IN THE COURT OF APPEAL AT NYERI

(CORAM: KANTAI, LESIIT, & ALI-ARONI,

JJ.A.) CRIMINAL APPEAL NO. 48 OF 2018

BETWEEN

ELMASI LELEMUSI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from conviction and sentence of the High Court of Kenya at Nanyuki (Kasango, J.) delivered on 4th October 2017

in

HCCRA No. 34 of 2014)

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JUDGMENT OF THE COURT

1. The appellant, **Elmasi Lelemusi**, was charged before the Principal Magistrate's Court in Maralal, with two counts, namely, attempted robbery with violence contrary to ***section 295*** as read with ***section 297(2) of the Penal Code*** and the particulars attributed to this offence were that, on 21st December 2013 at Kisima Township, in Samburu Central District within Samburu County, jointly with others not before Court, being armed with a dangerous weapon an AK 47 riffle Serial Number 794159 and a Samburu sword attempted to rob **Veronica Wairimu Mwaniki** of money

and at or immediately

before or after the time of such robbery threatened to use actual violence on the said **Veronica Wairimu Mwaniki.**

2. In Count II, the appellant was charged for being in possession of a firearm illegally, in violation of ***section 89(1) of the Penal Code.*** The particulars of the offence being that on 21st December 2013, at approximately 8:30 pm, in Kisima Township, Samburu Central District, within Samburu County, he was found in possession of an AK-47 rifle Serial Number 794159, without a certificate or permit, and the circumstances indicated a reasonable presumption that the firearm was intended to be used or had recently been used in a manner that was prejudicial to public order.

3. To put the case into context, we shall briefly revisit the facts of the case. The prosecution called six (6) witnesses. The first prosecution witness was **Veronica Wairimu Mwaniki (PW1),** who testified that she operated Nemakuris Wines and Spirits Shop at Kisima, where she also offered M-Pesa services and was also a KCB agent. On 21st December 2013, while at her place of work, she was attending to Ibrahim Kipkemboi (PW3), who wanted to deposit Kshs. 1,000 in his M-Pesa account, the appellant and another person walked in and stood at the M-Pesa counter. She felt uneasy about the appellant and his companion, prompting her to ask through the guard, Narumoto, who spoke Samburu, what they wanted. Narumoto inquired from the appellant and asked them to leave if they had no business there. The two men exited, but the appellant returned shortly thereafter. The

appellant, who was bare-chested,

covered with two shukas and armed with a rifle, began shooting at the walls of the shop while his accomplice remained outside. He also fired three shots at the counter, causing significant damage to PW1's business. PW1 and her daughter, PW2, lay on the floor due to the gunshots. She later collected three cartridges inside the shop. She further testified that when the appellant attempted to enter the counter, Ibrahim grabbed him from behind, causing the firearm to fall to the ground, and the same was seized by Narumoto, who ran inside the counter for safety, after which PW2 closed the main door of the shop. The appellant then tried to retrieve a sword from his waist, and as PW1 and the others struggled to disarm him. The sword cut PW1's fingers on her left hand, and also bit her left hand. They eventually overpowered the appellant, who fell to the ground.

They called the police, and were joined by members of the public. The appellant was then escorted to the Maralal Police Station. Due to the bite she sustained from the appellant, PW1 went to the Kisima Health Centre and later to Maralal District Hospital for treatment. She was issued a P3 form.

4. **Booda Amran (PW2)** testified that on 21st December 2013, at around 8:30 pm, she had taken food to her mother at her place of work. While there, PW1 told her that she had noticed two Morans who seemed to have ill intentions. Shortly thereafter, PW2 saw the appellant enter the shop and start shooting randomly at the roof. Together with PW1, they lay down behind the counter and heard Ibrahim and

Narumoto calling for help.

The appellant had long, twisted hair covered with a black veil and was wearing a "shuka."

PW3 and Narumoto called for help and subdued the appellant by pinning him down. She quickly closed the main door of the premises and called the police. In the process, the appellant was disarmed, and the sword he carried was taken away from him. PW2 confirmed that nothing was stolen from their premises. Shortly thereafter, the police officers arrived, took the appellant into custody, and recovered the firearm and sword.

5. **Ibrahim Kipkemboi (PW3)** testified that on 21st December 2013, at around 8:30 pm, he was at Nemakuris Mpesa Agent, intending to deposit some money, when he saw the appellant, who attacked him and fired at the roof. He quickly moved to the side, and as the appellant approached the counter, he ambushed him from behind and grabbed his hands, causing the firearm to fall. He called Narumoto, who came, picked up the firearm, and threw it behind the counter. The appellant tried to retrieve a sword he had tied to his waist, but he was overpowered, and they managed to take it away.

