



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 246 OF 2015.

MICHEAL MAYALO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Being an Appeal from the sentence of the senior Resident Magistrate Hon. D. K. Mikoyan delivered on 24th March 2016 in Nakuru Criminal case No. 1874 of 2009.)

JUDGMENT

1. The appellant was charged with one count of **attempted robbery with violence contrary to Section 297 (2) of the Penal Code**. The particulars being that on the 15th day of March 2009 at Naka Estate in Nakuru District of the Rift Valley Province jointly with others not before Court while armed with dangerous weapons namely fork jembe, panga and axe attempted to steal from dwelling house of **Simon Kipchanga** and immediately before used actual violence against **Benson Agota** a watchman by hitting him with a fork jembe occasioning bodily harm.
2. The appellant denied the charge and the case proceeded for full trial with the prosecution calling 4 witnesses in support of their case while the appellant in his defence gave unsworn statement without calling any witness. By the judgment delivered on 24th March 2010 the trial magistrate found the appellant guilty of the offence charged, convicted him and sentenced him to death which was commuted to life imprisonment.
3. The appellant being aggrieved and dissatisfied with the sentence, he filed this appeal through a Petition of Appeal dated 15th of February 2012 challenging the conviction and sentence on the following grounds: -
 - i. *That there is no documentary evidence of inventory form or occurrence book to link the appellant with the exhibit.*
 - ii. *That the First Force Securicor did not produce evidence to proof that PW1 was at the scene of crime as their employer.*
 - iii. *That despite the fact PW1 alleged to have identified the appellant the first report made at the nearest chief office was not proved.*
 - iv. *That some of the key witnesses were not called to tie the loose ends of the prosecution case.*
4. The state opposed the appeal on both conviction and sentence and the matter proceeded for hearing on 30th of July 2020. The appellant adopted his filed grounds of appeal and written submissions filed through email while the state counsel representing the state gave oral submissions.

APPELLANT'S CASE

5. During the hearing, the appellant withdrew his appeal on conviction and proceeded with appeal against sentence.
6. The appellant stated that he has been in prison for 12 years; was not married at the time of arrest and he has learnt welding work and obtained a certificate of Grade 1 & 2.

PROSECUTION'S CASE

7. The state counsel **Ms. Rita Rotich**, submitted that the appellant appealed on sentence only and urged the Court to consider the aggregated circumstances in this case. She stated that the appellant used dangerous weapons; panga, axe and hoe. He also used actual violence which

resulted in bodily harm of the complainant, the degree of injury was classified as grievous harm.

ANALYSIS AND DETERMINATION

8. On 30th July when the matter came up for hearing, he withdrew appeal on conviction and proceeding with appeal on sentence. What is in issue is whether the sentence imposed on the appellant was harsh and unreasonable.

9. The appellant was charged with the offence of **attempted robbery with violence contrary to Section 297(2) of the Penal Code**. The section provides as follows;

“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.”

10. **Section 389 of the Penal Code** provides for attempts to commit offences and states 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.”

11. A three Judge bench of the High Court has also dealt with this issue in Nairobi **Petition No.618 of 2010, Joseph Kaberia Kahinga and 11 others Vs Attorney General [2016] eKLR**. The High Court made the following observations:

“We find and hold that the Petitioners have a case when they argue that the sub-sections of Section 297 of the Penal Code are ambiguous and not distinct enough to enable a person charged with either offence to prepare and defend himself due to lack of clarity on what constitutes the ingredients of the charge. Article 50(2) of the Constitution proclaims what constitutes “a fair trial” when a person is charged with a criminal offence. Article 50(2)(b) states that:

“Every accused person has the right to a fair trial, which includes the right to be informed of the charge, with sufficient detail to answer it.

From the argument advanced by the Petitioners, it is apparent that a person charged under Section 297(2) of the Penal Code faces prejudice because he can, as is the case of some of the Petitioners, be convicted and sentenced to death where the same facts and circumstances may have constituted facts which supported the charge for the lesser offence of attempted robbery with violence contrary to Section 297(1) of the Penal Code.

Generally, inchoate offences attract less severe punishment than completed offences. That is the general trend in the Penal Code. For instance, under Section 220 of the Penal Code a person convicted of the charge of attempted murder is liable to be sentenced to serve a maximum term of life imprisonment while, if a person is charged with committing murder under Section 203 of the Penal Code, the sentence is death.”

12. Further in the above cited case of **Kaberia**, the High Court recommended as follows: -

“We hereby declare that section 295, 296(1), 296(2), 297(1) and 297(2) of the Penal Code do not meet the constitutional threshold of setting out in sufficient precision, distinctively clarifying and differentiating the degrees of aggravation of the offence of robbery and attempted robbery with such particularity as to enable those accused to adequately answer to the charges and prepare their defences.”

13. From the foregoing, there is no doubt that the death sentence was not appropriate for the offence herein. It was appropriate to apply **Section 386 of the Penal Code** to allow the appellant benefit from the least severe punishment in view of the ambiguity of the law in this area of attempted robbery with violence. I hereby set aside life imprisonment imposed against the appellant and reduce the sentence to sentence already served as he has served over 7 years.

14. FINAL ORDERS

i. **Appeal on conviction dismissed.**

ii. **Sentence reduced to sentence already served.**

Judgment dated, signed and delivered via zoom at Nakuru

This 17th day of September, 2020

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RACHEL NGETICH

JUDGE

In the presence of:

Jeniffer - Court Assistant

Rita for State

Appellant in person