



**Mwangi v Director of Public Prosecution (Constitutional Petition
159 of 2019) [2021] KEHC 113 (KLR) (28 July 2021) (Judgment)**

Evans Kiratu Mwangi v Director of Public Prosecution [2021] eKLR

Neutral citation: [2021] KEHC 113 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTIONAL PETITION 159 OF 2019**

EKO OGOLA, J

JULY 28, 2021

BETWEEN

EVANS KIRATU MWANGI PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

Sections 297(2) and 389 of the Penal Code that provided two different sentences for the crime of robbery with violence were conflicting and could only be cured through amendment.

Reported by John Ribia

Jurisdiction – jurisdiction of the High Court – review jurisdiction – where an applicant sought to review an appeal decision of the High Court at the same court - whether the High Court had the jurisdiction to determine an application for review of sentence where the same court had already determined the appeal.

Statutes – interpretation of statutes – conflicting provisions - section 297(2) of the Penal Code as read vis-à-vis section 389 of the Penal Code – conflicting sentences - whether there was a conflict between the sentencing for robbery with violence as provided for under section 297(2) of the Penal Code (provided for a death sentence) and 389 of the Penal Code (provided a sentence of imprisonment for a term not exceeding 7 years) - Penal Code (cap 63) sections 297(2) and 389.

Criminal Procedure – sentencing – where a lesser sentence was available – whether the court was mandated to sentence an accused person to a lesser/minimum sentence where the option was available.

Constitutional Law – fundamental rights and freedoms – right to dignity – right to a fair trial – right to equality and freedom from discrimination – where there was a conflict between the sentencing for robbery with violence as provided for under section 297(2) of the Penal Code (provided for a death sentence) and 389 of the Penal Code (provided a sentence of imprisonment for a term not exceeding 7 years) – where the petitioner was sentenced to death under section 297(2) of the Penal Code - whether the alleged conflict violated the petitioner’s right to a fair trial, right to dignity and right to equality and freedom from discrimination – Constitution of Kenya, 2010 articles 27, 28 and 50(2)(p); Penal Code (cap 63) sections 297(2) and 389.



Brief facts

The petitioner was charged with the offence of attempted robbery with violence contrary to section 297(2) of the Penal Code, which provided the sentence for attempted robbery with violence as death. However, section 389 provided that the sentence for an attempted felony as being imprisonment for a term not exceeding seven years if the intended offence was punishable by death or life imprisonment. The lower court convicted him and sentenced him to death.

Aggrieved, the petitioner filed an appeal to the Mombasa High Court Criminal Division but the High Court upheld both the conviction and the sentence. Further aggrieved, the petitioner filed the instant petition. The petitioner submitted that he was discriminated against when he was sentenced in accordance to section 297(2) of the Penal Code instead of section 389 of the Penal Code which stipulated a more lenient sentence.

Issues

- i. Whether the High Court had the jurisdiction to determine an application for review of sentence where the High Court had already determined the appeal.
- ii. Whether there was a conflict between the sentencing for attempted robbery with violence as provided under section 297(2) of the Penal Code (provided for a death sentence) and 389 of the Penal Code (provided a sentence of imprisonment for a term not exceeding 7 years).
- iii. Whether the petitioner was entitled to benefit from the lesser sentence imposed by section 389 of the Penal Code for the offence of attempted robbery with violence.
- iv. Whether the alleged conflict in provisions applicable to sentencing for the offence of attempted robbery with violence under the Penal Code violated an accused person's right to a fair trial, right to dignity and right to equality and freedom from discrimination.

Relevant provisions of the Law

Penal Code (cap 63)

Section 297 - Attempted robbery

(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.

Section 389 - Attempts to commit offences

Any person who attempts to commit a felony or a misdemeanour is guilty of an offence and is liable, if no other punishment is provided, to one-half of such punishment as may be provided for the offence attempted, but so that if that offence is one punishable by death or life imprisonment he shall not be liable to imprisonment for a term exceeding seven years.

