REPUBLIC OF KENYA

High Court at Machakos

Criminal Appeal 131, 132 & 132 of 2008

1. JACKSON WAMBUA KITUA
2. TIMOTHY MULWA KIILU
3. SAMMY KIOKO NZUKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Makindu Principal Magistrate's Court

Criminal Case No.2274of 2005 by Hon. B. Ochieng, P.M on 10/6/2008)

JUDGMENT

The three appellants, **Jackson Wambua Kitua,Timothy Mulwa Kiilu, Sammy Kiko Nzuki** were jointly charged with one, **Ancent Kibata Mbatha** with attempted robbery with violence contrary to section 297(2) of the Penal Code. The particulars were that on the night of 29th – 30th July, 2005 at Kathyaka Market Kikumbulyu Location, Kibwezi division in Makueni District within the Eastern Provinces, they jointly with others not before court while armed with pangas, axe, bows, arrows and mattocks attempted to rob **Justus Manga Mulatya** and at or immediately before or immediately after the time of such robbery used actual violence to the Said **Justus Manga Mulatya.**

The appellants pleaded not guilty to the charge and were soon thereafter tried by the Principal Magistrate's Court at Makindu. Briefly, the prosecution case was that on the night of 29th and 30th July, 2005 at about midnight the complainant(PW1) a businessman at Kathiakani Market was asleep in his residential house cum shop, when he was woken up by a commotion that sounded like gun shots. PW2, **Julius Nzembi** and PW3, **Juma Wamukumbo,** his two watchmen were apparently under attack by a gang of thugs armed with crude weapons and explosives. The two watchmen were overpowered and they fled. The thugs proceeded to dig holes in the walls of the sitting and bedroom forcing the complainant and his family members to retreat to the store but the thugs were relentless. They moved to the store where they continued with their mission. In the meantime the complainant had managed to call the police on his cell phone and was informed that they were on their way to his rescue. The thugs managed to dig the third hole on the store wall and one of them passed his hand through the same and flashed a torch in the room. The complainant responded by slashing the hand with a panga and then short three arrows through the hole using a bow but apparently missed his target. The thugs unable to get to him and feeling frustrated demanded that he gives them money or else they will torch his house. As this was going on, PW5, **Daniel Muhui** and PW7, **Corporal Wilson Makenda** both of Kibwezi Police Station and their colleagues who were on Mobile patrol duties along Mombasa-Nairobi highway were informed about the ongoing robbery and immediately rushed to the scene and found the robbery still in progress. The thugs on noticing the approaching headlights of the vehicle used by these police officers sensed danger and escaped but one of

them, the 3rd appellant who had accessed the house through one of the holes they had made on the wall was late in escaping. According to PW5 and 7 he came out of the house charging at them whilst welding a panga ready to strike. PW5 opened fire with his AK 47 and wounded him. He was handcuffed and bundled into the police vehicle. A mattock, 2 arrows, an axe and a panga were recovered at the scene. The police officers gathered from the 3rd appellant that his accomplices who had escaped were dressed in maroon cloths disguised as matatu conductors and were heading for Makindu. The officers pursued them and on the highway near Kiboko area, they mounted a road block but to no avail. On their way to police station at Makindu area, 3rd appellant allegedly spotted his accomplices. According to PW5, he was alone while PW7 said they were 2. PW5 further stated that they gave chase and managed to arrest the same (*appellant 2 herein*) **Ancent Kibata Mbatha** near **Makindu Market.** However, PW7 stated that they gave chase and one of the suspects made good his escape while a second entered a certain home and hid therein but they were able to flush him out and arrest him but confirmed that he was the said **Ancent Kibata Mbatha.** Thereafter, the 3rd appellant was rushed to Makindi District Hospital and later taken to Kibwezi Police Station for questioning. Later the same day as the 3rd appellant was being escorted back to hospital by officers amongst them, PW5, and PW4, **PC Joseph Letip** they bumped into 1st and 2nd appellant at Kiunduani area walking by the road side. 3rd Appellant identified the two as his accomplices too and caught by surprise they were arrested without incident. 2 metal tubes were recovered from them. The 1st appellant had a blackish/Marron balaclava while 2nd appellant was wearing a maroon pair of trousers, black/grey jacket containing a small torch. They were eventually escorted to Kibwezi Police Station.

After the 3rd appellant had been treated he was issued with a P3 form. PW6, **Dr Peter Otieno Ochungo** completed/signed the appellant's P3 form on 23rd November, 2005. On examining him he noted a healed cut on the forehead and healed wounds on the private parts and buttocks where he had been shot. PW6 classified degree of injury as harm. Though PW2 (watchman) alleged that he was hit repeatedly with a rungu and slashed with a panga his P3 form was never produced in evidence.

PW7 took photographs of PW1's home showing the damage caused by thugs and produced 10 sets of photographs as exhibits. He further prepared exhibit memo form and forwarded the two black metal tubes to the Firearms Examiner CID Headquarters who on examining the same formed the opinion that the same were homemade explosive devices in terms of the Firearms Act Cap 114. The Firearms Examiners Report dated11th November, 2005 was produced in evidence.

It is instructive, neither PW1 nor PW3 was able to identify any of the thugs at the crime scene while PW2 purported to have identified all the appellants at the scene but he was unable to pinpoint how he identified them yet they were strangers and apparently there was no source of light at PW1's homestead apart from the spotlights the thugs were flashing. No identification parade was held to verify his assertions with regard to identification of the appellants. On being put on their defence the 3rd appellant, **Ancent Kibati Mbatha** opted to make unsworn statements in his defence while 1st and 2nd appellants gave sworn statements in defence denying the charge.

