REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA PEAL AT NAKURU

Criminal Appeal 175 & 176 of 2004

BETWEEN

1. NDIRANGU NDERITU MUREITHI

2. JOSEPH MAINA MWANGI……...……..APPELLANTS

AND

REPUBLIC……...……RESPONDENT

(Appeal from judgment of the High Court of Kenya at Nakuru (Mr Justice Musinga & Kimaru JJ) dated 13th July, 2004 in H.C.CR.A NO 203 OF 2000)

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JUDGMENT OF THE COURT

The two appellants Ndirangu Nderitu Mureithi, the first appellant, and Joseph Maina Mwangi, the second appellant, were tried and convicted on one joint charge of attempted robbery with violence contrary to **section 297(2)** of the Penal Code. The particulars contained in that charge were that on 20th August, 1999 at about 10 am at Kuweka Trading Limited in Nakuru District, Rift Valley Province, the two of them, while armed with a dangerous weapon, namely, a pistol, attempted to rob John Kiprono Birir of cash and at or immediately before or immediately after the time of the robbery, they threatened to use actual violence on the said John Kiprono Birir. Apart from the charge of attempted robbery, the second appellant was separately charged on two other counts of being in possession of a fire-arm (count 2) and ammunition (count 3) without the relevant certificate contrary to **section 4(1)** of the Firearms Act, Chapter 114 of the Laws of Kenya. The particulars of those charges were that on 20th August, 1999 in Nakuru Town, the second appellant was, without reasonable excuse, found in possession of a revolver S/No 295816 and three rounds of ammunition without a firearm certificates. The two appellants were tried by a Senior Resident Magistrate (Mrs Muketi) who in the end found them guilty on the respective charges brought against them. On the charge of attempted robbery the two appellants were sentenced to suffer the ultimate penalty, namely, death that being the only sentence provided for that offence. In respect of the charges relating to the firearm and ammunition, the Magistrate discharged the second appellant under **section 35(1**) of the Penal Code. The two appellants then appealed to the High Court against their conviction and sentence. The High Court by its judgment dated and delivered on 13th July, 2004, dismissed their appeals. They now come to this Court on a second appeal and that being so, the Court can only deal with matters of law – see **section 361(1**) of the Criminal Procedure Code.

Mr J. Githui, learned counsel for the first appellant, raised two points of law on behalf of the first appellant. The first point of law raised by Mr Githui was that there was no proper charge before the trial

magistrate and upon which evidence could be received and upon which the appellants could be convicted. If this point were to succeed on behalf of the 1st appellant, the success would undoubtedly benefit the second appellant as well, for the charge against the two appellants was a joint one and if it is incurably bad for the 1st appellant, it must also be incurably bad in respect of the second appellant.

Expounding on this point, Mr Githui told the Court that **Section 297(2)** of the Penal Code merely prescribes the penalty and does not define the offence of attempted robbery with violence. If we understood Mr Githui correctly, and we hope we did, he was contending that the appellants were charged with a non existent offence, and that being so, in Mr Githui's view, even the curative provisions of **section 382** of the Criminal Procedure Code are irrelevant for those provisions can only apply where there is a valid charge in the first place. We respectfully agree with Mr Githui that where a charge is incurably defective, the cure-all provisions of **section 382** of the Criminal Procedure Code cannot apply. **Section 77 (8)** of the Constitution of Kenya provides that:

"No person shall be convicted of a criminal offence unless that offence is defined, and the penalty therefore is prescribed, in a written law…….".

So that for the curative provisions of **section 382** of the Criminal Procedure Code to apply, there must, in the first place, be a defined crime with a prescribed penalty, and the definition of the offence and its penalty must be set down in a written law. This is a basic and fundamental principle in our constitutional jurisprudence and was obviously provided for in our Constitution to prevent a leader with dictatorial or tyrannical tendencies from saying:-

"It is a crime because I do not like or approve of it".

Were the two appellants charged with a non-existent offence in count one as Mr Githui contended? Mr Gumo, the learned Assistant Deputy Public Prosecutor, on behalf of the Republic, did not think so. Mr Gumo submitted that **sections 296(1)** and **297(1)** are totally different from **sections 296(2) and 297(2)** because the former sections create offences punishable by imprisonment while the latter two create offences punishable by death. So that a charge under **section 297(1)** must and can only be laid under that section and a charge under **section 297(2)** must and can only be laid under that section.

We have not the slightest doubt that Mr Gumo is correct in his appreciation of the position and that 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. The same position applies in respect of robbery under **sections 296(1)** and **296(2)** of the Penal Code. The position is, however, different in the case of murder which is defined in **section 203** and punishable under section **204** of the Penal Code. A charge of murder is invariably laid under both **sections 203** and **204** of the Penal Code. The same position applies to a charge of manslaughter under **section 202** and punishable under **section 205** of the Penal Code. We accordingly reject Mr Githui's contention that there was no proper charge upon which the appellants could be tried and convicted. There was in fact a valid charge under **section 297(2)** of the Penal Code.

