REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 371 OF 2007

JACK MWANGI SIMON……..……..APPELLANT

VERSUS

REPUBLIC……..……..RESPONDENT

(Being an appeal against the original conviction and sentence in Nanyuki Chief Magistrates Court Criminal Case No. 1335 of 2006 (Hon. H.N. Ndungu) on 27th September, 2007)

JUDGMENT

The appellant together with two other people were charged with the offence of attempted robbery with violence contrary to **section 297 (2)** of the **Penal Code**. According to the particulars of the offence, on the 11th July, 2006 at Makutano village in the then Laikipia District within the then Rift Valley Province, jointly with others not before court while armed with dangerous weapons namely pangas, the appellants attempted to rob Rose Njiru Musembi and at or immediately before or immediately after the said attempt threatened to use actual violence to the said Rose Njiru Musembi.

Only the appellant was convicted and sentenced to death; his co-accused persons were acquitted.

The appellant has appealed against the conviction and sentence and in the petition of appeal filed in this Court on 18th October, 2007 he raised four grounds of appeal; they are that:-

1. The learned magistrate erred in law and in fact by admitting the charge of attempted robbery by relying on the evidence of PW2, a police officer without observing that the complainant (PW1) did not support the same;

2. The learned magistrate erred in law and in fact by relying on the evidence of the recovery of iron bar and panga without observing that the same was recovered some hours after the arrest;

3. The learned trial magistrate erred in law and fact by failing to find that some of the essential witnesses were not summoned;

4. The learned magistrate erred in law and fact by “being impressed by my (the appellant’s) mode of arrest”; and

5. The learned magistrate erred in law and fact by failing to consider the appellant’s defence adequately.

As always, this being the first appellate court, we are under the legal obligation to reconsider the evidence, evaluate it afresh and come to our own conclusions irrespective of the trial court's conclusions on matters of fact. As we endeavour to undertake this task, we are enjoined to bear in mind that, though we may reach a different conclusion from that of the trial court on matters of fact, it is only the trial court that saw and heard the witnesses and some allowance has to be given for this advantage whenever it is necessary to do so. In this regard we are guided by the Court of Appeal decision in **Okeno versus Republic (1972) EA 32**, where the court said that:-

An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."(See page 36 of the decision thereof)

It was the evidence of **Rose Njiru Musembi (Musembi) (PW1)** that on the night of 10th July, 2006 or the 11th July, 2006, at around 11.00 pm she was in her house when she heard a lady call one Mwangi over the phone and tell him that "she was at home" and therefore "he could come".

At 3.00 am the following morning, she heard movement of people in her compound; she was able to see three of them because according to her there was moon light. One of them was armed with a rungu, the other had a panga and an iron bar while the other one had a pistol. Sensing danger, Musembi called Administration Police officers from their camp at Nturukuma.

After a while, Musembi heard a gunshot and commotion outside and this time there appeared to be many more people outside her house. She ventured out and found that one of the people she had earlier seen armed with a panga and iron bar had been arrested. It happened to be the appellant.

It was her evidence that sometimes before this incident, the same three armed men she had seen had invaded her house and forced her to accompany them to her shop ostensibly to give them money; they, however, ran away and escaped when they saw people coming from the opposite direction while they were on their way to Musembi's shop.

One of the police officers based at Nturukuma camp and who received Musembi's call was **Corporal Felix King'ori (Corporal King'ori) (PW2)**. According to him, Musembi called on or about the material night and reported that she had been invaded by robbers. She told him that they were armed with a pistol, a panga, an iron bar and a rungu. The officer and his colleagues rushed to the scene. Just as Musembi had reported, they indeed found three men in her compound. They did not confront them immediately but hid in what we understand to have been some bush or thicket.

According to this witness, there was a motor vehicle driving in the direction of Musembi's compound; this appears to have scared the alleged armed robbers and not knowing that police officers were lurking in the nearby bush, they ran towards them in their bid to escape. Corporal Felix Kingori ordered them to lie down but they defied him and ran away. He fired his gun but still the suspected robbers escaped.

Unfortunately for the appellant, he fell down and was quickly apprehended by the police officers; according to Corporal Kingori, he was arrested while armed with an iron bar and a panga. These weapons were recovered and exhibited in evidence.

Upon the arrest of the appellant, he led the officers to his accomplices' houses. They managed to arrest one of them that particular morning. The other co-accused was not at his house but was arrested more than a month later.

