



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**Criminal Appeal 136 & 133 of 2006**

**SILA LOKI ALOISE .....1<sup>ST</sup> APPELLANT**

**JAMES NDIKU NGUTA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

(From the original conviction and sentence in Criminal Case No. 2606 of 2005 of the

Chief Magistrate's Court at Machakos by S. A. Okato – Senior Resident Magistrate)

## **JUDGEMENT**

The two appellants were jointly charged with attempted robbery contrary to

section 297(2) of the Penal Code. The particulars are that on the 10<sup>th</sup> day of September 2005 at Mitaboni Location Machakos District within the Eastern Province jointly with others not before court while armed with dangerous weapons namely Somali swords and whips attempted to rob Alexander Muthonga Kaloki of his money and at or immediately before or immediately the time of such attempted robbery used actual violence to the said Alexander Muthonga Kaloki.

The prosecution called 5 witnesses and after full trial the two appellants were convicted and sentenced to death. They aggrieved by the decision of the trial court hence this appeal.

The evidence of PW1 Alexander Muthonga Kaloki stated that on the material night at about 8.45 p.m. together with his wife PW2 while going home, his wife was attacked from behind by 1<sup>st</sup> appellant. When he turned back the 1<sup>st</sup> appellant ran away and he followed him in order to apprehend him. As he was trying to arrest the 1<sup>st</sup> appellant, a group of people emerged from the bush and attacked and seriously injured him. He says that during the attack he was able to identify the 1<sup>st</sup> and the 2<sup>nd</sup> appellant as part of the group who confronted him and injured him. He says that he was stabbed in the head which injuries led to the paralysis of his right hand and leg. He says as he was being attacked, his wife screamed for help and attracted members of public and when the members of public came the intruders had ran away. He was then taken to Machakos General Hospital and later transferred to Kenyatta National Hospital. He says that he sent his brother to report the matter at Mitaboni Police Post and as a result the two appellants were arrested. PW1 confirmed that the two appellants were

persons known to him for a long time and that they were immediate neighbours.

PW2 Rose Kipchumba Alex is the wife to PW1 and confirmed that on the material day she was in company of her husband heading home after they had closed their shop. Before reaching home they were approached by the 1<sup>st</sup> appellant from behind and he demanded a black jacket from her. It was then that PW1 turned and started running after the 1<sup>st</sup> appellant. At the same time a group of people emerged from the scene and went in the direction where her husband and 1<sup>st</sup> appellant ran to. She immediately heard her husband screaming for help and later found he had been injured in the head. In her evidence she stated that at the time she recorded her statement she gave out the names of the two appellants as the ones who attacked her husband.

PW3 David Kaloki testified that on the material night while in his house he heard screams about 100 metres away from his house. He says that he recognized the screams as of PW2 who is his sister in law. He immediately went to the scene and he was informed that his brother has been beaten by a group of people. He found his brother lying on the ground and did not find the attackers. He says that as he was taking his brother to hospital he told him that he had been attacked by the appellants and later learnt that they had been arrested by police.

PW4 APC Boniface Mbatha attached to Mitaboni AP camp stated that on 21<sup>st</sup> September 2005 the wife to PW1 came and reported that on 11<sup>th</sup> September 2005 the complainant had been attacked. He says that the reportee who is PW2 gave out the names of the appellant as the ones who assaulted her husband. As a result he reported to the homes of the 1<sup>st</sup> and 2<sup>nd</sup> appellants and arrested them

and took them to Machakos Police Station.

PW5 is the doctor who treated PW1 and he produced the P3 AS EXHIBIT No. 1 after assessing the degree of injury as grievous harm.

PW6 PC Timothy Anjara stated that on 10<sup>th</sup> September 2005 at about 11.00 p.m. while at Machakos Police station he received a report from the complainant's brother David Kaloki that the complainant had been attacked by robbers. The reportee was accompanied by the complainant who could not talk well. He then referred the complainant to hospital for treatment. On 23<sup>rd</sup> September he visited the complainant in hospital where he informed him that he had been attacked by the appellants herein who were his neighbours. He also confirmed that the appellants were arrested by Administration Police officers at Mitaboni.

After the close of the prosecution case the appellants gave un-sworn testimony and denied the charge that was preferred against them. The trial court after evaluating the evidence convicted the appellants as charged and sentenced them to death. The basis of the conviction is that the evidence of PW1 was sufficiently corroborated by his wife Rose Kipchumba Alex who was an eye witness and whose evidence was direct and highly reliable.

We have on our part taken into consideration the submissions by the two counsels who appeared for the appellants in this matter. We have also taken into consideration the evidence tendered by the prosecution and the defence by the two appellants. Having done so it is our view that the charge of attempted robbery

contrary to section 297 (2) of the Penal Code cannot be sustained. The evidence on record is that the two appellants are persons who are known to the complainant and his wife. On the material night as PW1 and PW2 were walking home, they were approached by the 1<sup>st</sup> appellant who demanded money and jacket from PW2. PW1 and PW2 clearly recognized the person who was demanding money from them and since the 1<sup>st</sup> appellant was alone, PW1 started chasing him in order to arrest him. Immediately a fight ensued between PW1 and 1<sup>st</sup> appellant and as PW1 was fighting with the 1<sup>st</sup> appellant, the 2<sup>nd</sup> appellant and others immediately joined and started assaulting PW1. It is clear from the evidence of PW1 and PW2 that they clearly recognized the appellants herein since PW1 had a torch which he had just loaded with new batteries and using those batteries he flashed at his attackers who were persons well known to him. The complainant was seriously injured though nothing was stolen from him and there is no evidence to show that the attackers made any attempts to steal from him. The initial attempt was made at PW2 and that is why PW1 chased the 1<sup>st</sup> appellant. We therefore think the charges as framed by the prosecution cannot be sustained. The first report that was made by the complainant and his relative is about assault against the complainant. We therefore think the charge as framed is an afterthought made to fix the appellants herein.

In the circumstances we are of the view that the correct charge should be assault causing actual bodily harm since there is ample evidence to show that as a result of the attack by the appellants, the complainant suffered serious injuries. For that reason we set aside the conviction under section 297(2) of the Penal Code and substitute with a conviction under section 251 of the Penal Code since

the evidence on record discloses the offence of assault causing actual bodily harm. Having taken into consideration the evidence on record as tendered by the prosecution we think that there is ample and sufficient evidence to connect the appellants with the offence of assault causing actual bodily harm. In our humble view that is the reason why the complainant and his relatives in their first report to the police indicated that the complainant was assaulted by the appellants herein. Consequently we set aside the conviction and sentence entered by the trial court for the charge of attempted robbery contrary to section 297(2) of the Penal code and substitute with the conviction under section 251 of the Penal Code. we have noted that the complainant suffered serious injuries and as a result the appellants deserve no mercy and leniency for their conduct. We think we should give them the maximum sentence provided under section 251 of the Penal code. We sentence each of the appellants to 5 years imprisonment from the date of this judgement.

Dated, signed and delivered at Machakos this 17<sup>th</sup> day of December, 2009.

**ISAAC LENAOLA**

**JUDGE**

**M. WARSAME**

**JUDGE**



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