REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 187 OF 2010

MICHAEL KIMUTAI BIWOTT…..…….....…….APPELLANT

VERSUS

REPUBLIC…….……...RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 8321 of 2009 Republic v Michael Kimutai Biwot in the Senior Resident Magistrate's Court at Eldoret by A. Onginjo, Senior Principal Magistrate dated 8th December 2010)

JUDGMENT

1. The appellant was convicted for the offence of attempted robbery with violence contrary to section 297 (2) of the Penal Code. He was sentenced to death. The appellant has appealed against the conviction and sentence.
2. The particulars of the charge were as follows-

> *"On the 21st of June 2009 at Tulwet Cetre in Uasin Gishu District within the Rift Valley Province jointly with others not before court, being armed with [an] offensive weapon namely knife attempted to rob Paul Kipkemboi Kebenei of his motor vehicle Registration No. KAM 878Y make Toyota Corolla/ Cash and immediately before the time of such attempt wounded the said Paul Kipkemboi Kebenei."*

3. The primary grounds in the appeal can be condensed into four. First, that that the charge was not proved beyond reasonable doubt; secondly, that the trial court failed to consider the appellant's defence; thirdly that the sentence meted out was harsh and excessive in the circumstances; and, fourthly, that the learned trial Magistrate did not consider the mitigation proffered by the appellant. In his written submissions, the appellant contended that the brother of the complainant was a material witness who did not testify at the trial. He also submitted that critical communication data from the mobile telephone company was not produced at the trial. The appellant also faulted the learned trial Magistrate for relying on evidence of bad character and for failing to apply section 389 of the Criminal procedure Code in sentencing. Lastly, the appellant submitted that he was a minor at the time of the offence. Accordingly, he contended that the death sentence handed down was illegal.
4. The State contests the appeal. The position of the state is that all the key ingredients of the offence were proved beyond reasonable doubt. We were urged to find that the evidence of the ten witnesses called was sufficient to prove the offence. It was thus unnecessary to call the complainant's brother to the stand. The failure to produce the telecommunication data was not

fatal to the conviction. The State submitted that the appellant was positively identified; that the learned trial Magistrate did not rely on evidence of bad character or err in sentencing.

5. This is a first appeal to the High Court. We are required to re-evaluate all the evidence on record and to draw our own conclusions. In doing so, we have been careful because we have neither seen nor heard the witnesses. See *Pandya v Republic* [1957] E.A 336, *Ruwalla v Republic* [1957] E.A 570, *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190.
6. PW1 was the complainant. In the material parts of his evidence, he said as follows-

> *"I drove to Kesses and when I entered petrol station to fuel, Ngeno came with [a] young man who wanted to hire taxi and introduced us. There was light at station. He told me his father Kemei was sick. He told me his father had undergone operation but had developed complications and tummy was swelling and he needed to take him back to Moi Teaching and Referral Hospital, I was by then with my brother and Ngeno……..*
>
> *"I went with him to a rough road but he did not even know the people there. At that point Rop called and informed me he had called his brother and he directed me to his home. I turned the vehicle to go to Rop's brother's home, when I had moved 100 meters, I heard the boy warn me not to try and stop, I turned to look at him and saw a knife wielded [sic] at me. I raised alarm 3 times and I turned and held knife which stabbed my palm. The vehicle stopped on the bank [sic] of the road and it went off. I was stabbed on the right side of the face unto my tongue and I felt stab on my tongue healed scar on the right side of face. He ordered me to open door and I tried to struggle with him. He had stabbed me on the back and right elbow. I did unlock doors and he opened. I also opened to get out."*