Held

1. When the Supreme Court made the landmark judgment in *Francis Kariokor Muruatetu & Another v Republic* SCK Pet. No. 15 of 2015 [2017] eKLR in December 2017, many convicts approached the court for lesser sentences in all cases where the penalty clause prescribed a fixed and mandatory sentence; the argument being that such sentences denied the court discretion in sentencing, and therefore, inconsistent with the Constitution. However, on July 6, 2021, the Supreme Court gave directions limiting the application of *Muruatetu* case to sentences in murder cases only. The Supreme Court had reiterated that its decision in the *Muruatetu* case did not invalidate mandatory sentences or minimum sentences in the Penal Code, the Sexual Offences Act or any other statute. In so far as, the instant petition was founded on the *Muruatetu* decision, and the instant court having dealt with the petitioner's appeal, the instant court was *functus officio*. In the circumstances, the court could not assume jurisdiction on the instant petition for review of the sentence.
2. Article 50 of the Constitution guaranteed the petitioner the right to a fair trial, which included the right to the benefit of the least severe of the prescribed punishments for an offence. Sections 297(2) and 389 of the Penal Code provided sentences for the crime of attempted robbery with violence. Section



297 which was the substantive provision for robbery with violence prescribed a sentence of death while section 389 under which the crime also fell prescribed a sentence not exceeding seven years. The drafters of the Penal Code seemed to have created two sentences for the offence in question. As a result, a conflict emanated that could only be resolved by way of amendment. Nevertheless, the Constitution courtesy of article 2 was the supreme law and any other legislation was subordinate to it. The Constitution mandated that an accused should have been entitled to the least severe sentence which in the instant case was that provided by section 389 of the Penal Code.

3. The conflict between sections 279(2) and 389 of the Penal Code violated the petitioner's rights under articles 27, 28 and 50(2)(p) of the Constitution.

Petition allowed.

Orders

- i. *The conflict between sections 279(2) and 389 of the Penal Code violated the petitioner's rights under articles 27, 28 and 50(2)(p) of the Constitution.*
- ii. *The petitioner was entitled to benefit from the lesser sentence imposed by section 389 of the Penal Code.*
- iii. *By virtue of (ii) above, the Petitioner having been convicted on March 4, 2005 and having served a sentence in excess of seven years imprisonment, the sentence of attempted robbery with violence, and the sentences of seven years set in abeyance on the (ii) and (iii) counts which were to run concurrently, was to be immediately released from prison unless held for reasons not indicated in the petition.*

Citations

Cases

1. *Omolo, Felix Ochieng v Attorney General & another* Petition No 15 of 2015; [2017] eKLR - (Explained)
2. *Francis Kariokor Muruatetu & another v Republic* Petition 19 of 2018; [2018] eKLR - (Explained)

Statutes

1. Constitution of Kenya, 2010 articles 27(1),(2),(4); 28; 50(2)(p)(q) — (Interpreted)
2. Penal Code (cap 63) sections 297(2), 40(3); 296(2); 297(2); 389 — (Interpreted)

Advocates

Ms Wanjohi for the respondent

JUDGMENT

1. The petitioner was charged with the offence of attempted robbery with violence contrary to section 297(2) of the [Penal Code](#) and sentenced to death in Malindi Cr Case No 669 of 2001 of 2001. Consequently, he appealed to this court. His appeal in Criminal Appeal No 92 of 2007 was dismissed and his conviction upheld.
2. The petitioner has now petitioned this court for review of sentence in view of the Supreme Court declaration in *Francis Kariokor Muruatetu & Another v Republic* SCK Pet No 15 of 2015 [2017] eKLR in which the apex court found the mandatory nature of the death sentence to be unconstitutional and under article 50(2)(q) of the Constitution.

Brief Circumstance of the Offence

3. The particulars are that on 15/03/2001, at Ngala Estate in Malindi location, the petitioner jointly with others not before court, while armed with dangerous weapons namely pistols, attempted to rob Cosmas Kadenge Charo of motor vehicle KAM 128S Toyota Corolla and immediately before or immediately after the attempted robbery shot and wounded the victim.