The 3rd appellant who was the 1st accused in the trial alleged that he was a bar waiter and was shot at midnight as he was heading home from work at a certain market. He came to Makindu District Hospital to find that he had been shot in his private parts.

Ancent Kibata Matha, 2nd accused in the trial was a matatu conductor in motor vehicle registration No. KAP 008P and that he was arrested at dawn as he was heading to the bus stage to wait for the matatu to begin the day's work.

1st Appellant who was the 3rd accused alleged that he was arrested while returning back home From Kinduani market by officers in a police vehicle who alleged he looked suspicious. 2nd appellant who was the 4th accused alleged he was heading to Moi Girls Secondary School near Kiunduani market when officers in a police vehicle stopped and arrested him. All the appellants denied knowing each other. `

The learned magistrate having carefully evaluated the evidence on record both for the prosecution as well as the defence was satisfied that the prosecution had failed to prove its case against **Ancent Kibata Mbatha** to the required standard and gave him the benefit of doubt, found him not guilty and acquitted him under section 215 of the Criminal Procedure Code for lack of sufficient evidence. However, he found that the prosecution had proved its case against the other appellants beyond reasonable doubt, found them guilty as charged, convicted them accordingly and sentenced them to mandatory death sentence.

The appellants were aggrieved by the conviction and sentence aforesaid. They each preferred an appeal to this court on the grounds that the sentence imposed was unlawful, evidence tendered was contradictory, there was non-compliant with section 207(1) of the Criminal Procedure Code as well as sections 33 and 78 of the Evidence Act, the judgment of the learned magistrate failed to meet the requirements of section 169 of the Criminal Procedure Code and that their defences were not given due consideration.

When the appeals came before us for hearing on 11th July 2012 they were consolidated at the request of **Mrs. Gakobo,** learned Principal State Counsel and the appellants not objecting. The appellants opted to canvass the appeals by way of written submissions which we have carefully read and considered.

The State however conceded to the appeals on the ground that he evidence on record did not support the charge sheet. The ingredients of the offence were not proved. The evidence nonetheless showed that the appellants had damaged the complainant's house by digging holes in it. This amounted to malicious damage to property. Counsel therefore urged us to find them guilty of the said charge and convict them accordingly.

In response, the 1st appellant opted to say nothing. On his part however; the 2nd appellant submitted that the people who caused damage to the complainant's house were never identified. Just like the 1st appellant, the 3rd appellant too elected to keep quiet. .

Despite the State conceding to the appeals, it is still our duty as a first appellate court to re-evaluate the evidence afresh and determine for ourselves whether the evidence taken at the trial can sustain the conviction. We draw our matching orders in this regard from the case of **Okeno vs Republic [1973] E.A. 32.**

The appellants were convicted for the offence of attempted robbery contrary to section 297(2) of the Penal Code. However, having considered the evidence on record, we are bound to agree with the learned Principal State Counsel that the same did not support the charge nor the conviction. The ingredients of the offence were not proved by the prosecution. The offence charged required that there must be an assault with intention to steal. In the circumstances of this case, the complainant had locked himself in his residence cum shop. He never came into contact with any of the robbers. The closest that he did so was with the 3rd appellant whom he shot at using a bow and arrow when he tried to access the store where the complainant had retreated to with his family. The complainant was never assaulted by thugs who raided his compound. The person who seems to have been assaulted by the thugs was PW2. He was the watchman in the employ of the complainant. He testified that in the course of the thugs trying to get to the complainant, they assaulted him . He was allegedly cut on the head by a panga. He was subsequently treated at Makindu District Hospital and discharged. However, his treatment records were not tendered in evidence. Instead PW6, the doctor who testified for the prosecution only produced the P3 form in relation to the 3rd appellant and another person, **Mwanza Mwahika.** However, the said **Mwanza Mwahiko** never testified. In a nutshell the court was not availed sufficient evidence of assault to enable it convict the appellants on the offence charged. It follows therefore the appellants' conviction was not safe.

Nonetheless, the evidence on record show that the appellants dug several holes in the house of the complainant in a bid to get him. The police officers who visited the scene confirmed that indeed the house of the complainant had been extensively damaged. In total 3 holes were dug through the walls. Clearly the appellants committed the offence of malicious damage to property contrary to section 339(1) of the Penal Code. Section 179 of the Criminal Procedure Code allows this court to convict an appellant for another minor offence although not initially charged with. This is however subject to the offence being

minor and the evidence led proving such minor offence. In this case there is no doubt at all that the offence proved on the evidence is one of malicious damage to property. This is a minor offence to one initially preferred against the appellant. Whereas the offence of attempted robbery with violence attracts a death penalty, malicious damage to property is a misdemeanor and attracts a jail term of 5 years.

We are satisfied on the basis of the evidence adduced that the appellants were guilty of the offence of malicious damage to property contrary to section 339(1) of the Penal Code and accordingly convict them.

In the result, we allow the appeals, quash the conviction and set aside the sentences of death imposed. In their place we enter a conviction for the offence of malicious damage to property contrary to section 339(1) of the Penal Code. However, in view of the fact that the appellants have been on death row since 10th June 2008, they have been more than sufficiently punished. We would in the premises commute the sentence to the term so served with the consequence that each appellant shall be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **5TH** dayof **OCTOBER, 2012.**

ASIKE-MAKHANDIA **GEORGE DULU**
JUDGE **JUDGE**