REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: R. MWONGO, J.

CRIMINAL APPEAL NO. 58 OF 2015

(Being an Appeal from the Original Conviction and Sentence in Criminal Case No 3033 of 2013 in the Chief Magistrate's Court, Naivasha, (E. Kimilu-SRM)

MERCY NJOKI MAINA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Background

1. The appellant was charged with the offence of attempted robbery contrary to **section 297 (2)** of the **penal code.** The particulars of the charge that on 22nd of December 2013 around 11 PM at Chechnya along Naivasha Maai Mahiu road in NAIVASHA, jointly with others not before the court and while armed and dangerous weapons namely pistols and stones, attempted to rob Evanson Mwangi Ngacha vehicle registration number KBS 039T, an Isuzu FRR lorry white in colour valued at Kshs 6 million, and at the time of the attempted robbery used actual force by laying stones on the road to prevent the escape of Evanson Mwangi Ngacha.

2. The appellant denied the charges, but was convicted at the end of the hearing. The trial court meted out the mandatory death sentence prescribed under **section 297(2)** of the **Penal Code**.

3. The brief facts are that Evanson Ngacha (PW3) was the driver of the aforesaid vehicle with one Muema Kitulu (PW2) as his conductor on 22 December 2013. At around 10:30 pm as they drove towards my Maai Mahiu along Naivasha Maai Mahiu road leaving Naivasha, a lady waved them down, requested a lift and they obliged. After entering the vehicle, the lady (the appellant) made a call and described the vehicle she had boarded. After a while, she called again and indicated to the person she was speaking with that they were passing railways flyover. PW2 became rather suspicious, locked his door, and requested PW3 to lock his door. In the meantime, the lady kept pointing out the different stages where she sought to be dropped, until they arrived at a blue gate on the left hand side of the road.

4. As PW3 slowed the vehicle to stop at the gate pointed out by the appellant, he saw some men holding building blocks on both sides of the road. They threw the blocks on the road seeking to stop the vehicle. The appellant reached out to the door in an attempt to force her way out of the vehicle. Immediately, the men outside jumped onto the vehicle, hanging on the doors. The appellant then attempted to grab steering wheel, and managed to switch off the vehicle's engine. She was overpowered by PW 3, who quickly switched on the vehicle and started driving off. In the commotion, PW2 grabbed the appellant, took her handbag and mobile phone which had been ringing all along, and restrained her. PW2 did not allow the appellant to receive any of the incoming calls. Meanwhile, PW3 managed to steer the vehicle which run over several of the building blocks placed on the road by the men who were now trying to gain entrance into the vehicle.

5. The lorry managed to escape the trap, and the driver drove straight to Longonot Police Post, flashing vehicles along the way to alert them of the danger ahead. At the police post, they reported the incident and handed over the appellant the police. The police immediately sent a signal of the report to the police flying squad, Naivasha, who soon arrived. PC Kemboi PW4 of the flying squad interrogated PW2, PW3 and the appellant, then went with PW2 and PW3 to the scene. There, he found the blocks at the scene. When he went to the gate where the accused had wanted to be dropped, he noted that the place was bushy and deserted. Back at the police post, PC Kemboi searched the appellant and found tablets in her handbag which he suspected what to be used in the robbery and forwarded them to the government chemist for analysis. They were found not to have any unusual content.

6. Aggrieved by the judgment, the appellant has appealed. Her appeal is against both the conviction and sentence of death on following grounds:

1. That the learned trial magistrate erred in law and fact by failing to find that identification was not conclusively proved as

required by law

2. That the learned trial magistrate erred in law and fact by failing to find that the prosecution did not prove its case beyond reasonable doubt

3. That the learned trial magistrate erred in law and fact by failing to appreciate that the appellant was not provided with witness statements as required by law

4. That the learned trial magistrate erred in law and fact by sentencing the appellant to a prison term that was both harsh and excessive.

Issues for determination

7. Having considered the material before me the issues for determination are as follows:

a) Whether the identification of accused was conclusively proved.

b) Whether failure to provide witness statements was prejudicial to accused.

c) Whether the death sentence was a proper sentence for the offence of attempted robbery

Whether the accused was identified conclusively

8. The appellant argues that in the absence of an identification parade, she was not properly and positively identified as the perpetrator of the offence. That the evidence shows that the incident took place at night and it is not clear what source of light used to identify so as to eradicate any possibility of error. The identification done in court – dock identification – was worthless. She cited the case of **R v Turnbull & Others (1973) 3 All ER 549** where the court stated:

" The judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused and observation? At what distance? In what light? Was the observation impeded in any way….? Had the witness ever seen the accused before? How often, if only occasionally, had any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused to the police by the witness when first seen by them and his actual appearance?"