6. **Cpl. Samuel Kipsang (PW4),** the arresting officer, testified that on 21st December 2013, at around 8:20 pm, he received a call from a member of the County Assembly inquiring about his location and informing him of gunshots at Mama Booda's premises. He organized a team of officers and quickly proceeded to the scene. Upon arrival, they heard

someone shouting at

them outside. They left some officers outside while two entered the premises. Inside, they found the appellant detained by members of the public and already disarmed. They re-arrested the appellant, searched him and found some money and a phone in his possession. They recovered a firearm, a sword, and two spent cartridges. Thereafter, they escorted the appellant to the Maralal Police Station.

7. **PC Job Muita (PW5),** the investigating officer, testified that on 22nd December 2013, he was informed and instructed by County CID Commandant, Mr. Mugo and OCPD Mr. Bagacha, on a robbery in the Kisima area. He went to the report office to gather details about the incident, then visited the crime scene in the company of other officers.

   He testified further that at the scene of the crime, an AK rifle was recovered. The firearm was identified as a government firearm given to appellant's brother, who was a reservist. He interrogated the appellant, who mentioned that he had been approached by one Kokai, who was at large and armed with a G3 rifle. Kokai allegedly suggested they rob a lady in the Kisima area. He thereafter prepared a memo form and sent the exhibits to a ballistic expert, who confirmed that the four cartridges recovered from the scene of the crime were fired from the same firearm, recovered from the appellant.

8. At the close of the prosecution's case, the appellant was found to have a case to answer and he was placed on his defence. He gave unsworn testimony and informed the court that on the

material day, he had come from Sirata Lolkoti and headed to the market in Lekurut to sell animals. He remained at the market until around 4:00 p.m. As it approached 5:00 p.m., he began walking towards Kisima, arriving there at 7:30 pm. He entered an M-Pesa shop and, as he approached the counter, someone emerged and grabbed him by the waist. Another pulled the firearm from him, but he held on to it, but someone struck his finger with a knife. Realising they intended to take the gun from him, he shot into the air out of fear; he was subsequently arrested. He lost consciousness and only regained it while in police custody at Maralal Police Station. He had with him Kshs. 41,000 before he was arrested, upon regaining consciousness, he found that he only had Kshs. 1,000 left. He asserted that the charges against him were fabricated.

9. In its judgement delivered on 16th July 2014, the trial court found that the prosecution had proven beyond all reasonable doubt that the appellant committed the offence, convicting him and sentencing him to death in Count I. As for Count II, the appellant had, at the time of taking plea, pleaded to having had a firearm and was convicted on his own plea of guilty and sentenced to serve seven (7) years' imprisonment.

10. Dissatisfied with the judgement, the appellant preferred a first appeal to the High Court on grounds that the trial magistrate erred in convicting him and sentencing him to a seven-year sentence for Count II based on an unequivocal

plea of guilt; that there was insufficient evidence to support the charge of attempted robbery in Count I; the conviction was based on

contradictory evidence; the court failed to consider the defence and submissions; the trial court did not specify the language in which the trial was conducted, thereby affecting his right to a fair hearing; and the prosecution failed to adduce in evidence identification forms and an inventory of the recovered cartridges and firearm.

11. In a judgment delivered on 4th October 2017, the High Court dismissed the appeal, affirmed both the conviction and sentence.

12. Dissatisfied with the decision of the High Court, the appellant filed the instant appeal on grounds to be found in a supplementary memorandum of appeal dated 8th February 2025, on the grounds that the learned judge erred in affirming the conviction based on a defective charge that did not include the words "assaulted and/or wounded with intent to steal"; the evidence on record did not support the charge; failing to consider that there was no evidence indicating that the appellant approached the counter to steal; the death sentence was affirmed without the seven-year sentence being held in abeyance unfairly prejudicing the appellant; for failing to evaluate the evidence on record; the appellant was entitled to a lesser punishment not exceeding seven years; and the death sentence is unconstitutional.

13. Learned counsel for the appellant filed submissions dated 10th February 2025. Counsel attacked the charge sheet, urging that it was defective as two distinct charges were

lumped together;

the charge did not conform with section 297(1) and 297(2) of the Penal Code; the charge sheet lacked sufficient particulars as required under Article 50(2)(b) and (n) of the Constitution. In support, he referred to ***Wilson Maina Wanjohi vs. Republic*** ***[2018] KEHC 3120 (KLR),*** where the court held that a criminal offence must be declared to be so by law.

