



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**CRIMINAL APPEAL NO: 21 OF 2016**

**(From Original Conviction and Sentence in Criminal Case No. 2188 of 2011 of the Chief Magistrate's Court at Thika)**

**JULIUS KIMANI KANGETHE.....APPELLANT**

**-V E R S U S-**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

1. This is the judgment of **Criminal Appeal No. 21 of 2016**. The appellant thereof is one **JULIUS KIMANI KANGETHE**. He was charged at **Thika** in Criminal case **No: 2188 of 2011** for attempted **Robbery** with **Violence** contrary to **Section 297 (2)** of the Penal code.

**Count I:**

Particulars thereof were that on **8<sup>th</sup> day of May 2011** at **Kibereke** trading Centre in **Muranga County** within Central Province while armed with Pangas jointly with others not before this court attempted to rob **SIMON NJAU NGUGI** of his personal items and immediately before the time of such attempted robbery used actual violence to the said **SIMON NJAU NGUGI**.

**Count II:**

He was also charged with: Attempted Robbery with Violence contrary to **Section 297 (2)** of the penal code.

Particulars thereof were that on the **8<sup>th</sup> day of May 2011** at **Kibereke** trading Centre in **Muranga County** within Central Province while armed with Pangas jointly with others not before court attempted to rob **JOHN NJUGUNA MWAURA** of his personal items and immediately before the time of such attempted robbery used actual violence to the said **JOHN NJUGUNA MWAURA**.

**Count III:**

He was also charged: Attempted Robbery with Violence contrary to **Section 297 (2)** of the Penal code.

Particulars thereof were that on the **8<sup>th</sup> day of May 2011** at **Kibereke** trading Centre in **Muranga County** within Central Province, while armed with Pangas jointly with others not before court attempted to rob **DAVID NJOROGE KAMAU** of his personal items and immediately before the time of such attempted robbery used actual violence to the said **DAVID NJOROGE KAMAU**.

**Count IV:**

Attempted Robbery with Violence contrary to **Section 297 (2)** of the Penal Code.

On the **8<sup>th</sup> day of May, 2011** at **Kibereke** trading Centre in **Muranga County** within Central Province, while armed with Pangas jointly with others not before court attempted to rob **SIMON NG'ANG'A MWANGI** of his personal items and immediately before the time of such attempted robbery used actual violence to the said **SIMON NG'ANG'A MWANGI**.

2. He denied the charge and a fully fledged trial ensued. The court convicted him of the said offences and sentenced him to **20** years imprisonment.

3. Being aggrieved and dissatisfied the appellant has appealed against both the conviction and the sentence. He is unrepresented.

**GROUND OF APPEAL are:**

1. That the trial magistrate failed to make a specific finding in relation to the burden of proof.
2. That the evidence relied on to convict was not sufficient in case of attempted robbery.
3. That the trial magistrate is imposing a **20** years sentence without considering the provision of **Section 389** of Criminal Penal Code.
4. That the trial magistrate did not take into account the appellant's defence.

4. The Director of Public Prosecutor (**DPP**) – **Madam Muthei**, gave a notice to the appellant that should his appeal fail, his sentence would be enhanced to life sentence. The appellant took cognition of the said notice of enhancement but decided to proceed with his appeal notwithstanding his conviction could be enhanced.

**5. SUBMISSIONS.**

By the Appellant:

1. The appellant attacked the testimonies of **PW1, PW2 & PW4** who claimed that the appellant was in fact their neighbour, if so why was there a need for identification parade in which they all participated, page 29, line 1 to 6?
2. That PW3 was attacked on face, neck and back, PW6- the Doctor, says there was no cut on him by the panga.
3. The scene of crime was not conducive for identification. For example, if **PW3** could not recognize the weapon he was attacked with, how could he recognize the assailant?  
  
Equally, if **PW1, PW2** and **PW4** did not recognize the weapon which was used to attack **PW3**, how could they recognize the assailant?
4. This means also that during the commission of the offence there was no enough light to identify the assailant.
5. On identification parade, the investigation told **PW7** – the parade officer, that he did not conduct the parade, page 13, line 24-25. And yet **PW5** told the court, page 27, line 22-23 that the investigation officer was at the parade. This is contradictory.
6. There was a grudge between me and the local councillor who got me arrested and got people to frame charges against me. The councillor was not called to testify, page 23, line 22-24.