9. In the present case, the accused was given a lift from Naivasha town to Chechnya which is some distance from where she boarded the vehicle. PW3 and PW2, the driver and turn-boy, respectively, gave evidence by that the accused sat next to them in the vehicle. Both testified that they stopped near a petrol station to pick the appellant, and there was sufficient light in that area. I do not see why, under normal and reasonable circumstances, the driver and the turn-boy would fail to recognise the face of the person they had given a lift and interacted with over a period of about 30 minutes or more in the lorry. Further, they had had a risky experience with the appellant in the lorry which could have led them into grave harm had they not physically restrained her and overpowered her.

10. Given that it was speed PW2 and PW3 who were in the lorry with the accused, and it was they who after restraining her, handed her over to the police, after the harrowing incident, it is clear in my mind that they had opportunity to internalise her appearance. It therefore was not necessary to have an identification parade, and I so find and hold. This ground of appeal therefore fails.

Whether failure of the prosecution to provide witness statements to the accused caused prejudice

11. The appellant submitted that the failure of the trial courts to provide her with witness statements during trial prior to the start of the case greatly prejudiced her. She stated that she was unable to prepare adequately for her defence as she could not know the evidence and case that she would be facing.

12. It is the practice in criminal cases in Kenya to avail the witness statements to accused persons before the hearing of the case. In **Joseph Ndungu Kagiri v Republic [2016] eKLR,** it was held that:

"I find that failure to provide the appellant and his co-accused with the prosecution witness statements in advance as provided for under Article 50(2)(j) violated their constitutional right to a fair trial and vitiated the entire trial and its immaterial that they were ultimately acquitted. In my view, under no circumstances should a fair trial be jeopardized. These were the key witnesses and their evidence was crucial and the accused persons were entitled to be supplied with the said statement prior to the trial. It is immaterial that they were able to cross-examine the prosecution witness as learned counsel Mr. Njue for DPP submitted. The fact that they were able to cross-examine the witnesses does not take away their constitutional rights provided in the constitution nor can it be the yardstick for measuring a fair trial. In fact, failure to provide the accused persons with the witness statements prior to the trial was an illegality and a breach of their rights to a fair trial. I find that failure by the prosecution to provide the accused persons with prosecution witness's statements amounted to a violation of their constitutional rights to a fair trial."

13. In that case reliance was placed on the case of **Thomas Patrick Gilbert Cholmondeley v. Republic (2008) eKLR** where the Court of Appeal categorically stated that:

> ***"We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under……. our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial; all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items."***

14. Further, and most critically, **Article 50 (2) (j)** of the **Constitution of Kenya 2010** provides for the fundamental right to a fair hearing, including the right of the accused person to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence. **Sub-article (c)** of **Article 50(2)** provides for the right of the accused to have adequate time and facilities to prepare his defence.

15. In this case, there is no indication in the proceedings that the trial magistrate addressed anywhere the issue of availing witness statements to the accused. It appears that the prosecution was heard and concluded without the accused being given witness statements to enable her adequately prepare for her defence. Unless the accused person had access to the witness statements she would be wholly disabled in preparing her defence, and could not challenge the prosecution's evidence at the opportune time.

16. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any way. Fair trial entails the interests of the accused, the victim and of the society. It is a fundamental human right. Fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be assured as this is a constitutional, as well as a human right. Under no circumstances can the court countenance any form of jeopardy to a person's right to fair trial.

17. On this issue, therefore, I find that the appellant's right to fair trial was violated, as a result of which the entire case against her must be determined as having been unconstitutional. It is for the court to ensure that there is a fair trial and that an accused person has been provided with adequate facilities to ensure that a fair trial can be conducted and is not unnecessarily vitiated by lapses of a procedural nature. Accordingly, this ground of appeal succeeds.

Whether the death sentence was a proper sentence

18. The appellant argues that the sentence imposed was excessive as the offence only involved attempt. Further that the death sentence was outlawed by the case of **Francis Karioko Muruatetu & Another [2017] eKLR**.

19. Section **297(2)** of the **Penal Code** provides as below;

> ***(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.***

20. However, the charge is an inchoate offence, and should properly be read together with **section 389** of the **Penal Code** which provides for sentences for attempted offences. In particular, **section 389** provides that:

> ***389. 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.***

21. On sentencing, **section 389** is clearly in conflict with **section 297(2).** The latter provides for a death sentence for attempted robbery, whilst **section 389** provides for two kinds of punishments for inchoate offences, viz.: a).One half of the punishment prescribed for the full offence; and b) If the offence is punishable by death or life imprisonment, a maximum of seven years imprisonment. The sentence in **Section 297** is certainly not proportionate to the offence.

22. Although this argument was not made by the appellant quite as eruditely and concisely as set out above, the core of the issue asserted by the appellant was the unfairness of the sentence of death meted against her. It necessarily draws out the other arguments about conflict in the provisions and disproportionality.