14. Counsel further referred to ***Isaac Omambia vs. Republic [1995] KECA 156 (KLR),*** where this Court held that an objection to the charge could have been raised during the trial and though no such objection was raised, he argued that the same so glaring that the trial magistrate herself, or the prosecution ought to have taken note and taken action under section 214 of the Criminal Procedure Code and that failure by the appellant to raise the issue should in the peculiar circumstances of the case not be visited upon him.

15. On whether there was evidence of intention to steal, counsel asserted that the appellant did not take anything from PW1. Additionally, two eyewitnesses confirmed that the appellant did not make any demands during the incident. Counsel contended that it is common for people from the Samburu community to carry a sword as part of their cultural practices. Further, the appellant did not assault or injure PW1 as alleged, as the sword remained lodged in the appellant's body, and PW1 injured herself while attempting to remove it.

Further, he contended that the evidence on record did not

support the learned Judges' holding that " in the course of the

struggles that ensued, the appellant injured Veronica." That if the appellant intended to injure anyone, he could have used the gun on PW1 and those inside the shop.

16. Regarding the failure to suspend the 7-year sentence on Count II, counsel submitted that it prejudiced the appellant as he is uncertain of which of the two sentences he is serving - whether it is the 7-year sentence or the death sentence.

17. On the legality of the sentence, counsel argued that section 297(2) of the Penal Code, which prescribes the death sentence, conflicts with Section 389 of the Penal Code, which provides that sentences for attempt to commit an offence should not exceed 7 years. He relied on the case of ***David Mwangi Mugo vs. Republic*** ***[2011] KECA 283 (KLR),*** and ***Ndiwa vs. Republic*** ***(Criminal Appeal 290 of 2018) [2024] KECA 45 (KLR).*** In both cases, the Court held that there was a conflict between section 297(2) and 389 of the Penal Code, and once there was an apparent conflict in the provisions in relation to the sentence imposed, an accused person is entitled to the less punitive punishment of the two.

18. Regarding the constitutionality of the death sentence, counsel submitted that the trial magistrate ignored the appellant's mitigation and further argued that the punishment prescribed for the offence is mandatory in nature, thus depriving judicial officers of their discretion and violating ***Articles 50(2)*** and ***25(c) of the Constitution.***

19. On his part, learned counsel for the respondent filed submissions dated 10th February 2025, and submitted that a thorough review of the evidence placed the appellant at the scene of the crime. Further, the prosecution witnesses were consistent in recounting the general events that occurred on the material night. The witnesses testified that the appellant, accompanied by an unknown person, entered the premises of PW1; their behaviour was suspicious, prompting the witnesses to take notice. Further, the appellant admitted being at the scene on the material night and that he indeed fired the gun.

20. Furthermore, counsel submitted that contrary to the appellant's allegations, the prosecution witnesses consistently described how PW1 sustained the injuries during the confrontation and disarmament of the appellant.

21. On whether the charge sheet was unclear and defective, it was submitted that the charge sheet was clear regarding the section of the law under which the charges were based, as well as the particulars of the offence. Furthermore, the appellant was provided with an interpreter who translated the proceedings from English to Samburu, a language the appellant speaks and understands. He pleaded not guilty to Count I and guilty to Count II. In support of this contention, counsel relied on ***Sigilani vs. Republic* [2004] KEHC 1207 (KLR),** where the court held that an accused ought to be charged with an offence known in law and on ***Alexander Lukoye Malika vs. Republic* [2015] KECA 764 (KLR),**

where this Court identified situations

in which a conviction based on a plea of guilty can be interfered with.

22. On the ground that potential witnesses were not called, leaving loose ends in the prosecution's case, counsel argued that the witnesses presented at trial were sufficient to prove the elements of the offence beyond a reasonable doubt, leading to the appellant's conviction. Moreover, section 143 of the Evidence Act states that no specific number of witnesses is required to prove any fact.

23. On whether the court considered the defence, counsel contended that the appellant gave an unsworn testimony which protected him from cross-examination. Further on, interrogating the defence, both courts concluded that the testimony did not displace the prosecution's case, resulting in the trial court's conviction, which the High Court subsequently upheld.

24. On sentencing, counsel submitted that the appellant received a death sentence, which is the statutory mandatory sentence under section 295(2) of the Penal Code. This provision has not been deleted or repealed from the statutes. Additionally, the appellant has not raised the issue of the constitutionality of the sentence in this current appeal, nor did this issue arise before the High Court.

