REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO. 211 OF 2008

(From Original Conviction and Sentence in Criminal Case No. 1465 of 2006 of the Chief Magistrate's Court

at Mombasa – T. Mwangi, SRM)

KALU MWANGO NGOMBO.....APPELLANT

- Versus -

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellant is ***Kalu Mwango Ngombo***. He was arraigned in court on 27th April 2006 and charged with the offence of attempted robbery with violence contrary to Section 297(2) of The Penal Code. The particulars of the charge being that on the 15th day of April, 2006 at about 3.00am at Bombolulu village of Mombasa District, jointly with others not before court, while armed with dangerous weapons namely pangas attempted to rob GODWING ADEGU of a radio make Nakiva valued at Kshs. 1,000/- and at or immediately after the time of such attempted robbery threatened to use actual violence on the complainant.

Trial in the Subordinate Court closed on 1st July 2008 after the prosecution had called four witnesses and the accused had given unsworn testimony in his defence. The appellant was convicted and sentenced to death on 21st July, 2008. He appeals against both his conviction and sentence.

The complainant's (PW 1) sleep in the wee hours of 15th April 2006 was interrupted when he suddenly

noticed three people inside his single roomed house. That this was at about 3.00am and he was with his family. One of the three, was the appellant who ordered him to keep quiet as he PW1 had started screaming. That all the three persons were armed with pangas. The scream woke up the neighbours who came to his rescue. The three sensing danger, took to their heels but were chased by PW1 and his good neighbours who included PW2 and PW3. Two of the suspects escaped but the appellant was arrested and taken to Nyali Police Station.

The appeal raises four grounds which are as follows:

(a) that the conviction on attempted robbery with violence was erroneous as the evidence, if at all, disclosed the offence of house breaking.

(b) that the prosecution failed to call material witnesses and this failure should be construed against them.

(c) that the death sentence imposed was unlawful.

(d) that the learned Magistrate erred in rejecting the defence put forward by the appellant.

As required of us on a first appeal we must consider all the evidence adduced at trial, re-evaluate it and draw our own conclusions. It is really a re-trial. (**Okeno –Vs- Republic 1972 EA 32**). In discharge of this duty the court is fully minded that it did not have the advantage of the trial court which heard and saw the witnesses testify.

We now turn to examine the evidence in some detail. PW1 says that he was able to see the three people who broke into his house using the powerful lights of his torch. Alarmed, he started to scream. In response, his neighbours came to his rescue. In panic, the trio quickly exited by climbing a wall to PW1's house. The wall collapsed and they made out. By this time neighbours including PW2 and PW3 had reached the scene and they all started to chase the three intruders. After a short distance, PW1 says it was 50 meters, the chase ended when the appellant was caught and arrested. That PW1, PW2 and PW3 were all involved in arresting the appellant as he attempted, in vain, to climb over a wall to a Mosque. The accounts of PW1, PW2 and PW3 are consistent and corroborates each other. PW1, using a torchlight, never lost sight of the appellant from the time the appellant entered his house, began to run until his arrest. PW2 and PW3 on their part never lost sight of the appellant from the moment they saw him run with two others upto the point they apprehended him.

Our assessment of the above evidence is that the incident inside PW1's house was short and quick. It happened suddenly and PW1 was rudely woken up in his sleep. And it is because of this that PW1's first instinct was to start screaming. PW1 was beleaguered and in distress. We have no doubt that his torch enabled him to see that three people had invaded the privacy of his house. Again even in the brevity and tension of that moment he could have been able to see that they were armed with pangas. It is however doubtful that he had sufficient opportunity to see the faces of the three people and make any meaningful impression of them. PW1 could not have identified the appellant positively in those circumstances. But that was not all!

PW1 was able to see the three people climb over his house wall and collapse the wall in the process. He saw the three run, he participated in chasing them and arresting one of them who was taken to the police station and charged, this was the appellant. The chain of this event was quick and unbroken. The appellant was at all times within the view of PW1. PW2 and PW3 corroborate the account of PW1 from the point when the three were running for their lives. We think and hold that the learned magistrate was

perfectly entitled to find that the appellant was one of the three armed men who broke into PW1's house on the morning of 15th April, 2006 and attempted to rob him. In the light of his evidence the Magistrate was entitled to reject the defence evidence put forward by the appellant.

