**REPUBLIC OF KENYA**

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

**CRIMINAL APPELLATE DIVISION**

**CRIMINAL APPEAL NO. E019 OF 2025**

**KELISA DULACHA…….**

**APPELLANT**

**VERSUS**

**REPUBLIC…….**

**……RESPONDENT**

**(Being an appeal arising from the conviction and sentence dated 15th May 2025 delivered by Hon W.K CHERUIYOT (PM) in Moyale SPMCR No E059 of 2024**

**BETWEEN**

**REPUBLIC……PROSECUTOR**

**VERSUS**

**KELISA DULACHA ……ACCUSED**

## JUDGEMENT

### A. INTRODUCTION

1. The Appellant and two others were charged with the offence of attempted robbery with violence contrary to section 297(2) of the Penal Code. The particulars were that on the 18th day of February 2024 at about 0110hrs at Hillo mining site in Moyale Sub County within Marsabit county with others not before court while armed with offensive weapons namely carbine firearm and panga attempted to rob ***ABDIKADIR MOHAMED'S*** shop and immediately before attempting to rob threatened to use violence on the said ***ABDIKADIR MOHAMED***.
2. On count (ii) and (iii), the Appellants co accused one Ibrahim Guracha Borbor was charged with the offence of being in possession of a firearm and ammunition without a firearm certificate contrary to provisions of ***Section 4(1),(2) of the firearms Act, Cap 114 laws of Kenya*** and on Count (iv) the Appellant was charged with the offence of being unlawfully present in Kenya contrary to

***Section 53(1),(j) as read with Section 53(2) of the Kenya Citizenship and Immigration Act of 2011.***

3. The Appellant took plea and admitted to being in Kenya unlawfully and was sentenced to pay a fine of Kshs.10,000/= or in default to serve three months imprisonment, but denied the charge faced on the main count of attempted robbery with violence. The prosecution called eight (8) witnesses to prove their case and at the end of the trial the Appellant was convicted of the offence of attempted robbery contrary to section 297(2) of the Penal code and after mitigation was sentenced to serve twenty (20) years imprisonment.

## B. EVIDENCE AT TRIAL

### (i) Prosecution Case

4. **PW1 Abele Warabo**, stated that he was a village elder and a businessman within Hillo area of Moyale town. He recalled that on 18.02.2024 at about 0100hrs he was asleep in his house when he heard screams and woke up to go check on what was happening. He found a crowd of people who had arrested the appellant and accused him of staging an armed robbery. He pacified the crown

and called the police, who arrived and rearrested the appellant, who had been found in possession of a gun. He confirmed that he did not witness the attempted robbery incident and did not know who owned the gun found in possession of the Appellant.

5. **PW2 Halkano Abdullahi Tache**, testified and stated that he was a Tuk Tuk driver and, that on the material, evening had gone to Hillo mines to try his luck in mining for gold. While do so he heard noise and went to inquire on what was going on. He was told that the accused and other unknown robbers had attempted to rob a wholesale shop, while armed with a rifle and he ( the appellant )had been arrested by the mob and the rifle recovered from him. On inquiry the appellant confessed that his accomplices were accused 2 and accused 3, Whom they arrested and handed them over to the police.

6. PW2 confirmed that the appellant had suffered mob justice and apart from the rifle, his colleagues in crime had been found in possession of a panga and four phones, one of which belonged to the watchman at the Wholesale shop, where the attempted robbery had occurred. Under cross

examination PW2 confirmed that he was not at the scene of the attempted robbery and had acted on information given by the Appellant to arrest the other co accused.

7. **PW3 PC Bernard Onyango** attached to Dabel police station confirmed that on the material night at about 3.00 am he was asleep at his house, when he was called by the OCS, who requested him to accompany him to Hillo where some armed robbers had been arrested by members of the public. When they went to the scene the found the Appellant and his co accused and proceeded to re arrest them and escorted them to the police station. He also affirmed that at the point of re arrested they did recover a gun and machete. The said gun was recovered from the appellant, while the machete had been recovered from the appellants co accused (A2) at the trial.

8. Upon arrest, he proceed to prepare an inventory for the recovered rifle, six rounds of ammunition, which was signed by the appellant and the second inventory of the Nokia phones which was signed by the 2nd accused person. Under cross examination, he clarified that he found the gun had already been confiscated by the elders and they were the ones

who told him that the same had been recovered from the Appellant.