4. The petitioner submitted that the mandatory nature of section 297(2) of the Penal Code infringed on his fundamental rights and freedom from discrimination guaranteed under section 27(1), (2) & (4) of the Constitution and was contrary to section 389 of the Penal Code which provided that he ought not be liable to serve a term exceeding 7 years. Further, the petitioner avers that the Court of Appeal discriminated against him by failing to reconcile his appeal and have him have the benefit of the least severe of the prescribed punishment as held in *Protus Buliba Shikuku v Republic*.
5. The petitioner submitted that the time he has spent in prison is adequate punishment for the offence he committed and that he is now reformed.
6. Ms Wanjohi learned prosecutor submitted that the petitioner was sentenced to death, and 7 years imprisonment for the offences of attempted robbery with violence, being in possession of a firearm without a firearm certificate, and being in possession of ammunitions without a firearm certificate, respectively. However, the jail terms were held in abeyance in light of the death sentence.
7. Ms Wanjohi further submitted that the aggravating circumstances of the offences committed outweigh the mitigating circumstances. Consequently, a deterrent sentence of 30 years including the time served would be appropriate for the attempted robbery with violence together with the jail terms held in abeyance.

The Determination

8. Having carefully considered the petition, the following issues arise for determination:
 - (a) Whether this court has the jurisdiction to entertain the petition for review of sentence under *Muruatetu* case.
 - (b) Whether there is a conflict between section 297(2) and 389 of the Penal Code.
 - (a) Whether this court has the jurisdiction to entertain the petition for review of sentence under *Muruatetu* case.
9. It is noteworthy that when the Supreme Court made the landmark judgment in the *Muruatetu* case in December 2017, many convicts approached the court for lesser sentences in all cases where the penalty clause prescribed a fixed and mandatory sentence; the argument being, that such sentences denied the court discretion in sentencing, and therefore, inconsistent with the Constitution. However, on 6/7/2021, the Supreme Court gave directions limiting the application of *Muruatetu* case to sentences in murder cases only. The Supreme Court has reiterated that its decision in the *Muruatetu* case did not invalidate mandatory sentences or minimum sentences in the Penal Code, the Sexual Offences Act or any other statute, thus: -

“[14] It should be apparent from the foregoing that *Muruatetu* cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the Constitution. It bears restating that it was a decision involving the two petitioners who approached the court for specific reliefs. The ultimate determination was confined to the issues presented by the petitioners, and as framed by the court.

[15] To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under section 40(3), robbery with violence under section 296 (2), and attempted robbery with violence under section 297 (2) of the Penal Code, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented,



and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. *Muruatetu* as it now stands cannot directly be applicable to those cases.”

10. Accordingly, in so far as, this petition is founded on *Muruatetu* decision, and this court having dealt with the petitioner’s appeal, this court is *functus officio*. In the circumstances, the court cannot assume jurisdiction on this petition for review of sentence.

(b) Whether there is a conflict between section 297(2) and 389 of the Penal Code.

11. Section 297 of the Penal Code provides as follows:

“(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 it 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 person or persons, or if, at or immediately before or immediately after the time of assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

Section 389 of the Penal Code reads as follows-

“Any person who attempts to commit a felony or a misdemeanor is guilty of an offence and is liable, if no other punishment is provided, to one-half of such punishment as may be provided for the offence attempted, but so that if that offence is one punishable by death or life imprisonment he shall not be liable to imprisonment for a term exceeding seven years.”

12. It is common ground that the petitioner was charged with the offence of attempted robbery with violence contrary to section 297(2) of the penal code, which provides the sentence for attempted robbery with violence as death. However, section 389 provides the sentence for an attempted felony as being imprisonment for a term not exceeding seven years if the intended offence is punishable by death or life imprisonment. The lower court convicted him and sentenced him to death. The petitioner filed an appeal being Mombasa High Court Criminal Appeal No 92 of 2007 but the High Court upheld both the conviction and the sentence.

13. The petitioner submitted that he was discriminated against when he was sentenced in accordance to section 297(2) of the penal code instead of section 389 of the Penal Code are which stipulates a more lenient sentence of a maximum of seven years imprisonment.