23. This anomaly in sentencing was pointed out by the Court of Appeal in the case of **David Mwangi Mugo v Republic (2011)eKLR** as follows:

> ***"The submission on the legality of it is that section 297(2) of the Penal Code which prescribes the sentence of death, is in conflict with section 389 of the same Code which requires that in offences of attempt to commit a felony, the sentence should not exceed seven years' imprisonment."***

24. A three Judge bench of the High Court also dealt with this issue in Nairobi Petition No.618 of 2010, reported as **Joseph Kaberia Kahinga and 11 others v Attorney General [2016]eKLR**. There, the bench of Lesiit, Kimaru and Mutuku,JJs, held as follows:

> ***"We find and hold that the Petitioners have a case when they argue that the sub-sections of Section 297 of the Penal Code are ambiguous and not distinct enough to enable a person charged with either offences to prepare and defend himself due to lack of clarity on what constitutes the ingredients of the charge. Article 50(2) of the Constitution proclaims what constitutes "a fair trial" when a person is charged with a criminal offence. Article 50(2)(b) states that:***
>
> ***"Every accused person has the right to a fair trial, which includes the right to be informed of the charge, with sufficient detail to***

answer it."

From the argument advanced by the Petitioners, it is apparent that a person charged under Section 297(2) of the Penal Code faces prejudice because he can, as is the case of some of the Petitioners, be convicted and sentenced to death where the same facts and circumstances may have constituted facts which supported the charge for the lesser offence of attempted robbery with violence contrary to Section 297(1) of the Penal Code."

Generally, inchoate offences attract less severe punishment than completed offences. That is the general trend in the Penal Code. For instance, under Section 220 of the Penal Code a person convicted of the charge of attempted murder is liable to be sentenced to serve a maximum term of life imprisonment while, if a person is charged with committing murder under Section 203 of the Penal Code, the sentence is death."

25. The three judge bench of the High Court in the above case made several recommendations. One of the holdings is as follows:

We hereby declare that section 295, 296(1), 296(2), 297(1) and 297(2) of the Penal Code do not meet the constitutional threshold of setting out in sufficient precision, distinctively clarifying and differentiating the degrees of aggravation of the offence of robbery and attempted robbery with such particularity as to enable those accused to adequately answer to the charges and prepare their defences.

26. What is to be made of the situation in the present case? The above provisions and recommendations on the sentencing disclose the confusion in the law. The recommendations suggest that the provisions ought not to be applied in a manner that is most disadvantageous to the fundamental rights and freedoms of an accused person. Where such confusion exists, and until recommendatory measures have been taken by the relevant authorities to address the confusion, it is my view that the court should give the benefit of the least severe punishment to the accused person. In this case, the death sentence is both not proportionate to the offence of attempted robbery and there is a lesser offence provided. The applicable principle would be to apply the least severe of the prescribed punishments.

27. This principle finds support in **Article 50 ((2) (p)** of the **Constitution** which provides as follows:

"(2)Every accused person has the right to a fair trial, which includes the right –

(p) to the benefit of the least severe of the prescribed punishments one offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing"

I am alive to the fact that the principle of the least severe of prescribed punishments in the above article applies to situations where the punishments for the offence have changed between the time of commission of the offence and the time of sentencing. However, it is the intrinsic spirit underlying the provision – that where there are conflicting sentences, the least severe should be applied –that seems to me to attract and do justice.

Conclusion

28. In the present case, I have found that the appellant was properly identified , and that ground of appeal fails.

29. I have also found that the accused's rights were violated due to the failure to supply her with witness statements, which is indeed a fatal omission, which cannot be remedied.

30. Finally, as shown in the arguments above, the punishment of death for the inchoate offence of attempted robbery with violence under **section 297(2)** of the **Penal Code** is inappropriate and disproportionate to the sentence for the substantive offence. The applicable principle should be to apply the least severe of prescribed punishments.

Disposition

31. Having considered all the appellant's grounds of appeal, and also having carefully reviewed the evidence on record, I find that the appeal succeeds overall in that the appellant's fundamental rights were violated by the fact that she was not provided witness statements. Under the circumstances, the appellant was unconstitutionally impeded in her defence. On that ground alone, the appeal is allowed and the conviction and sentence are hereby set aside.

32. Having determined as above, it is not necessary in this case to make any pronouncement concerning the sentence meted on the appellant for attempted robbery under **section 297(2)**.of the **Penal Code**.

33. Consequently, the appellant shall be released forthwith unless otherwise lawfully held.

34. Orders accordingly.

Dated and Delivered at Naivasha this 6th Day of November, 2018

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RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Mary Njoki Maina - Appellant in person

2. Mr. Koima for the State

3. Court Clerk – Quinter Ogutu