

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO. 30 OF 2015

CORAM: D. S. MAJANJA J.

BETWEEN

SHEE MWINYI RASHID.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. N. Ruguru, Ag. SRM dated 18th June 2014 at Chief Magistrate's Court at Mombasa in Criminal Case No. 1550 of 2012)

JUDGMENT

1. The appellant, **SHEE MWINYI RASHID**, was charged and convicted of the offence of attempted robbery with violence contrary to **section 297 (2)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. It was alleged that on 8th July 2012 at Maweni area, Likoni location within Likoni District jointly with others not before the court, while armed with offensive weapons namely a knife and a metal rod attempted to rob **HILLARY SIGILADI** of his mobile phone make Nokia E65 valued at Kshs15,500 and immediately before such attempt threatened to use actual violence on the said **HILLARY SIGILADI**.
2. The prosecution's case was that the Police at Likoni police station received a tip off from members of public that a group of young men were terrorizing members of public. The commanding officer decided to lay ambush and accompany the officers. He assigned four officers the exercise among them PC Hillary Sigiladi (PW 1) and PC Wesley Rono (PW 2). PC David Kinoti, the investigating officer, took statements of the witnesses and produced the exhibits in the case.
3. PW 1 told the court that they proceeded to the area which was along a road with a few kiosks. Two officers were stationed in front including PW 2 and he was with another officer behind. At that point four people appeared and one of them pulled out a knife and demanded his mobile phone. He did not give him and stepped back. The assailant pointed at his head with the knife. PW 1 pulled out his pistol and fired randomly and hit the man with a knife. The other assailants ran away while the man he hit, who is the appellant, was injured on the hip and hand.
4. PW 2 confirmed that he was at the scene when he heard gunshots. He ran towards that direction and found a kitchen knife, one metal rod and the mobile phone belonging to PW1. The suspect was lying down. He was arrested and taken to the police station.
5. In his unsworn defence, the appellant told the court that on the material day he was going home when he heard people saying "stop stop". It was dark. Suddenly he saw a light in front of him and heard gunshots. He was shot on the palm and abdomen. He denied he attempted to rob PW 1.
6. I have considered the evidence and the testimony of PW 1 and PW2 established that there was an assault and PW 1 was threatened with a knife whereupon he shot the appellant who was in close proximity. I reject the appellant's defence as the testimony of PW 1 and PW 2 show that he was part of a group of four people intent on stealing and harassing people. I affirm the conviction.
7. The appellant was sentenced to death in view of the mandatory provisions of **section 296(2)** of the *Penal Code*. The Supreme Court decision in *Francis Karioko Muruatetu & Another v Republic SCK Pet. No. 15 OF 2015 [2017] eKLR* declared the mandatory death sentence for the offence of murder unconstitutional. In *William Okungu Kittiny v Republic KSM CA Criminal Appeal No. 56 of 2013 [2018] eKLR*, the Court of Appeal applied the *Muruatetu Case (Supra) mutatis mutandis* to the provisions of **section 296(2)** of the *Penal Code (Chapter 63 of the Laws of Kenya)* which imposes the mandatory death penalty for the offence of robbery with violence. Following these decisions, there is no reason why the same principle should not apply to the offence of attempted robbery with violence. In light of these decision, I set aside and quash the sentence of death imposed on the appellant.
8. In light of the circumstances, having regard to the fact that the appellant was a first offence, was remorseful and the offence was an attempt, I now sentence the appellant to **five (5) years imprisonment**. The sentence shall run from the date of the sentence in the subordinate court. Save for the issue of sentence aforesaid, the appeal is dismissed.

DATED and DELIVERED at MOMBASA this 7th day of September 2018.

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Ogega, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.