The appellant was charged with attempted robbery with violence contrary to Section 297(2) of The Penal Code. This section must be read together with Section 297(1). The two provide as follows:-

"297(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.

Section 297(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 evidence adduced by the prosecution proves the following:

(a) The appellant with two others invaded the home of PW1 on the morning of 15th April, 2006.

(b) The appellant and the other two were each armed with offensive weapons namely pangas.

(c) The appellant and the two others threatened to use actual violence on PW1.

(d) The appellant and the two others attempted to steal a radio make 'Nakiva' from PW1.

We find and hold that the essential elements of the offence exist. The appellant in the company of two people entered the home of PW1 with the intention of stealing and indeed attempted to steal a radio from him. These intruders threatened to cause physical harm to PW1 and threatened to use actual violence on him. The three were each armed with pangas which are both dangerous and offensive weapons. The learned Magistrate was entitled to convict the appellant.

The Appellant also critics the prosecution for failing to call the "KK" guards as witnesses. They had assisted PW1, PW2 and PW3 take the appellant to the Nyali Police Station. Whether a person should be called as a witness is a matter within the discretion of the prosecutor and as the Court of Appeal observed in **Criminal Appeal No. 100 of 1984 Benjamin Mugo Mwangi & Another –Vs- Republic** "*a court will not interfere with that discretion unless, perhaps, it may be shown that the prosecutor has been influenced by some oblique motive*."

An oblique motive is one which is slanted, insincere and in bad faith. The KK guards were not involved in the arrest of the appellant, they came into the picture after the arrest. Hear what PW3 says:-

"After we arrested him some guards from KK guards assisted us to take him to Nyali Police Station."

In our view their testimony would not add any material value to the testimony of the prosecution witnesses and the prosecution was in perfect exercise of its discretion when he choose not to call them.

Lastly, the appellant argued this court to find that the death sentence imposed was unlawful. The appellant is convicted of an offence of attempted robbery with violence contrary to ***Section 297(2)*** of The Penal Code. The punishment prescribed under that section is the death penalty. This punishment is in contrast with the punishment prescribed by ***Section 389*** of The Penal Code for offences of attempts to commit a felony or a misdemeanour. The Section reads 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. (emphasis ours)"

The Court of Appeal was called upon to resolve this apparent conflict in **Criminal Appeal No. 277 of 2007 Evanson Muiruri Gichane -Vs- Republic** and had this to say:-

"The apparent conflict in the law may only be resolved by Parliament. But the appellant is entitled to the less punitive of the two offences."

Following this decision, we find that the appellant ought to have been sentenced under the provisions of the less punitive ***Section 389*** of The Penal Code.

In addition, in declaring that the death penalty is not the only sentence for the crime of murder, The Court of Appeal in its decision of **Godfrey Ngotho Mutiso –Vs- Republic (Criminal Appeal No. 17 of 2008**) made the following observations-

"We have confined this judgment to sentences in respect of murder cases, because that was what was before us and what the Attorney General conceded to. But we doubt if different arguments could be raised n 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. Without making conclusive determination on those other sections, the arguments we have set out in respect of Section 203 as read with Section 204 of the Penal Code might well apply to them." (emphasis ours)

Although the appellant and his co-perpetrators were armed with pangas, they did not use any personal violence or inflict any injury on PW1 or any other person. Infact when an alarm was raised, they took to their heels and fled. They threw the offensive weapons as they ran. In the circumstances of this case, would a death penalty be a just punishment? We think, and hold, that it is out of proportion with the wrong committed, harsh and excessive. We very much doubt that the learned Magistrate would have imposed the death sentence if he had the advantage we now have of making this decision after The Court of Appeal pronouncement in **Godfrey Ngotho Mutiso**.

In the result, we hereby dismiss the appeal against conviction and allow the appeal against sentence to the extent that we substitute the death sentence with a prison term of seven (7) years to take effect from the date of conviction.

Orders accordingly.

Dated and delivered at Mombasa this 15th day of November, 2011.

G. NZIOKA **F. TUIYOTT**
JUDGE **JUDGE**