REPUBLIC OF KENYA

IN THE HIGH COURT KENYA AT GARISSA

CRIMINAL APPEAL NO. 49 OF 2016

ABDI WELLI HASSAN .....APPLICANT

V E R S U S

REPUBLIC ..... RESPONDENT

(From the conviction and sentence in Garissa SRM Criminal Case No. 669 of 2002 J. G. Kingori – SRM).

JUDGMENT

The appellant was charged in the Senior Resident Magistrate's court at Garissa in Criminal case No. 699 of 2002 with attempted robbery with violence contrary to section 297(2) of the Penal Code. The particulars of the offence were that on 28th June 2002 at Garissa Municipality in Garissa District within North Eastern Province jointly with others not before court while armed with a weapon to wit a Somali knife attempted to rob Gerlus Kalume Kitsao and immediately before and immediately after time of such attempted robbery did harm to the said Gerlus Kalume Kitsao. He pleaded not guilty to the charge. After a full trial, he was convicted of the offence and sentenced to suffer death as by law prescribes.

Aggrieved by the decision of the trial court, the appellant appealed in the Meru High Court. His appeal No. 4 of 2003 was summarily dismissed by the High Court at Meru. He made an appeal to the Court of Appeal and on 26th June 2016 the Court of Appeal decided that his appeal to the High Court be heard and determined. The appeal file was then sent to the High Court at Garissa for hearing and disposal. This explains the long delay in the hearing and determination of the appellant's appeal.

The appellant filed his appeal in person but later his advocate Issac Wanjohi filed a supplementary petition of appeal. At the hearing of the appeal, the appellant's counsel relied on both the original petition of appeal and the supplementary petition of appeal. The grounds of appeal are as follows:-

1. The trial magistrate erred both in law and facts while being impressed that the appellant was arrested with a knife without observing that he was not charged with the same as required in section 308(a) of the Criminal Procedure Code to prove the same.

2. The magistrate erred in law and fact in convicting him when charges were not adequately proved as the law requires of a charge of this nature.

3. Trial magistrate erred both in law and fact when he rejected his defence without giving cogent reasons for so doing in light of the prosecution case as law requires in 169(1) of the Criminal Procedure Code.

4. The learned trial magistrate erred in convicting the appellant while the appellant was not properly identified despite the fact that the alleged offence occurred under circumstances that were not favourable for identification.

5. The learned magistrate erred in law and in fact in convicting while placing reliance on identification evidence that was not sound, and could not be relied on, as the alleged attempted robbery occurred at night in circumstances that were not (conclusive) to proper identification.

6. The learned trial magistrate misdirected himself in law by failing to give the appellant benefit of a lesser sentence provided by section 389 of the Penal Code, despite the fact that the appellant was at the time still a teenager, who begged for leniency and was a first offender.

The counsel for the appellant Mr. Wanjohi submitted that the Magistrate wrongly placed reliance of doubtful identification evidence linking the appellant to an alleged robbery with violence. Counsel emphasized that the incident occurred at night and as such circumstances were not favourable for positive identification of the appellant who was unknown to the complainant. Counsel relied on a case of ***Peter Kimaru -vs- Republic Criminal Appeal No. 11 of 2002*** which was referred to in the case of ***Joseph Waiharu and 2 Others -vs- Republic 2012 eKLR,*** where the court emphasized that before convicting on evidence of visual identification at night, such evidence should be absolutely water tight. Counsel also relied on a case of ***Amolo -vs- Republic (1988 – 1993) Vol. 2 KLR 254*** which emphasized the same requirements with regard to identification.

Counsel emphasized that no description of the appellant was given by prosecution witnesses and no identification parade was conducted and as such the Magistrate was wrong in holding that the identification was positive.

Counsel also argued that the charge was defective as the particulars referred to a Somali knife as the weapon, while the witnesses talked about a wooden plank. Counsel submitted that the Magistrate under Section 214 of the Criminal Procedure Code should have amended the charge, failure to which as the particulars of the charge and the evidence were at valiance, the charge was defective and the appellant should have been acquitted. Counsel relied on the case of ***Jason Yongo –vs- Republic (1983) eKLR.***

Counsel asked the court to take note on the fact that the appellant had spent 14 years in jail pursuing an opportunity to be heard after his initial appeal to the High Court at Meru was summarily rejected. Counsel submitted therefore that in the worst of scenario, the appellant who was convicted at the age of 16 should be given the benefit of the doubt and the sentence reduced to that already served.

Mr. Okemwa the Prosecuting Counsel stated that the appellant was convicted in 2004 and his appeal to the High Court was initially summarily rejected. The Court of Appeal however ordered that the appeal be heard.

Counsel submitted that there existed various discrepancies in the evidence of identification. In addition, the charge sheet mentioned the dangerous weapon as the Somali knife but the evidence of witnesses related to the use of a wooden plank. Counsel left the matter for decision by the court.

In response Mr. Wanjohi emphasized that the appellant was convicted as a teenager and proper identification was not done.

This is a first appeal. As a first appellate court, I am require to re-evaluate all the evidence on record and come to my own conclusions and inferences see the case of ***Okeno -vs- Republic (1972) EA 32.***

I have re-evaluated the evidence on record. The prosecution called 5 short witnesses. PWI was Gerlus Kalume Kitsao the complainant. PW2 was Elizabeth Mweni the wife of the complainant. PW3 was Andrew Komu Saka a driver with Kenya Power & Lighting Company a co-woker of the complainant PWI. PW4 was PC Abdi Rahman Issac Mohamed of Garissa Police Station. PW5 was Dr. Ondongo Benjamin of Provincial General Hospital Garissa.

There is no doubt that PWI the complainant was assaulted and his wife PW2 was present. PWI stated that among the attackers the appellant had a knife. PW2 also claimed that the man had a knife. The is described in various forms. It was described as a knife, it was also described as a wooden knife which broke into two pieces which was brought and produced in court.

The appellant was arrested at the scene. He fell down after a struggle. Therefore in my view after evaluating all the evidence on record, one cannot say that he was not at the scene at that particular time. When he was put on his defence, he said that he did not know the reason why he was arrested and that he was on drugs. He did not bother to dispute the prosecution story. In my view therefore the appellant was part of the group that attempted to rob the complainant PWI. The issue of identification is therefore disposed of as he was arrested at the scene in the act.

The weapon that was described as a knife in the charge sheet was described by witnesses to be a wooden knife which got broken, which means it was an imitation of a Somali knife. That in my view was sufficient reason for the Magistrate to have found the appellant guilty of the lesser and cogent offence of simple attempted robbery contrary to Section 297 (1) of the Penal Code. The Magistrate was thus wrong in my view in finding the appellant guilty and convicting him for attempted robbery with violence. I will quash the conviction and substitute the same with the conviction of attempted simple robbery under Section 297(1) of the Penal Code.

As for the sentence the offence of attempted robbery under Section 297(1) is a maximum sentence of 7 years imprisonment. The appellant has already served 14 years imprisonment, so I am told. That has been unfortunate because his initial appeal to the High Court was summarily rejected. I cannot help better than stating that the sentence he has already served be deemed to be adequate punishment. This means that he has to be released from prison forthwith.

Consequently I quash the conviction for an offence under Section 297(2) of the Penal Code and substitute therefore a conviction for the offence of attempted simple robbery under Section 297(1) of the Penal Code. With regard to sentence, I set aside the sentence of death imposed by the trial court and order that the prison sentence that the appellant has served is adequate punishment for the offence under Section 297(1) which provides a maximum sentence of 7 years imprisonment. In effect therefore the appellant will be released from custody forthwith unless otherwise lawfully held.

Dated and delivered at Garissa this 7th day of December 2016.

GEORGE DULU

JUDGE