REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

CRA NO.99 OF 2009

(Appeal from conviction and sentence of Senior Resident Magistrate Hon. M. Wambani in Bungoma court in criminal case no.2291 of 2008)

MOHAMMED ALI WANJALA

alias MOHA...APPELLANT

VS

REPUBLIC...RESPONDENT

JUDGMENT

The Appellant was convicted by the Senior Resident Magistrate at Bungoma of attempted robbery with violence contrary to section 297 (2) of the penal Code whose particulars were that on 26/11/2008 at Siritanyi village in Musikoma location in Bungoma District of the Western Province he jointly with another not before the court and while armed with a dangerous weapon namely a knife attempted to rob Joseph Wekesa Masinde (PW1) of his unregistered motor cycle engine number BL325MN2 34 make TVS valued at Ksh.110,000/= and at or immediately before or immediately after the time of such attempt used actual violence to the said PW1. He was sentenced to death. He was aggrieved by the conviction and sentence and preferred this appeal.

The prosecution evidence on which the Appellant was convicted was as follows. PW1 is a boda boda motor cyclist at Keringet hotel stage in Bungoma town. The Appellant is a bicycle boda boda in the same town and the two know each other. PW2 Silas Wanjala and PW3 John Onyango Makokha are also boda boda operators in the town. They operate from the same place as PW1. On 26/11/2009 at about 9.00 p.m the Appellant and another man came to PW1 to be taken to Siritanyi for a funeral and were charged Ksh.200/=. They boarded PW1's motorcycle and were ridden up to Siritanyi area. PW1 stopped, with the engine running. The passengers alighted. The Appellant's colleague slapped PW1 and the Appellant stabbed him (PW1) at the back of the neck with a knife. PW1 left the motorcycle and the engine went off. The Appellant tried to ignite it but it could not. He hit PW1 who fell down. The attackers ran away leaving the knife (exhibit 1) here. PW1 rose up and picked the knife. He was bleeding from the injury. He rode back to town and met PW2 and PW3 and informed them about the attack. The matter was reported to Bungoma Police Station and PW1 treated at Bungoma District Hospital. The Appellant had parked his bicycle at some kiosk in town. The boda boda men laid ambush and when he came for it at 3.00 a.m he was arrested and taken to the Police Station where he was charged. Medical record (exhibit 3) showed PW1 had suffered a stab wound on the neck. The degree of the injury was *"harm"*.

The Appellant denied that evidence in sworn defence to say that on this day he did his bicycle boda boda business as usual. After work he took his girlfriend Linet for ladies night at Simba Club. At 2.00 a.m he booked into a lodging at the club with her. At about 4.00 a.m he was woken up by somebody who said that there was a man who claimed Linet was his girlfriend. At 4.15 a.m police came to arrest him saying he had taken another person's wife. He denied attacking PW1 or wanting to take his motorcycle. He stated that his key witness would have been Linet but that she had since been married by PW1.

The trial court considered the evidence and concluded that the guilt of the Appellant had been proved beyond doubt.

It is the responsibility of this court to subject the entire evidence to fresh and exhaustive scrutiny to be able to determine whether the conviction was merited, while appreciating that the trial court had the advantage of seeing and hearing the witnesses **(OKENO V. REPUBLIC [1972] EA 32).**

The Appellant complained that the charge had not been proved as PW1 had stated that he had not been robbed; the prosecution case was full of discrepancies; the trial court had not observed the provisions of sections 55 (2) and 88 (1) of the Criminal Procedure Code; the prosecution had relied on the recovery of the knife without observing the provisions of sections 41 and 42 of the Police Act; and that the trial court had rejected the sworn defence without reasons as is required by section 169 (1) of the Criminal Procedure Code. The position taken by Mrs. Leting for the State was that there was sufficient evidence on which the Appellant was convicted. She pointed to the fact that PW2 and PW3 had seen PW1 carrying the Appellant and his colleague to Siritanyi and that PW1 had returned bleeding to say what had happened and also pointed out that the court had cautioned itself of the danger of relying on the evidence of a single witness at night but had found that the evidence was water tight.

The record is clear that PW1, PW2, PW3 and the Appellant are known to one another as they all operate boda boda business in Bungoma town. PW1's testimony that he was hired by the Appellant and his colleague to take them to Siritanyi this evening was supported by PW2 and PW3 who saw them and talked to the Appellant. PW1 testified that at the end of the journey he was attacked by the two who wanted to take the motorcycle but it could not ignite. PW1 did not say that the place where he was attacked had any form of lighting, but he stated that he was attacked and stabbed by the people he had carried. The people ran away leaving a knife which was brought for PW2 and PW3 to see and he was bleeding form the wound. The injury was further confirmed by medical evidence.

The Appellant correctly pointed out that the judgment did not show that his sworn defence had been carefully considered and analysed alongside the prosecution evidence. However, we have independently looked at the prosecution evidence and the defence. The impression given during the defence was that PW1 and the Appellant had each an affair with Linet whom PW1 eventually married; that it is for this reason that he had been framed by PW1. However, when he cross-examined the prosecution witnesses, including PW1, he did not raise the issue of Linet or the claim that the two were quarrelling about her. He did not allege that PW1 had since married her. PW4 P.C. Saidi Omari of Bungoma Police Station investigated the case and his testimony was that PW1 came while bleeding from the injury and his shirt had blood. We find that there were sufficient grounds to reject the defence.

Regarding the knife, its only value was that the attackers left it at the scene and it was taken to police. No finger prints were lifted from it and it was not bloodied.

Sections 41 and 42 of the Police Act and sections 55 (2) and 88 (1) of the Criminal Procedure Code are not relevant to the case.

We find that the Appellant was properly convicted on sufficient evidence.

Regarding sentence, we note that death penalty is the ultimate sentence but, depending on the facts of the case, the court can give a lesser sentence. Death penalty for the offence should be left for the most grave of the circumstances. In this case the Appellant was a first offender and informed the court he was HIV positive and the sole bread winner in his family. We consider that 10 years in jail would be the most appropriate sentence. We order that sentence in place of death penalty which we set aside. To that extend, the appeal is allowed.

Dated and delivered at Bungoma this 26th day of March, 2012.

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A. O. MUCHELULE **F. N. MUCHEMI**

JUDGE **JUDGE**