25. Having duly considered the record, the appellant’s grounds of appeal, rival submissions, case law cited, and the law, we are of

the considered opinion that the issues for our consideration are: whether the charge sheet as crafted was defective; whether the ingredients of the offence of attempted robbery with violence were proved to the required standard and whether the appellant was prejudiced for failure to suspend the sentence meted out in Count II.

26. This being a second appeal, the court is restricted to addressing itself to matters of law only as provided in ***section 361 (1)(a***) of the Criminal Procedure Code. The Court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are not based on evidence or they are based on a misapprehension of the evidence, or that the courts below acted on wrong principles in making the findings. In ***Karingo vs. Republic [1982] KECA 23 (KLR),*** this Court stated as follows:

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did. (Reuben Karari s/o Karanja v Republic (1950) 17 EACA 146)."***

27. The appellant has taken issue with having been charged under section 295 as read with 297(2) of the Penal Code

Section 295 provides as follows:

> ***(1) Any person who assaults any person with intent to steal***

anything, and, at 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) Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

Section 297(2) provides that:

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.

28. The case advanced by the prosecution was that the appellant attempted to steal from PW1's shop but was overpowered by PW3 and Narumoto. In the process of disarming the appellant, PW1 was cut as she attempted to take the sword from the appellant, who resisted the move. The appellant made no demands and took nothing from the shop.

29. The two courts below are blamed for failure to see the anomaly in the charge sheet. The petition of appeal filed against the trial court's judgment did not raise the issue, nor was the issue raised or addressed at trial. How, then, can the two courts be blamed for failing to deal with an issue not raised? Since the issue did not arise at the High Court, we are not prepared to deal with it as it is being raised for the first time before this Court.

30. Having stated as above, we see from the facts of the case that the appellant ought to have been charged under ***section 295(1)*** of the Penal Code, which squarely fits the case for the prosecution. The evidence on record, as narrated by the prosecution witnesses, indicates that the appellant and a person accompanying him entered the shop. At the same time, PW3 was being attended to, and the appellant and his companion left after being asked to do so because PW1 & PW3 thought they looked suspicious. A short while later, the appellant returned alone and headed to the counter when PW3 and Narumoto accosted him. The appellant, who was armed, shot at the ceiling, but he was overpowered and subdued. The appellant explained that he had gone to deposit some money, but was accosted; he feared that his gun was going to be taken, and he fired in the air, possibly to scare his attackers. PW1 in her evidence stated that when the appellant was subdued, she went for the sword and was cut in the process. All witnesses agree that the appellant did not steal or demand anything.

31. With the facts as narrated by both sides, the appellant's version of the event appears plausible. He entered the shop the first time with one other person, intending to deposit money. He left when someone else was being attended to and then returned when he was accosted. He felt threatened, and he shot into the air to scare. Both times, he did not steal or attempt to steal, nor demand anything. These simple facts are not in dispute, and we therefore arrive at the conclusion that the claim of attempted robbery was misplaced, based on mere suspicion and cannot stand.

32. Indeed, the appellant had no business carrying an unlicensed gun around, which aroused suspicion. For this, he was charged (Count II), pleaded guilty, convicted and sentenced to seven (7) years imprisonment.

33. The last issue raised concerns the effect of failure to suspend the lesser charge when the appellant was sentenced to suffer death. The court indeed fell into error. However, with the finding above, the ground is now moot. Nevertheless, the position taken by the courts is that one cannot serve a death sentence concurrently or consecutively with another. In ***Douglas Sila Mutuku & 2 Others vs. Republic (2014) KECA 867(KLR),*** this Court in similar situations had this to say:

> ***"…it is now a settled practice that it is inappropriate and clearly impracticable to sentence a person to suffer death more than once. Both courts below ought to have ordered the sentences on***

the other counts to be held in abeyance and only be given effect

if the first death sentence is, for whatever
reason set aside on appeal."

34. In the instant scenario, though the trial court ought to have held the lesser punishment in abeyance, failure to do so cannot be said to have caused a miscarriage of justice. It is common sense that the death penalty was ultimate in relation to the two punishments. The reason why lesser sentences are held in abeyance is to cater for circumstances where the severe sentences are overturned or set aside. In the situation the appellant now finds himself in, the lesser punishment then takes effect.

35. Based on our findings on Count 1, should the appellant have served the seven-year jail term in Count II, judgment having been delivered 8 years ago, he may be set free unless otherwise lawfully held.

Dated and delivered at Nyeri this 11th day of December, 2025.

S. ole KANTAI

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF

APPEAL ALI-

ARONI

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

Signed

DEPUTY REGISTRAR