One of the officers who accompanied **Corporal King'ori** to Musembi's home was **Police Constable Aden Wako (PW3) (Constable Wako)**. His evidence was that they found the robbers in a squatting position. They identified themselves to the intruders as police officers and ordered them to rise. They rose but ran away. The officers managed to arrest the appellant was armed with a metal bar and a panga. The officer said that the appellant led them to his co-accused persons' homes but that they only managed to arrest one of them that morning while the other one was arrested much later.

The investigations officer only identified in the proceedings as **Constable Stephen (PW4)** and who was then based at Nanyuki police station, testified that on 11th July, 2006 he was asked by the duty officer to visit Musembi's home where there had been an attempt to rob her. He proceeded as directed and found the appellant had been arrested by the officers from Nturukuma administration police camp. He also found a panga and an iron bar at the scene. He accompanied the appellant as he led him and the other officers to the homes of the people the appellant is alleged to have been in the company of during the attempted robbery. One of them was arrested on that day but the other was arrested later; they were charged and tried together though.

In his defence the appellant opted to remain silent while his co-accused gave unsworn statements; they denied having anything to do with the attempted robbery. The 2nd accused person in particular testified that he was at home sleeping when he was arrested.

As noted earlier the appellant's alleged accomplices were acquitted and it is the appellant's case that we are most concerned with in this appeal.

At the hearing of the appeal, the appellant sought to rely on his handwritten submissions which were filed on 2nd April, 2013. He urged that the prosecution evidence was inconsistent. He relied on the case of **Ramkrishan Pandya versus R (1957) EA 336** to support his argument that a court should not rely on contradictory or inconsistent evidence.

The appellant also submitted that apart from being inconsistent, the evidence did not disclose the offence of attempted robbery. He said the weapons alleged to have been recovered from him were not exhibited.

The appellant urged that there were essential prosecution witnesses who ought to have been called but who were not called to testify. For instance there are those workers of the complainant who are alleged to have alerted her of the impending robbery but that none of them was called to testify.

The appellant denied that he had confessed to the crime and led the officers to the homes of his purported accomplices. He urged that the prosecution did not discharge its burden of proving that he attempted to rob the complainant. In this regard he relied on what he alleged to been the Court of Appeal decision in **Charles Kibara Muraya versus R Criminal Appeal No. 330 of 1987** where the court held that the more serious the charge the heavier the burden on the prosecution (to prove it).

Finally, the appellant urged that in convicting him the learned trial magistrate contravened **section 169 (1)** of the Penal Code and that she did not come to the correct conclusions upon analysing the prosecution evidence.

Mr Njue for the state on the other hand, opposed the appeal and maintained that there were no contradictions of any sort in the prosecution case. As far as witnesses are concerned counsel invoked **section 143** of the **Evidence Act** to the effect that no particular number of witnesses ought to have been called to prove a certain fact. Counsel urged that in the absence of any gaps in the prosecution case no negative inferences could be drawn against it on the basis that certain witnesses were not called to testify.

On proof of the charges, the state counsel submitted that once it was established that the appellant was found armed in the appellant's compound at odd hours, the presumption was that he was there to commit the offence with which he was charged and the burden was upon him to rebut that presumption. In this regard counsel relied on **section 111** of the **Evidence Act** which places the burden of proof upon the accused person in certain cases and that the case against the appellant was such a case.

On contravention of **section 169** of the **Criminal Procedure Code**, counsel urged that the judgment was delivered in open court and in the language of the court. The evidence was properly analysed and the reasons for the conviction were duly given. Counsel asked us to dismiss the appeal and uphold both the conviction and the sentence.

Inorder to understand the offence of attempted robbery with violence in **section 297(2)** of the **Penal Code** under which the appellant was charged one has to consider **section 297(1)** of the same code. That section, that is **section 297(1) of the Code,** provides that a crime of attempted robbery is committed when one assaults another with intent to steal and at or immediately before or immediately after such assault uses or threatens to use actual violence to any person.

Section 297(2) of the Code prescribes the circumstances under which attempted robbery becomes attempted robbery with violence. According to this provision, attempted robbery metamorphoses into attempted robbery with violence if the offender assaults another with intent to steal and that at or immediately before or immediately after such assault uses or threatens to use actual violence to any person and he is at the time armed with a dangerous or offensive weapon or is in the company of one or more persons or immediately before or after the assault he wounds, beats, strikes or uses any other form of personal violence to any person.

Perhaps to understand this particular provision of the law better, it is necessary to reproduce its two parts in verbatim:-

297. Attempted robbery

(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.

(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.

