REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 1263 of 2002

(From original conviction(s) and Sentence(s) in Criminal Case No. 121 of 2001 of the Chief Magistrate's Court at Nairobi (R. A. Mutoka – PM)

DAVID MWANGI MUGO…..…….....……..……..……
APPELLANT

VERSUS

REPUBLIC…….....…….....RESPONDENT

J U D G M E N T

DAVID MWANGI MUGO was found guilty and convicted of **ATTEMPTED ROBBERY WITH VIOLENCE** contrary to **Section 297(2)** of the Penal Code in count 1, and sentenced to death and in counts 2, 3, 4 and 5 of **BEING IN POSSESSION OF VARIOUS FIREARMS AND AMMUNITION WITHOUT FIREARMS CERTIFICATE** and sentenced to 3 years imprisonment in each count. The prison terms were ordered to run concurrently. The Appellant had jointly been charged with another, one **SAMSON MACHARIA MUCHIRIA** who died while the appeal was still pending. The Appellant lodged this appeal challenging his conviction and sentences on the following grounds. One that the evidence adduced was inconsistent with the charges framed against him. secondly that the first count was defective in that the amount of money intended to be robbed and value of the car intended to be stolen were not disclosed, thirdly that the conviction could not stand since the charge was not read to the Appellant and consequently he never pleaded to the same as required under **Section 214(1)** of the **Criminal Procedure Code**. Fourthly that on 24th May 2002. the Court Coram was not indicated and therefore, **Section 85** as read with **Section 88** of **Criminal Procedure Code** was never complied with and further the Appellant's defence was not duly considered and finally that the learned trial magistrate erred when she admitted the retracted statement under inquiry without first making a finding as to its admissibility.

The brief facts of the case are that as PW1, Patel Rafu in Company of one **BHIMJI LALJI** stopped at Forest Road stage, near Shell Petrol Station to pick PW2, PW3 and two other workers, two men approached his drivers window. Patel did not see them approach, he just heard a gun shot. He decided to drive away but within a short distance Bhimji fell on him and he noted that he was bleeding from the head. Just then police officers interviewed PW1 and PW3 who were at the rear of Patel's pick-up then told Patel to drive Bhimji to hospital. Bhimji died as a result of the bullet wound.

In the meantime, PW4, PW5 and PW10 using the descriptions given to them by PW2 and PW3 managed to track down the Appellant and his co-accused. After an exchange of fire PW4 and PW5 apprehended the Appellant and recovered a berretta revolver with 6 rounds of ammo exhibits 3 and 4. The ballistic expert later found that the bullet which hit and killed **BHIMJI** was fired from the revolver recovered from the Appellant.

PW10 chased and apprehended the Appellant's co-accused and recovered from him a US colt revolver with 4 rounds of ammunition exhibit 11 and 12 respectively.

Both Appellants in their defence before trial court denied that they were in any way involved in this offence. The appeal was opposed.

We have carefully analyzed and evaluated afresh the evidence adduced before the lower court bearing in mind that we neither saw nor heard the witnesses and giving due allowance. (See **OKENO vs. REPUBLIC 1972 EA 32)**. We will deal with each of the issues raised by the Appellant systematically.

The Appellant's first ground was that the evidence adduced was inconsistent with the charges he faced. In his written submissions, which Appellant filed and relied upon, he submitted that count of **ATTEMPTED ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the Penal Code was not proved. He submitted that the Complainant, PW1, did not say that any attempt to rob him had been made. That in evidence, all PW1 said that he heard a loud sound but never stopped. That since no one talked to him and therefore no demands were made to him, then the charge remained without evidential and tangible support. He relied on the Machakos **HCCC No. 68/01 KANGETHE TUTI vs. REPUBLIC**.

Mrs. Kagiri in her submission on behalf of the State did not give any submissions in response to the Appellants submission on ground one. The Appellant did not supply copies of the judgment in **Kangethe Tuti vs. Republic** (Supra) and we are unaware of what the court said if at all in regard to evidence needed to prove a charge of **ATTEMPTED ROBBERY** contrary to **Section 297(2)** of the **Penal Code**. We must hasten to add that each case ought to be considered in its own merits in regard to the facts and circumstances.