The second issue of law raised by Mr Githui can be shortly and summarily disposed of. He contended that the appellants were not given their right of a hearing during their first appeal in the High Court. Nothing can be further from the truth. The two appellants were present before the High Court when their appeals were called out for hearing. The 1st appellant is recorded as telling the two Judges of the High Court as follows:-

" ***1ST APPELLANT:I have written down my submissions and presented them to court and I will reply after the state counsel has addressed the court***"

The second appellant also stated:-

"2ND APPELLANT: I have also written down my submissions and presented them to court. I will reply after the state counsel has addressed the court."

Thereafter Mr Gumo who appeared for the Republic in the High Court, addressed the learned Judges at some length and at the conclusion of his address, the appellants are again recorded as stating:-

"1st APPELLANT: PW1 and PW2 were the ones who were involved. PW2 is a director of Weka (sic) Trading Company. He was not there. He only came out and found me lying down. He did not know how that person was made to lie down. I was not involved in the robbery. My case is one of mistaken identity. The evidence of PW1 was not credible."

And the second appellant said:-

" 2nd APPELLANT: I was not arrested at the scene. I was arrested from a bar. I was not found in possession of a gun".

In the face of the record before us, we are at a loss to understand how anyone can say that the appellants were denied their right to a fair hearing under **section 77 (2) (c)** of the Constitution. The High Court gave them an opportunity to be heard and they were heard. They chose to give the High Court written submissions and the record contains long hand-written notes analysing the evidence of all the witnesses who testified before the trial magistrate and even citing what the appellants thought were relevant authorities. They then answered the verbal submissions of Mr Gumo. If that does not amount to a hearing, then we do not know what will ever amount to one. We reject Mr Githui's contention on this aspect of the matter as well.

These were the only points of law raised on behalf of first appellant. The evidence on which he was convicted was clearly overwhelming. He was caught right at the scene of the attempted robbery and his unsworn explanation that he was merely an innocent passer-by who stepped on a stone fell down and was set upon by a lynch-mob was rejected by both courts below and in our view there was more than ample material upon which the two courts below were entitled to reject his defence. No point of law arises on that evidence and in our view, the first appellant's conviction was, in all the circumstances, inevitable.

That now brings us to the appeal of the second appellant which was argued before us by Mr Ikua. Mr Ikua challenged the connection between the arrest of the second appellant and the place where the attempted robbery had occurred. The attempted robbery took place just outside the Kuweka Trading Company shop. None of the witnesses at the scene i.e. **John Kiprono Birir (PW 1)** who was the victim of the attempted robbery, **Stephen Kamau Ngure (PW 4)** who was to drive the vehicle taking money to the bank, **Babu Shah (PW 2)** the owner of the shop, **Juma Hamisi Murage (PW 3**) who collected the first appellant from the scene with **Michael Asiba (PW 5)** testified that they had seen the second appellant at the scene. But it was the evidence of **PW 1** and **PW 4** that a man wielding a gun approached **PW 1** who was sitting on the driver's seat and pointed the gun at the head of **PW 4.** Two other people moved to the rear side where **PW 1** was seated with the money and a struggle ensued. The gun-man, seeing the struggle, moved to **PW1's** side; **PW1** got hold of him and took away the gun. Another person then twisted the arm of **PW4** who had got hold of the gun during the struggle and that person took away the gun and disappeared with it. Meanwhile, **PW6,** and his party of police officers were taking tea at Nyandarua Hotel which is clearly within the vicinity or surrounding of Kuweka Trading Company. **PW6** and his party saw a man being chased by a group of people and he was brandishing a gun at the group pursuing him. **PW6** arrested him and the person so arrested was the second appellant. In a short unsworn statement, the appellant said he was walking innocently doing his work when he heard people making noise on the road and "shouting there he is ". He was hit and he fell down. He was badly injured.

We agree with Mr Ikua that the second appellant was not identified at the scene. But a gun had been used during the attempted robbery and as we have said, someone snatched that gun from **PW4** and disappeared with it. A short while later, **PW6** and his party came upon the second appellant being chased by a crowd and the second appellant was keeping the crowd at bay by brandishing a gun at them. No other incident of attempted robbery or a robbery was known of in the area within the same time. In our view, the two

courts below were perfectly entitled to infer from these circumstances that it was the second appellant who had snatched the gun from **PW 4** and that the second appellant was being chased from the scene of the attempted robbery at Kuweka Trading Company. He ran into the hands of police officers who arrested him and disarmed him of the gun. That gun, whatever its serial number, was found to contain rounds of ammunition. The second appellant did not show to **PW 6** any certificate authorizing his possession of the gun or the ammunition. Once again, we are satisfied on the recorded evidence that like in the case of the first appellant, the conviction of the second appellant was inevitable.

That being our view of the matter, it follows that the appeals of the first and the second appellants must fail. We accordingly order that the two appeals be and are hereby dismissed.

Dated and delivered at Nakuru this 3rd day of March, 2006.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

E. M. GITHINJI

…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR