REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO 54 OF 2013

Appeal from original conviction and sentence of Acting Principal Magistrate at Hola (M.O Obiero) in Criminal Case No 251 of 2012

DAKANE MOHAMUD MOGHOW……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGEMENT

Dakane Mohamud Moghow, the Appellant has raised three grounds of appeal styled as follows:

i. **That the learned trial magistrate erred in law and fact by sentencing me to death without proper finding that the evidence adduced by witnesses, PW1 and PW2, was attempted robbery thus contravening section 389 of the Penal Code given other facts that death sentence imposed on me by the trial magistrate was unlawful (sic).**
ii. **That the learned trial magistrate erred in law and fact in convicting me without proper finding that prosecution side failed to prove their case beyond reasonable doubt.**
iii. **That the learned trial magistrate erred in law and fact in adequately (sic) rejecting my defence without giving any reasons as to why it could not stand against the fabricated prosecution case.**

The Appellant was on 14th April 2013 sentenced to death for attempted robbery with violence contrary to Section 297 (2) of the Penal Code. The victim of the said offence is one Mary Katumbi Mulwa, PW1. It is alleged that on 3rd November 2012 at Bura Village Ten (10) in Tana River County within Coast Province, jointly with another not before the court, being armed with dangerous weapon namely a gun attempted to rob Mary Katumbi Mulwa cash and during the time of such an attempt used actual violence on the said Mary Katumbi Mulwa.

The Appellant filed this appeal in person. However, at the time of the hearing of the appeal, he had engaged a lawyer, Mr. C. P. Onono who upon coming on record informed this court that after perusing the petition and grounds of appeal he did not wish to amend the Petition and Grounds of Appeal. He also informed the court that after consultations with the Appellant and reading the evidence adduced in the lower court he did not wish to submit and wished to leave the matter to the court to decide.

The prosecution conducted by learned State Counsel Mr. Orwa made oral submissions. He submitted that the evidence of PW1 is corroborated by that of Daniel Mwasia Mulwa, PW3, in as much as he saw the people who attacked them and that of Paul Musee Munyoki, PW2 on the injuries sustained by PW1; that it was 8.30pm and there was ample light and that the Appellant was arrested immediately thereafter; that

the Appellant did not raise any defence during the trial and therefore the allegation that the trial court rejected his defence is baseless and lacks merit; that the prosecution proved its case beyond reasonable doubt and that Section 389 of the Penal Code was not contravened. He urged the court to dismiss the appeal.

The facts of the case are that on 3rd November 2012, PW1 and her brother PW2 were at a hotel belonging to one Charles. It was 8.30pm and the place was lit with electricity generated by solar. Two men wearing face masks went to the place. One man is described as tall and the other short. The tall man was armed with a gun and the short one was armed with a knife. The tall one ordered PW1 to kneel down. She complied. PW1, who was behind a door was spotted by the attackers and ordered to kneel down too. He complied. The attackers ordered PW2 to give them mobile phones but he declined. The attackers demanded money from PW1 and PW2 and both said they did not have money. PW1 told them that the owner of the hotel had gone with the money. The attacker with the gun then walked out. PW1 and PW2 confronted the one with a knife and a struggle ensued. They fell down struggling as a result of which PW1 sustained a cut below the left ear. PW1 and PW2 raised alarm that attracted their neighbours. The attacker with the knife was arrested. Both witnesses identified the attacker who was arrested as the Appellant.

This being a first appeal, we are alive to the requirement that we must re-examine the evidence adduced in the lower court and re-evaluate the same with a view to arriving at our own independent finding.

We understand the Appellant to be contesting the conviction and sentence. He is raising issue with three things, namely:

i. Illegality of the sentence in view of Section 389 of the Penal Code
ii. Lack of proof of the prosecution case to the standard required by the law
iii. Rejection of his defence by the trial court.

In our analysis of this case, we have noted that the Appellant did not tender any defence before the trial court. The record of that court shows that the trial magistrate placed the Appellant on his defence and explained to him the requirements of Section 211 of the Criminal Procedure Code. The court shows that the Appellant informed the court that **"I leave it to court. I do not have any evidence to tender in my defence."** It is therefore clear to us that there was no defence offered by the Appellant and therefore it cannot be true that the trial court rejected his defence. Ground of appeal number three is baseless and had no merit. We are with the Learned State Counsel on this point and hereby dismiss this ground of appeal.