The learned trial magistrate found the Appellant guilty of the charge without going into the issue of the ingredients needed to prove the charge. The trial court however analyzed the evidence adduced and evaluated it quite well. Simply put, a charge under **Section 297 (2)** of the **Penal Code** is proved where a person assaults another with intent to steal anything and at 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 and; in addition, if the offender is

(i) either armed with any dangerous or offensive weapon or instrument; or

(ii) is in company with one or more other person; or

(iii) immediately 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.

In the instant case, the Appellant and his co-accused were seen by PW2 and PW3 as they approached the driver (PW1) of the vehicle they were waiting for. As the two boarded the back of the Pick-up that PW1 was driving, they saw both the Appellant and his co-accused draw pistols and one of them, identified by PW3 as the Appellant in this appeal fired a shot. PW1 drove off before he realized that his co-driver had been shot in the head. The co-driver, **BHIMJI**, died from the inflicted wounds.

While it is true that PW1 had not noticed the two men approach, he did hear the shot before his driver's window glass was shattered and shortly later his co-driver collapsed on him. The evidence adduced proves that the Appellant approached PW1's window and immediately fired a short which hit PW1's co-driver. PW1 drove off simultaneously to the shooting and did not stop until he saw the police car in which PW4, PW5 and PW10 were traveling in. The Appellant and his co-accused approached PW1's vehicle soon after it stopped to pick PW2 and PW3 and 2 others. They were both armed with fully loaded revolver pistol. They or at least one of them used their firearm to shoot at PW1 and in the process hit and killed PW1's co-driver. Even if they never uttered any word, from their conduct looked at in totality it can be inferred that they had an intention to commit a serious offence. They approached the driver of the pick up and immediately fired. Their intention can be inferred from that conduct as evidence

to prove that they may have been interested in stealing the vehicle. In our view, considering the time of the incident, 7.00 a.m. and the place, along a road near a stage, the Appellant and his co-accused must have been interested in taking over the vehicle to deprive PW1 of it rather than stealing cash or personal properties from PW1 and his passengers. We find that having fired the shot there was actual assault and use of force. Further, having walked towards PW1 the driver of the vehicle with drawn firearms, there is sufficient evidence to sustain a finding that the Appellant and his co-accused in their conduct of walking towards PW1 as they did amounted to a threat to use force to steal or to prevent resistance to stealing from PW1. The charge of attempted robbery with violence contrary to **Section 297(2)** of the **Penal Code** in our view was sustainable in the evidence adduced, we find no merit at all in the 1st ground and we dismiss it.

The second to fifth grounds were argued together. Ground two challenged the lack of disclosure of the amount intended to be stolen and also lack of disclosure of the value of PW1's vehicle in the charge. Again, Mrs. Kagiri did not specifically address her mind to this issue.

In **NJOROGE NDUNGU vs. REPUBLIC CA No. 31 of 2000**, the Court of Appeal while dealing with the issue of the prosecution failure to adduce evidence of actual sum stolen observed: -

"***Even assuming that no evidence was adduced to show the exact amount of money stolen in the robbery, there is no legal requirement that an exact figure of the money actually stolen be established. It is sufficient if some evidence is given to establish that some money was stolen."***

The observation was made in a case for the offence of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code**. The case before us is that of **ATTEMPTED ROBBERY WITH VIOLENCE**. The standard of evidence required to prove both cases are in our view similar. In the instant case, it is our view that the prosecution needed not prove the actual amount intended to be stolen or the value of the vehicle intended to be stolen. In regard to the money, neither the Appellant nor his co-accused came into contact or sight of any money from PW1 or his passengers. There is no evidence that any of them had any. It could have been speculative to require that actual amounts of money be quoted. As for the vehicle, police took possession of it, had a scenes of crime officer, PW6, photograph it and used the photographs exhibit 1, as evidence in support of the charge. That was sufficient evidence to satisfy the ingredient of the thing intended to be stolen. We find no merit in this ground and dismiss it.