7. PW1 was then taken to Lelmolo Nursing home by Rop's brother. He was later treated at Moi Teaching and Referral Hospital. A P3 form was filled out on 13th January 2010 by Dr. Imbenzi. It was produced at the trial by PW7 Dr Rono. The injuries noted were cut wounds inflicted by a sharp object.
8. On 25th June 2009, PW1 received a call from someone who said he wanted to talk to Mike. He switched off his phone and called his brother. He then called the person. The person said he was at Lessos. PW1's brother gave the police the numbers the appellant had used to call him, The police used data from the mobile service provider to track down the subscriber.
9. PW8, PC Simon Kariuki was the investigating officer. He is the one who tracked the appellant using the call data. He learnt the appellant was in Kitale prison facing other charges. He handed over the matter to PW11, Corporal Beatrice Lagat. The police later asked the complainant to attend an identification parade where he picked out the appellant. The parade was conducted by PW6, IP Abdi Noor.
10. PW2 was at Kesses Petrol Station at about 8.00pm when the appellant approached him. The appellant wanted contacts for a taxi operator to get a patient from Tulwet. As he did not have the contacts, he took him to a shop owned by a Mr. Ngeno (PW5). They found Ngeno's wife Prisca (PW3). She informed her husband who called PW1. Ngeno (PW5), confirmed calling the complainant to come and pick up the appellant. The complainant came with his brother. They negotiated the fare for the taxi. The complainant agreed to drop his brother home first before taking the appellant to the proposed destination.
11. PW3 was able to identify PW2 and the appellant as her shop is well lit by electricity. PW5 identified the appellant at his shop and also picked him out at the identification parade. PW4 also saw the appellant at Ngeno's shop. He learnt later that the complainant had been attacked. He accompanied the complainant to the hospital.
12. Evidence of recognition is generally more reliable than identification of a stranger, but mistakes may sometimes be made by witnesses. In *Wamunga v Republic* [1989] KLR 424**,** the Court of Appeal held as follows-

> *"It is trite law that where the only evidence against a defendant is of identification or recognition, a trial court is enjoined to examine such evidence carefully and to*

be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of a conviction."

13. In *Republic v Turnbull & others* [1976] 3 All ER 549, the court held that mistakes can be made even in cases of recognition; and that an honest witness may nonetheless be mistaken. In *Kiarie v Republic* [1984] KLR 739, the Court of Appeal had this to say-

> *"It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken. Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction."*

14. From the evidence, the appellant was clearly identified by PW1, PW2, PW3, PW4 and PW5. He was identified from electric light at both the petrol station and the shop. As the appellant was making enquiries for a taxi, there was sufficient time to identify him. Fundamentally, he spent time with PW1 at the shop and on the journey in the taxi for a positive identification.
15. In addition, the appellant was also identified by PW1 and PW5 at the identification parade conducted by the police. We agree with the learned trial Magistrate that the parade was conducted fairly and in accordance with the rules. Granted the evidence, we are satisfied that the appellant was positively identified as the person who accompanied PW1 on the taxi and who attacked and injured PW1.
16. Although it would have been desirable to produce the mobile phone data from the service provider, the appellant was positively identified. The relevance of the data hinged on the process of arrest and would have added little value to the identification of the appellant. That part of the appeal lacks merit.
17. In the same breath, the fact that the brother of the complainant was not called as a witness is neither here nor there. We also remain alive that under section 143 of the Evidence Act, no particular number of witnesses is necessary to establish a fact. See *Joseph Njuguna Mwaura and others v Republic* Court of Appeal Criminal appeal 5 of 2008 [2013] eKLR, *Bernard Kiprotich Kamama v Republic*, High Court, Eldoret, Criminal Appeal 123 of 2010 [2013] eKLR. The appellant did not convince us that a witness who could have given exculpating evidence was left out.
18. The next key question is whether the ingredients of attempted robbery were established. Section 297 of the Penal Code provides as follows-

> *"(1) Any person who assaults any person with intent to steal anything, and or immediately before 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, is guilty of a felony and is liable to imprisonment for seven years.*
>
> *(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, or immediately before or immediately after the time of assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."*

19. The nature of the offence requires proof of an intention to steal. PW1 testified that when they got to Tulwet junction, he decided to turn and park properly. The appellant disembarked. PW1 expected the appellant to return with the patient. After a few minutes, PW1 thought the place was too dark and turned to park in a better lit area. Suddenly, the appellant came back running, opened the front door, took out the paper bag and sat in the back seat.
20. The appellant said the condition of the patient had deteriorated. He said they should go and pick him. PW1 testified that when he and appellant were heading further on the rough road, the appellant ordered him not to stop. When PW1 turned, he saw the appellant wielding a knife. He raised an alarm; he tried to grab the knife which cut his palm. He was also stabbed on the back and on the right elbow. The appellant ordered him to open the door of the motor vehicle. The appellant opened the door and ran away.