14. In *Felix Ochieng Omolo v Attorney General & another* [2018] eKLR Ogola J held as follows:

“Is the offence of robbery with violence a felony as per section 389? section 4 of the Penal Code defines a felony as an offence which is declared by the law to be a felony or if not declared to be a misdemeanor, is punishable, without proof of previous conviction, with death, or with imprisonment for three or more years. It is evident that robbery with violence does fall within the definition of a felony. What punishment is offered for the offence of attempted robbery with violence? Section 297(2) on the one hand provides the death sentence while section 389 provides for a sentence of imprisonment for a term not exceeding seven years if the offence is punishable by death or life imprisonment. There is clearly a



conflict between the two sections as to the sentence that should be meted out for the offence of attempted robbery with violence.

15. Article 50 of the Constitution guarantees the petitioner the right to a fair trial, which includes at sub-article (2)(p) the right to the benefit of the least severe of the prescribed punishments for an offence. Sections 297(2) and 389 of the Penal Code provide sentences for the crime of attempted robbery with violence. Section 297 which is the substantive provision for robbery with violence prescribes a sentence of death while section 389 under which the crime also falls prescribes a sentence not exceeding seven years. In my reading of both provisions of the Penal Code, the drafters of the legislation seem to have created two sentences for the offence in question. As a result, a conflict emanated that can only be resolved by way of amendment. Nevertheless, the Constitution courtesy of article 2 is the supreme law and any other legislation is subordinate to it. The Constitution mandates that an accused should be entitled to the least severe sentence which in this case is that provided by section 389 of the Penal Code.
16. In *Evanson Muiruri Gichane v Republic* (*supra*) the Court of Appeal addressed the conflict between sections 297(2) and 389 of the Penal Code as follows:

“We have considered this ground of appeal and submissions by both Mr Monda and Mr Odhiambo and we are of the view that indeed, there may be a contradiction between sections 297(2) and 389 of the Penal Code. The section under which the appellant was convicted provides for death sentence while section 389 provides *inter alia*: -

“...but so that if that offence is punishable by death or life imprisonment he shall not be liable to imprisonment of a term exceeding seven years.”

The appellant was convicted of an offence (attempted robbery with violence) punishable by death. In terms of section 389 of the Penal Code the appellant shall not be liable to imprisonment of a term exceeding seven years. But he was sentenced to death. The apparent conflict in the law may only be resolved by parliament. But the appellant is entitled to the less punitive of the two sentences...

We think we have said enough to conclude that the appeal against conviction is unmeritorious while the appeal against the legality of the sentence has merit. Accordingly, this appeal is dismissed as regards the conviction of the appellant but we allow the appeal against the sentence to the extent that we substitute the death sentence with a prison term that will result in the appellant’s release from prison since the appellant was convicted and sentenced on 5th March, 2004 and should have been sentence to imprisonment not exceeding seven years.”

17. It is the finding of this court that the conflict between sections 279(2) and 389 of the Penal Code does violate the petitioner’s rights under articles 27, 28 and 50(2)(p) of the Constitution.
18. Having found that the petitioner is entitled to benefit from the sentence provided under section 389 of the Penal Code, this court makes orders as follows:
 - (a) That an order be and is hereby made that there is a conflict between section 297 (2) and 389 of the Penal Code as to the sentence for the offence of attempted robbery with violence and the conflict violates the petitioner’s rights under article 50 (2)(p).
 - (b) That an order be and is hereby made that the petitioner is entitled to benefit from the lesser sentence imposed by section 389 of the Penal Code.



- (c) That an order be and is hereby made that by virtue of (b) above, the petitioner having been convicted on 4/03/2005 and having served a sentence in excess of seven years imprisonment, the sentence of attempted robbery with violence, and the sentences of seven years set in abeyance on the (ii) and (iii) counts which were to run concurrently, be forthwith and is hereby released from prison unless held for reasons not indicated in the petition.

That is the judgment of the court.

DATED, SIGNED, AND DELIVERED AT MOMBASA THIS 28TH DAY OF JULY, 2021.

E. K. O. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Petitioner in person

Ms. Wanjohi for DPP

Ms. Peris Court Assistant