On the charge not having been read to the Appellant, he referred as to page 8 of the proceedings and relied on **Section 214(1)** of the **Criminal Procedure Code**. At page 8 of the proceedings, the prosecutor successfully applied to amend the charge by substituting the name RAJA BHIMJI LALJI to PATEL BHARAT RAFA. On the charge itself, the learned trial magistrate amended the charge so that the name of the person intended to be robbed BHIMJI LALJI was substituted with that of PATEL RAJU. Before the amendment was made BHIMJI LALJI was named as person on whom attempt to rob was made and also on whom violence was used by being shot dead. The effect of the substitution was that the person on whom the attempt to rob was made was changed to PW1.

The rest of the particulars of the charge remained unchanged. Evidence was also adduced to support those facts.

Section 214 (1) of the **Criminal Procedure Code** provides: -

"***Section 214(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case;***

Provided that –

(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to

the altered charge;

(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in he last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination."

Even though the trial magistrate merely informed the Appellant of the charge but took no fresh plea from him in compliance to **Section 214(1) proviso (i),** we do not think that the Appellant suffered any prejudice. The amended name in the charge did not substaintailly alter the charge or the evidence needed to prove it. All it did was to make a clarification to the effect that the person on whom violence was meted was different from the person the attempt to rob was made. Our view that no prejudice was suffered by the Appellant is further fortified by the fact that at the time the substitution was made only PW1 had given evidence. PW1 had not identified the Appellant or his co-accused and the amendment came soon after his evidence. The Appellant was also represented at the time the substitution was made. We find no merit in this ground and dismiss it.

We shall deal with the fifth ground before the fourth and sixth grounds for reasons that the two raise similar issues. on the fifth ground, the Appellant submitted that the learned trial magistrate did not comply with **Section 211** of the **Criminal Procedure Code** before calling him to give his defence after the close of the prosecution case and that his defence was not considered. We shall deal with the issues of his defence last. On the 28th August 2002 when the Appellant and his co-accused gave their defence, their advocate in the case, one **MR. SANG** addressed the court thus: -

"***Mr. Sang: I'm ready to proceed. Each accused will give an unsworn statement and call no witnesses."***

The learned trial magistrate is not shown to have recorded that she complied with the provisions of **Section 211** of the **Criminal Procedure Code** by explaining to the Appellants their right to the mode of defence under the law. However, the Appellant was represented by Counsel and before the court took the Appellant's defence, **MR. SANG** his advocate made the aforementioned submission. That submission in our view sufficiently indicates that the Appellant had been made aware of their rights and had, with help of their counsel chosen the mode of defence they would take. The provision of **Section 211** of the **Criminal Procedure Code** was complied with and the Appellant suffered no prejudice just because his advocate and not the court explained his rights under **Section 211** of the **Criminal Procedure Code** to him. The Appellant challenged the trial court's failure to indicate the Coram of the Court when the ruling in the trial within trial was made on 24th May 2002. On that date, the Appellant was required to answer to the prosecution evidence in the trial within trial. We shall consider this ground together with the sixth one which is that the learned trial magistrate erred in admitting the retracted statement under inquiry without the usual ruling as to its admissibility. It is true that when the court ruled that the Appellant should reply to the prosecution case in the trial within trial conducted by the Court to determine the admissibility of his statement, the trial court did not indicate the Coram of the court on that day. That omission affects only the trial within trial in our view, but does not affect the rest of the prosecution case for two reasons, one, it was an omission made in a 'mini-trial' or 'a trial within the main trial'. If the omission is fatal and we think it is, it should only affect the trial in which the omission was made and not the whole trial. The two trials are in our view severable.

Secondly, the trial involved the Appellants retracted statement and not all evidence generally. Even though the retracted confession also implicated the Appellant, the matter under consideration was the admission of the statement only.

The Court ruled that: -

"***I note the Statement was recorded by IP Odinga."***

The trial court then had IP Odinga re-called and he dully produced the Statement as evidence in court.

