come to shield themselves from the rain. The 4 men went to the service bay. After serving the customer, I heard Simon shouting calling my name. I went in the back towards the safe and saw him struggling with a man. I left to call people nearby the car wash. I went back in the company of other people. I helped to arrest the man Simon was struggling with. I called our boss and the boss called the police. The police came within a short while. The jacket and T-shirt had been torn during the struggle. He only had the trouser and one left side of shoe. The police visited the station and Simon led them to the scene where they recovered several items. The police recovered the jacket, one side of sport shoes, toy pistol, axe, panga and a blue T-shirt".*

4. PW5 Dr. Stephen Maina testified that he examined and treated the complainant on 23<sup>rd</sup> April, 2009. That the complainant had a 3 cm long cut on the top of his head; the cut had a rugged edge and it was deep. This was the only injury the complainant had. That he signed the P3 Form on 4<sup>th</sup> May, 2009, which was produced as an exhibit.

5. The appellants in his defence testified as follows:

*"On 22<sup>nd</sup> April, 2009, I came from Nairobi after my wife called me. She told me that my child was unwell; I left Nairobi at 5.00 pm. My wife told me to keep praying for her. I arrived at 8.00 pm. It was drizzling when I arrived. I got from the matatu I had. At Runyenyes I headed to Total Petrol Station. I was told the time for selling paraffin was over. I bribed the attendant and he agreed to sell me paraffin. I gave the man Ksh. 20/= as bribe but he declined saying it was little money. He gave me Ksh. 650/= as change after I gave him Ksh. 1,000/= note. We started exchanging words. The man pushed me and I got annoyed and hit him. He picked metal to hit*

***me. I screamed. He hit me on the head. I found myself at Runyenyes Police Station. The next morning I got my money but was arraigned in court”.***

6. Upon hearing the prosecution and defence cases, the trial magistrate convicted the appellant for the offence of attempted robbery with violence and sentenced him to death. Aggrieved by the trial court’s conviction, the appellant lodged a first appeal to the High Court. The High Court confirmed the conviction and upheld the death sentence. The appellant has now lodged a second appeal to this Court.

7. In his supplementary grounds of appeal, the appellant has cited the following grounds:

***i. That the learned judges erred in law in adopting different grounds of appeal than those raised by the appellant and ignored the submissions tendered by the appellant thus occasioning him miscarriage of justice.***

***ii. That the learned judges erred in law in upholding the finding of the trial court that the complainant (PW1) was indeed injured when his evidence and that of PW5 who produced the P3 Form conflicted in material particular to the extent that the offence of attempted robbery with violence was not proved.***

***iii. That the learned judges erred in law in failing to note that the recovery of the exhibits at the scene required to be dusted to reveal the last handlers.***

***iv. The learned judges erred in law in upholding the trial court’s finding that the offence with which the appellant was charged had been proved irrespective of the fact that the evidence of PW2, PW3 and PW4 never corroborated that of PW1.***

***v. That the learned judges erred in law in failing to note that an essential witness one Beatrice Wangari was not called to testify.***

8. At the hearing of this appeal, learned counsel Messrs Maragia Ogaro appeared for the appellant while the State was represented by the Assistant Director of Public Prosecution Messrs J. Kaigai.

9. Counsel the appellant elaborated on the grounds of appeal submitting that the learned judges erred in convicting the appellant when the essential ingredients for the offence of attempted robbery with violence had not been proved. It was submitted that the weapons allegedly used during the robbery were not recovered from the scene and there was all indications that the exhibits were planted; counsel submitted that when the police came to the scene of crime on 22<sup>nd</sup> April, 2009, nothing was recovered and it is a wonder that on the following day, it is alleged that a panga, axes, rungu and iron bar were recovered at the scene. It was submitted that if the scene of crime was properly lit, how come that the weapons that were produced as exhibits were neither seen nor recovered at the scene on 22<sup>nd</sup> April, 2009? It was submitted that the learned judges erred in law and should have required the weapons produced as exhibits to be dusted to reveal the last handlers. The appellant also took issue with the credibility of the complainant who testified that he was cut on the upper hand and even showed the trial court the alleged injuries sustained in the upper hand; however, it was submitted that the P3 Form did not corroborate the alleged injuries; that the medical report tendered in evidence by PW 5 show that the complainant had injuries to his head and no other injury; it was submitted that this material contradiction in the testimony of the complainant and the medical report shows that the offence of attempted robbery with violence was not committed. The prosecution’s case is that the complainant placed the sum of Ksh. 2,500/= in a safe owned by Beatrice Wangari. The said Beatrice Wangari was not called to testify to prove that indeed, there was money in the safe capable of being stolen. It is the appellant’s case that since Beatrice did not testify, the prosecution failed to prove that there was money in the safe capable of being stolen; that there can be no attempt to steal something that does not exist. On this submission, it is our considered view that whether or not there was money in the safe is immaterial for the offence of attempted robbery with violence or the facts of this case.