9. **PW4 Dalacha Abdikadir Mohammed** testified and stated that on the night of 18.02.2024 at around 1.00am he was at his shop/residence, when he heard people talking outside, and decided to check what was going on. He found his watchman, Molu seated and was surrounded by four people. As he approached them one of the strangers pointed a gun at him and ordered him to sit down and when he asked them what the problem was, they said that they were hungry and needed to get foodstuff from his shop. As the commotion reigned, his wife who was inside the house came out and started to scream, which caused the robbers to panic, and they opted to run away. He did not chase after the said robbers, but neighbours responded to the call for help, chase the said robbers and managed to arrest the Appellant, who was found in possession of a gun. In the process of interrogation, he named A2 as his co - conspirator and the mob went and arrested him too.

10. Under cross examination PW4 confirmed that the Appellant was not personally known to him before the robbery incident and had only seen him on the

material night. He clarified that though initially he had covered his face with a Kikoi, he saw him and recognised him once he had been re-arrested by members of the public and brought back to his shop. He further confirmed that it was the appellant who initially pointed the gun at him when he came out to check what was going on.

11. **PW5 Rukia Said** confirmed that she was PW4's wife and recalled that on the material night at around 0100hrs she was woken up by noise outside their home and followed her husband outside to check on what was going on. To her surprise, she found four persons armed with pangs and a gun had surrounded him and in panic started to scream for help. The said robbers panicked and ran away with neighbours in hot pursuit and in the process, they managed to arrest the Appellant, who on interrogation named his accomplices and they too were rounded up and handed over to the police

12. PW5 confirmed that though she did not previously know the Appellant, she was sure that she saw him on the material night holding the gun and he was immediately thereafter arrested with the said gun while hiding in a gold mine ditch. He

had tried to cock the said gun to shot at members of the public, but had failed in his endeavour to do so and members of the public thereupon pounced on him and had managed to arrest him and handed him over to the elders.

13. **PW6 Salat Mohamed** also confirmed that on the material night he was from the gold mine and was heading home at about 0100hrs, when he bumped into a crowd of people and elders, who had arrested two persons, including the Appellant and his co accused, known as Wario. The crowd had recovered a gun, a panga, and 2 phones from the said accused persons and they were later re arrested by the police who came and picked them up. Under cross examination, PW6 confirmed that he was not present when the Appellant was arrested but participated in the public arrest of the second accused person.

14. **PW7 P.C. Laura Ndiwa** from firearm laboratory, DCI headquarters stated that she had 21 years' experience in firearm examination and had undertaken extensive training in the same field. On 06.03.2023 they had received an exhibit memo form from P.C Ronald Onderi of DCI Moyale, with a request to examine a rifle serial No 88164 marked

as exhibit A1 and six round of ammunition marked as B1-B6.

15. She proceeded to examine the said exhibits and confirmed that Exhibit A to be a Russian siminor self-loading rifle chambered for Calibre 7.62 x 39mm, which was in good condition and was capable of being fired when test fired using rounds of ammunition in their store and therefore was a firearm within the meaning of the firearms Act. Further she did examine the recovered rounds of ammunition of calibre 7.62 X39mm and they were dented, being an indication that an attempt had been made to fire the same. She proceeded to dissect them and found each complete in component part that is the bullet and thus formed an opinion that exhibits B1 to B6 were not live bullets but were ammunition in terms of the firearm Act.

16. PW7 proceeded to produce the said Exhibits into evidence accompanied by her examination report. Under cross examination she confirmed that her work was limited to examine the firearm and not to establish its owner.

17. **PW8 P.C. Rondald Onderi**, confirmed that he was investigating officer of this case. On the

18.02.2024 he reported on duty and was briefed by the DCIO about the two suspects who had been arrested and detained at Dabel police station in a case relating to an attempted robbery which had occurred at Hillo Mining site and was further directed to go to the said scene to pick two more suspects who had later been arrested and were under the custody of the elders. He also got contacts of the complainant and other relevant witnesses who explained to him what had transpired and, in the process, also got to photograph the crime scene.