We have re-examined all the evidence in respect of ground of appeal number two to determine whether the same proves this case beyond reasonable doubt. The evidence of PW1 and PW3 is corroborated by that of Bernard Mutua, PW4, and that of Ramadhan Dabale Kolicha, PW5. These two lived near the scene. They were attracted by screams at 8.30pm on 3rd November 2012. They responded and on arriving at the scene PW4 found PW1 and PW3 struggling with somebody whom PW4 identified as the Appellant. He assisted them and they managed to overpower him. PW5 testified that he found PW3 and PW4 holding the Appellant. PW5 stated that he saw a lady who had been stabbed. We have no doubt that this clearly refers to PW1. PW5 stated that he called the police who arrived and arrested the Appellant.

The evidence of Police Constable Job Ouma, PW6, confirms that of PW5. He testified that upon receiving a telephone call he in company of other police officers went to the scene at Village Ten and found the Appellant having been tied with a rope. He stated that they did not find PW1 who had been taken to hospital and that the Appellant was also injured and was taken for treatment. PW6 also collected bloodstained clothes which PW1 and PW3 had been wearing. These were produced in court as exhibits. PW6 testified further that he also collected a knife at the scene. It was produced in court.

The injuries sustained by PW1 and PW3 were confirmed by Paul Musee Munyoki, PW2, who treated them and filled their respective P3 forms. PW2 testified that PW1 had a cut wound on left side of the neck which had been caused by a sharp object and bruises on the left knee. PW3 had cut wounds on left side of the ribs inflicted by a sharp object. These injuries are consistent with injuries caused by a knife.

This evidence is clear and unambiguous. It is well corroborated. The trial court considered this evidence and concluded that the charge has been proved beyond reasonable doubt. We agree with him. The Appellant was found struggling with PW1 and PW3. PW4 assisted and the Appellant was overpowered and tied with ropes. PW5 found him having been subdued. He did not manage to escape from the scene and there can be no mistake in his identity. The injuries sustained by PW1 and PW3 are confirmed and must have been sustained during the struggle. We have no doubt in our mind that the Appellant was one of the two people who attacked PW1 and PW3. Their intention was to steal from them as can be ascertained from the evidence of PW1 and PW3 that the two attackers asked for mobile phones and were armed with a gun and knife. This is the knife that was used to inflict injuries on PW1 and PW3. Our considered view is that the prosecution proved this case beyond reasonable doubt and we find so. The only logical conclusion is that ground number two has no merit. We hereby dismiss the same.

We now turn to the first ground of appeal. We understand the Appellant to be raising issue that the trial court did not comply with the requirements of the provisions of Section 389 of the Penal Code. This Section provides as follows:

> **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.**

The Appellant was charged with attempted robbery with violence under Section 297 (2) of the Penal Code. It is necessary to look at the provisions of Section 297 (1) and (2) to put this issue into context. It states thus:

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.**

The penalty for the offence under Section 297 (2) Penal Code is death. However when one reads this subsection together with section 389 Penal Code, there is an obvious contradiction. The issue we have to resolve is the applicable penalty. The court of Appeal in **Criminal Appeal No 277 of 2007, Evanson Muiruti Gichane v. Republic** dealt with a similar issue. In that case the Appellant had been charged with attempted robbery with violence under Section 297 (2) of the Penal Code. He was sentenced to death by the trial court. On first appeal, the superior court dismissed his appeal. On second appeal the court found that there may be a contradiction existing between Section 297 (2) and Section 389 of the Penal Code. The court pointed out this contradiction may only be solved by the Parliament. The court dismissed the appeal on conviction and reduced the sentence to seven years imprisonment as provided by Section 389 Penal Code.

We have given this case due consideration and we take the view taken by the Court of Appeal in the latest decision in **James Maina Magare & another v. Republic [2012] eKLR** where the Court discussed similar issue and concluded as follows:

> **" ……for the offence of an attempt to commit robbery with violence under section 297(2) of the Penal Code, in respect of which a sentence of death has been provided under the section, Section 389 of the Penal Code cannot apply. The fact that section 297 (1) of the Penal Code which provides for the offence of attempted simple robbery, provides for a sentence of seven years, confirms the legislatures intention to provide a more severe punishment for the more serious offence of attempted robbery with violence under Section**

297(2) of the Penal Code. In our view, the legislature's intention to exclude the offence under section 297(2) of the Penal Code from the application of section 389 of the Penal Code is clear. As was stated by this Court in Evans Kiratu Mwangi v. Republic, CR. APPEAL NO 154 OF 2009, section 297(2) of the Penal Code provides for a sentence of death, and that sentence is therefore lawful."

This ground has no merit and we therefore dismiss this appeal and uphold the conviction and sentence.

We make orders accordingly.

Dated and delivered this 22nd November 2013

S.N.MUTUKU **W. KORIR**

JUDGE **JUDGE**

Dated and delivered this 27th November 2013

S. N. MUTUKU

JUDGE