10. The appellant further submitted that the learned judges erred in law in upholding the death sentence

for the offence of attempted robbery with violence. It was submitted that under **Section 389 of the Criminal Procedure Code**, the sentence for attempted robbery with violence is a maximum jail term of seven years. The appellant cited the case of ***Evanson Muriruri – Gichane – v- R, Cr. Appeal No. 277 of 2007***, in support of this submission.

11. The State in opposing the appeal stated that the prosecution case was proved to the required standard; that the two courts below arrived at concurrent findings of fact which this Court should not interfere with. That from the testimony of PW1, the appellant was in the company of other persons; that the P3 Form tendered in evidence was proof that the complainant was injured and violence used; that the appellant was arrested at the scene of crime and there is no dispute as to his identity as one of the persons who attempted to commit robbery with violence; that PW 2 corroborated the testimony of PW1. On the legality of the death sentence for attempted robbery with violence, the State submitted that **Section 297 (2) of the Penal Code** was clear that attempted robbery with violence attracts a death penalty.

12. We have considered the rival submissions made in this appeal. We have examined the record of appeal and the judgement of the High Court. This is a second appeal which must be confined to points of law. As was stated in ***Kavingo – v – R, (1982) KLR 214***, a second appellate court will not interfere with concurrent findings of fact of the two courts below unless they are shown not to have been based on evidence. This was further emphasized in ***Chemagong vs. Republic, (1984) KLR 213***, at page 219 where this Court held:

***“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did. (Reuben Karari s/o Karanja vs. Republic 17 EACA146)”***

13. The appellant was charged with an offence under **Section 297 (2) of the Penal Code**. The offence in **Section 297 (2)** relates to one activity involving more than one act. It is incumbent on the prosecution to prove the activity and then prove the various acts that come within the definition of the offence under **Section 297 (2) of the Penal Code**. The single activity to be proved under **Section 297 (2)** is assault with intent to steal anything as per **Section 297 (1)**. The various acts to be proved under **Section 297 (2)** is that the offender is armed with dangerous or offensive weapons or instrument or is in the company of one or more persons and there is use of personal violence to any person at the time of assault.

14. Our analysis of the record shows that the evidence linking the appellant to the crime is the testimony of PW 1 and PW 2. It is our duty to determine whether the High Court properly evaluated the testimony of PW1 and PW 2 to determine if all the ingredients for the offence of attempted robbery with violence were proved. In support of the appeal, it was submitted that the prosecution failed to prove the ingredients of the offence. The gist of the appellant’s case is that on 22<sup>nd</sup> April, 2009, when the police arrived at the scene of crime, the weapons produced as exhibits were never recovered. It is the appellant’s case that although there was a scuffle between the appellant and the complainant, this was an assault and the appellant was not armed with any dangerous or offensive weapon. Counsel submitted that it is highly improbable that the police never recovered any exhibits at the scene of crime during the initial visit on 22<sup>nd</sup> April, 2009, and then allege that on the following day the exhibits were recovered. It is the appellant’s case that the weapons produced as exhibits were planted and never existed. On our part we ask ourselves whether there is any doubt that the weapons produced in evidence as exhibits were used at the time of the alleged offence. PW1 testified that the appellant was holding a panga and he cut him on the hand and that on the following day the police recovered the panga.. The P3 medical report tendered in evidence by PW5 shows the complainant had injury only to his head and does not reveal any injuries to his hand and we are left wondering where the injury to the hand came from. It is our considered view that this contradiction in evidence was material as it determines if violence was used or any weapon was used during the scuffle between the appellant and the complainant. In our mind, there is doubt as to the existence of the weapons allegedly recovered at the scene of crime; there is doubt whether the appellant was armed with all the dangerous weapons produced as exhibits; did the appellant have the panga, axe and iron bar? The prosecution evidence does not link the appellant to being armed with an axe or iron bar; there is no cogent evidence that the 3 other persons referred to were in the company of the appellant and

neither is there any evidence on record that these three other persons had the iron bar or axe ; there is doubt whether the alleged upper hand injury that the complainant showed the court was an injury sustained during the struggle with the appellant; the cause and origin of the injury to the upper hand cannot be linked to the appellant in view of the medical report. Due to these doubts, we are satisfied that the offence of attempted robbery with violence was not established to the required standard because the possession and use of dangerous or offensive weapons by the appellant was not proved. Despite the foregoing, the evidence on record reveals a scuffle or struggle between the appellant and the complainant took place. We are satisfied that the appellant assaulted the complainant and the offence of assault had been proved. **Section 251** of the **Penal Code** provides that any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years. We hereby quash the conviction of the appellant for the offence of attempted robbery with violence and set aside the death sentence meted upon him. We substitute in its place conviction for the offence of assault contrary to **Section 251** of the **Penal Code** and sentence the appellant to a term of 5 years imprisonment from 1<sup>st</sup> March, 2010, when he was convicted by the trial court.

***Dated and delivered at Nyeri this 30<sup>th</sup> day of July, 2014.***

***ALNASHIR VISRAM***

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***JUDGE OF APPEAL***

***MARTHA KOOME***

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***JUDGE OF APPEAL***

***OTIENO-ODEK***

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***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**