It is apparent that 'assault' is one of the key elements that must be established for an offence of attempted robbery with violence to be proved. The term assault as a term of art is not defined in the

Penal Code; it is however, defined as such in **Black's Law Dictionary, Standard Ninth Edition** to mean;

"***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."***

What this means is that 'assault' as a technical term does not always connote any form of physical contact. It is sufficient if there is evidence of a threat to use force on another person thereby causing him to have reasonable apprehension of an immediate battery.

Coming back to the evidence at the trial, the complainant saw armed strangers in her compound in the wee hours of 11th July, 2006. The presence of these armed men in her compound at such odd hours must have put her in reasonable fear or apprehension of an imminent attack or battery to her person for purposes of injuring her or to commit another crime.

The fact the assailants were three in number and that they were armed was sufficient proof of commission of an offence under **section 297(2)** of the Penal Code.

The evidence of **Musembi (PW1)** in this regard was corroborated by the testimony of **Corporal King'ori (PW2)** who confirmed that he received a report from complainant that she was under imminent attack. He acted on this report and immediately proceeded to the scene accompanied by his fellow officers one of whom was Constable **Wako (PW3);** the latter corroborated his evidence that indeed they went to the complainant's home and found three armed men in the complainant's compound on the morning of 11th July, 2006. Later**, Constable Stephen (PW4)** who was tasked to investigate the case proceeded to the scene of crime and met the administration police officers there.

We doubt and we see no reason why all these witnesses could possibly conspire to make up a story of attempted robbery at the complainant's home. We did not find any such suggestion either in the evidence in chief, or in the questions put to them or in the answers they proffered during their cross-examination. Neither did we find it in the defence of any of the accused persons who chose to give unsworn statements in their defence. We could certainly not find any such suggestion in the appellant's silence, who opted for this mode of defence when he was put to his defence. We therefore hold that there is nothing on record to suggest that the learned magistrate misdirected herself on the evidence when she found the evidence of the complainant, **Corporal King'ori (PW2), Constable Wako (PW3)** and that of **Constable Stephen (PW4)** to be consistent and credible with regard to proof of the offence of attempted robbery with violence.

The only other question that we have to consider and determine is whether the appellant was one of the persons who were ambushed in the complainant's compound. To answer this question the evidence of complainant together with that of **Corporal King'ori (PW2), Constable Wako (PW3)** and that of **Constable Stephen (PW4)** is vital.

On her part the complainant testified that she was able to see the appellant through the window of her house because there was moonlight. After the appellant was arrested she ventured outside her house and confirmed that he was the person he had seen.

Corporal King'ori (PW2) and **Constable Wako (PW3)** acted on the complainant's call immediately they received a report that she was in imminent danger of being attacked and went to the complainant's

home. Of the three assailants, they managed to arrest the appellant at the scene. He was armed and the offensive weapons were recovered. **Constable Stephen (PW4)** joined these officers at the scene of crime when he was tasked to investigate the case. He found the officers at the scene together with the appellant who was then under arrest. He also found the offensive weapons at the scene.

We are of the humble opinion and we agree with the learned magistrate in this regard that the complainant's evidence on the presence of the appellant in her compound on the fateful morning was corroborated by the evidence of Corporal **King'ori (PW2), Constable Wako (PW3)** and that of **Constable Stephen (PW4).** We agree with her findings that the appellant was arrested at the scene and armed.

Once arrested in those circumstances, the burden was upon the appellant to rebut the presumption that he was in the complainant's compound for purposes other than ulterior motives. We agree with counsel for the state that **section 111** of the **Evidence Act** which places the burden upon the accused persons in certain circumstances was applicable in this particular case.

Although the appellant argued that several crucial witness were not called, we are of the humble view that the evidence of the witnesses the prosecution chose to call was sufficient to establish beyond reasonable doubt that the offence of attempted robbery with violence as defined under **section 297(2)** of the Penal Code had been committed and that the appellant was its perpetrator.

In any event the prosecution, or any other party for that matter, is not under any obligation to summons any number of witnesses to establish a particular fact. We understand this to be meaning of **section 143** of the **Evidence Act, Cap. 80** which says:-

143. Number of witnesses

No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.

We think that for reasons we have stated, the appellant was properly convicted and sentenced; we do not find any reason to interfere with that conviction and sentence. In other words we hold that there is no merit in the appellant's appeal and we hereby dismiss it. It so ordered.

Signed, dated and delivered in open court this 15th day of December, 2015

Hedwig Imbosa Ong'udi — **JUDGE**

Ngaah Jairus — **JUDGE**