21. The appellant was carrying a white and blue striped paper bag. He left it in the car when he took off. It contained two sisal ropes, masking tape and the knife. The paper bag or its contents were identified by PW1, PW3, PW4 and PW5 respectively. The paper bag and the contents were produced and at the trial by PW11. Considering the appellant led the complainant to a deserted rough road, the lies that he needed a taxi to ferry a non-existent patient from hospital, and the eventual attack on the complainant, we have reached the conclusion that the appellant intended to steal the complainant's motor vehicle. The appellant attacked and wounded the complainant. What thwarted the scheme of the theft were the screams, the resistance by PW1 and the fact that the vehicle landed into a ditch.
22. We have also considered the defence proffered by the appellant at his trial. He stated as follows-

> *"On 21/1/2010 I was produced in court and I thought my mother was to come and withdraw case when I went to court, police officers not known to me came to the cells and one took my photograph using his phone and hand cuffed me and I was taken to a waiting Land Rover. Inside Land Rover were 3 men and a woman. They were speaking in Kalenjin. One of them was saying it was not me but the other said it was police who knew me better. I was taken to police station in basking area. On arrival parade had already been arranged. The people who were on parade were in offices upstairs looking at parade. I was told parade related to robbery was to be conducted and because I had not been involved in any I accepted to be on parade. After parade I was returned to cells I was again called at report office and I found complainant who told me he had no problem with me but there are people who mentioned me. He told me to call him. My father's number and to I gave him. He talked to my father and at 2:30pm my father came. I was called to crime office and my father said complainant wanted money but there was no way he could produce money and at same time pay fees and yet I had been sold motor bike. Complainant wanted 100,000/-. Because complainant and my father did not agree complainant told me we would meet in court and that is why I have been here to date.……..*
>
> *"My parents and siblings can confirm if I was in school but scene I was arrested they abandoned me. My parents are aware I was fabricated its the case. Complainant talked to me and said he had no problem with me and that it is other people who mentioned me. I did not question him about what he told me at Kitale Prison. The complainant identified me on parade. I have been fabricated in all the four cases."*

23. The learned trial Magistrate did not believe the appellant's version of events or that he was framed up. We agree. Upon re-evaluating the evidence, we have reached the conclusion that the appellant's defence was feeble and unbelievable. There was overwhelming evidence from PW1, PW2, PW3, PW4 and PW5. The medical evidence showed the injuries to the complainant were to the degree of grievous harm. There was clear evidence from complainant, PW4 and PW5 that the complainant had been cut and stabbed when he was taken to Elmolok Nursing Home.
24. The learned trial Magistrate did not make any adverse comments or findings on the character of the appellant. From the cross examination of the appellant, it transpired he had been charged for other unrelated offences in Kitale Chief Magistrates' cases numbers 1358 of 2008, 3630 of 2009 and 4146 of 2009. As there was no conviction, the trial court cosidered the appellant as a first offender. The only relevance of those other cases was the defence by the appellant that he could not have committed the present offence because he was in custody. But from the time lines, the appellant was not in custody at the time of the offence. In his defence he said that on 15th October 2009, he left school and went home. In his cross examination, he conceded he had been sent away from school for school fees.
25. Under section 297 (2) of the Penal Code that we set out earlier, the mandatory sentence for attempted robbery with violence is death. There is no discretion. See *Joseph Njuguna Mwaura and others v Republic* Nairobi, Court of Appeal, Criminal Appeal 5 of 2008 [2013] eKLR. Section 389 of the Penal Code provides that where no sentence for attempted offences is provided, then

the sentence shall be half of the attempted offence. In the present case, there is a clear sentence in section 297 (2) of the Penal Code. Section 389 does not therefore apply.

26. Under section 190 of the Children Act, a child should not be sentenced to death. Again under section 186 of the Act, a minor should receive legal assistance to prepare for his defence. The appellant claims in his submissions in this appeal that he was 16 years old at the time of the offence. Those matters were not raised at his trial. From his testimony, he joined Bonyonge High School in 2005. This offence occurred on on 21st June 2009. The charge sheet records that the appellant was an adult. We have not seen any evidence to show that at the time of the offence or even his trial, the appellant was a minor. We are unable to find that the conviction and sentence offended sections 186 and 190 of the Children Act.
27. In the end we have reached the conclusion that all the ingredients of the offence of attempted robbery with violence were proved beyond reasonable doubt. The mandatory sentence is death. There is no discretion. See *Joseph Njuguna Mwaura and others v Republic* Nairobi, Court of Appeal, Criminal Appeal 5 of 2008 [2013] eKLR.
28. The upshot is that the entire appeal lacks merit. It is hereby dismissed.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 2nd day of October 2014

GEORGE KANYI KIMONDO G.W. NGENYE-MACHARIA

JUDGE JUDGE

Judgment read in open court in the presence of-

The appellant.

Ms. B. A. Oduor for the State.

Mr Kemboi, Court clerk.