We agree that the court failed to rule on the admissibility of the Statement in issue in the "trial within trial" or to give any reason for its admission. The learned trial magistrate misdirected herself as to the issue of determination and in admitting the Statement in the circumstances prejudiced the Appellant and his co-accused. The Statement implicated both of them with the commission of the offence. The statement ought not to have been admitted for reason of the omission to indicate the Coram of the Court during the ruling in the trial within trial on 24th May 2002 and for the misdirection by the trial court on 5th July 2002 in which the Court failed to consider the matter in issue as explained hereinabove and erroneously admitted the retracted statement. We declare the admission of the statement and the subsequent reliance on the same as erroneous. The retracted statement ought to be disregarded.

We have considered afresh the rest of the evidence in support of the charge and the sentence in the five counts. Even without taking into account retracted statement of the Appellant and his co-accused, there is sufficient evidence on record to sustain the charge. In support of count1, the court relied on the recovery of the berretta revolver, exhibit 3, from the Appellant and the ballistic experts finding in his report, exhibit 16, that the bullet fired from that revolver caused the death of the deceased as named in the charge, to convict the Appellant. The conviction was not based solely on visual identification for reasons well argued out by the trial court. These reasons were basically the inconsistency of the evidence of identification by PW2 and PW3 and the failure by the prosecution to conduct identification parades. We are satisfied that the evidence on record, even without that in the retracted statement was strong enough to sustain the conviction for the main count.

The Appellant argued that his defence was not given due consideration. We have considered his defence afresh. The Appellant's defence was that he was shot by police as he went about his business of newspaper vending. That evidence does not shake the overwhelming evidence adduced by the prosecution to the effect that he had in his possession at the time of arrest a pistol which a few minutes earlier had been used to shoot and kill the deceased named in count 1, nor does it shake the evidence of PW4 and PW5 that together they chased the Appellant, exchanged gun fire with him before finally apprehending him. We are satisfied that the evidence against the Appellant was overwhelming and that his defence was a mere denial without merit. On the grounds given in our judgment we find the appeal against the conviction in all five counts to have no merit and dismiss it accordingly. We uphold convictions in all five counts.

On the sentence, we are aware that the Appellant did not specifically challenge the sentence imposed on him in any of the five counts. However, the learned trial magistrate made an error in imposing sentence generally and also in respect of count 2, 3, 4 and 5. It is trite law that where a person is charged with a capital offence together with other non-capital charges, if conviction is reached on all counts, the trial court has two options in regard to sentencing.

One, either impose sentences only in the capital charge and suspend consideration for the sentence on the other counts or alternatively impose sentences for all charges and suspend the sentences in all charges except the capital one. The reason for this is obvious, that if the capital sentence were to be executed, then it would be impossible to execute the rest of the sentences.

The second reason why we must disturb the sentences imposed herein is because of the fact that the learned trial magistrate ignored mandatory legal provisions and therefore imposed an illegal sentence. **Section 4(2) (a)** of the **Firearms Act** as amended provides that for possession of prohibited firearms, the minimum sentence that can be imposed is seven years imprisonment. The learned trial magistrate imposed 3 years imprisonment. It is far below the one provided under the law. Consequently in order to meet the legal requirement we set aside the sentences in counts 2, 3, 4 and 5 and in substitution thereto, sentence the Appellant to seven years in each of the four counts. We proceed to suspend the sentences in counts 2, 3, 4 and 5 unless otherwise ordered by an appellate court or other lawful authority.

The upshot of this appeal is that the appeal against conviction is dismissed. The conviction is upheld. The sentences are varied as follows; in count 1 the sentence of death is confirmed. In counts 2, 3, 4 and 5 the sentences of 3 years imprisonment on each count is set aside and substituted thereof by a sentence of 7 years imprisonment in each of counts 2, 3, 4 and 5. The sentence of 7 years imprisonment is suspended

unless otherwise ordered by an appellate court or other lawful authority.

Dated at Nairobi this 16th day of May 2006.

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LESIIT, J.

JUDGE

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MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

Appellant

Mrs. Kagiri for the State

Eric/Ann - CC

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LESIIT, J.

JUDGE

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M.S.A. MAKHANDIA

JUDGE