**Madam Muthei** for the respondent opposed the appeal. She submitted thus:

1. **On ground 1 of appeal**, at paragraph 7 of the record, the trial magistrate was able to say that the case was proved beyond reasonable doubt. The appellant's defence was a mere denial and thus rejected.
2. **On ground 2 of the appeal**, this ground does not stand.
3. **On ground 3 of the appeal**, this refers to the court and the appellant did not bring it up during his trial, so it is a mere afterthought.
4. **On ground 4 of the appeal**, the contents of judgment were sufficient, page 7 there of the judgment.
5. On the appellant's submissions, it is true that **PW1, PW2 & PW4** knew the appellant but others did not know him hence the identification parade. However, **PW3**, knew the appellant by name as such did not participate in the parade.
6. On recognition, **PW3** knew him and recognized him.
7. On sufficient light, it was the light in the bar, the source being electricity.
8. **Section 143** of Evidence Act, even one person can prove a fact in issue by way of evidence.
9. On issue that **PW3** was not injured, **PW6** – the clinical officer, confirms the injuries on **PW3** on the face, neck and back by way of corroboration.
10. **PW7** restated that identification parade was not in the open as asserted by the appellant. It was in a private room.
11. The prosecution therefore proved the case beyond reasonable doubt and the only reason they failed to steal was because **PW4** – being a security officer discovered the weapon to be a toy gun. So the Bar patrons turned against these thugs, pelting them with bottles and glasses. They ran off.

12. We therefore pray for the court to uphold the conviction and sentence and enhance the sentence to life as **20** years imprisonment is an illegal sentence.

**6. First Appeal.**

This being a first appeal, this court has the duty of reconsidering and evaluating the evidence afresh with view to reaching its own conclusions in the matter making allowance only for the fact that it neither saw nor heard the parties when they appeared before the trial court.

**See generally Okeno -Vs- Republic [1972] E.A 32.**

**7. Issues for Determination.**

1. Was the appellant one of those who attacked the Bar patrons at Four coins Bar?
2. Was the appellant recognized/identified?
3. Was there sufficient light to enable visibility of the attackers?

**8. Testimonies: Analysis.**

It was prosecution's case that on **8<sup>th</sup> May, 2011** at **Kibereke** trading Centre at a Bar known as four coins Bar at around 9p.m. at night, six men entered the bar, one was armed with a toy gun, other with pangas, these people took different positions, two of them stood at the door, two others stood at the middle of the bar room and ordered everyone to lie down. The other two went to the shelves.

However, one **DAVID NJOROGE KAMAU PW3** being an ex-military officer, recognized that the purported gun was in fact a toy pistol and such declined to lie to their orders and encouraged the others to fight back shouting that the weapon was not a gun.

All patrons threw bottles, glasses at these thugs. **PW3** said he recognized the appellant as a person from his home area, and the appellant on realizing injured **PW3** on the neck and back with the panga he was wielding. The lighting in the bar was the source of light for recognition/identification. The matter was reported to the police, with the help of the local councillor, the appellant was arrested.

**PW7** mounted an identification parade at the police station in which, other than **PW3**, identified the appellant positively.

Therefore, this confirms that the appellant was one of those who attacked the Bar patrons at Four coins Bar. He was not only identified and recognized through the light at the said bar.

**9. FINDINGS.**

For the above reasons, there is no merit in this appeal. The appeal is hereby dismissed. Accordingly, the sentence originally meted out of **20** years imprisonment is hereby enhanced to life sentence.

10. Orders accordingly.

**JUDGMENT WRITTEN AND SIGNED BY:**

**C. B. NAGILLAH**

**JUDGE**

**JUDGMENT DELIVERED, DATED AND COUNTERSIGNED IN KIAMBU BY:**

**THIS 10TH DAY OF MAY 2017**

**JOEL NGUGI**

**JUDGE**

**In the Presence of:**

.....the Appellant

.....for Respondent

.....for Court Assistant