18. Back at the station, he took custody of the recovered rifle, panga and 2 phones and thereafter made an inventory of the same which was signed by the suspects. After recording the witness statements, he did charge the accused with the offence they faced before the trial court. PW8 produced the rifle, 6 rounds of ammunition and phones into evidence and also confirmed that the 4th suspect was the wholesale watchman, whom he released after investigations had exonerated him from the said robbery.

**(ii) <u>Defence Case</u>**

19. The Appellant stated that he was a herd's man residing in Ethopia. Concerning the charges he faced he confirmed that on the material day he was at Hillo area and had been framed by the complainant as they had disagreed with him over access into a gold mine. He denied having possession of the recovered rifle and urged the court to discharge him of the offence faced.

20. **DW2 Wario Ana Halake** confirmed that he was a gold miner residing within Dabel area of Moyale town. On the material night four persons had gone to his house and called him to come out, after which they took him to the elder Abdi's home, where he found the appellant, who had been tied on his hands and legs. He was asked by the crowd if he knew the appellant and/or if he had information on the recovered rifle but was categorical that the appellant was not known to him and also that he had no iota of information on the recovered gun. The police were later called, and he was arrested alongside the appellant.

21. **DW3 Ibrahim Guracha Borbor** confirmed that on the material night he was at Hillo area mining gold at around 11.30pm, when Elder Abdi accompanied

by some youth, came and told him that his gun had been used to commit a robbery. They arrested him and he was subjected to physical assault and later handed over to the police. He further stated that both his co accused were persons not known to him and denied any involvement in the crime that occurred.

22. At the close of the defence case, the learned trial magistrate considered all the evidence adduced and found the Appellant guilty of the offence of attempted robbery with violence and, after mitigation, proceeded to sentence the Appellant to serve twenty (20) years in prison.

**C. THE APPEAL**

23. Dissatisfied by the conviction and sentence passed, the Appellant filed the following grounds of Appeal ;

***a. THAT the learned trial magistrate erred in law and fact by not noticing that the prosecution did not prove their case beyond any shadow of doubt.***

***b. THAT the learned trial magistrate erred in both matters of law and facts for convicting and sentencing the appellant***

***to serve an unlawful sentence in contravention of Section 389 of the Penal code and Article 50(2),(p) of the Constitution of Kenya***

c. ***<u>THAT</u> the learned trial magistrate erred in law and fact by not observing the mandatory provisions in Article 50(2), (g)&(h) of the Constitution and Section 43 of the legal Aid Act.***

d. ***THAT the learned trial Magistrate erred in both matters of law and facts by failing to notice that the prosecution's case was marred with contradictions and inconsistencies and discrepancies that go to the root of the case thereby offending the doctrine of fair trial as enshrined under Article 25(c) of the Constitution.***

e. ***THAT the learned trial Magistrate erred in both law and fact by failing to note that the vital witnesses ( the alleged elders who arrested the appellant and the watchman of the shop, one Molu Dulacha ) were not availed before court***

***to clear doubts as they were eye witnesses.***

f. ***THAT the learned trial Magistrate erred in both matters of law and facts by failing to notice that there were existing personal differences between the appellant and the complainant.***

g. ***THAT the learned trail Magistrate erred in both matters of law and facts by failing to order the sentence to start from the date of arrest according to Section 333(2) of the Criminal Procedure Code (CPC).***

h. ***THAT the learned trial magistrate erred in matters of law and facts by rejecting the Appellants defence without any articulate reason.***

24. The Appellant prayed that his conviction and sentence be quashed and he be set free.

## D. SUBMISSIONS

25. The Appellant relied on his submissions dated 17.11.2025 where he stated that his plea was not taken in a procedural manner and the trial court

record did not show whether he had admitted to the facts or not. This was a great procedural error that infringed on his right to fair trial under ***Article 50(2) of the Constitution of Kenya, 2010***. Secondly, the prosecution's case had been marred by contradictions, inconsistences and discrepancies especially regarding where and/or who had possession of the exhibits that were recovered. Some witnesses had alleged that the gun was recovered on him, while others had alleged that he had a panga and four phones. The evidence adduced was therefore unreliable and unsafe to be used as a basis to convict him.

26. Further, the evidence adduced was also not verifiable, for instance the purported firearm used had three conflicting serial numbers, being Serial No HA/64 as alluded to by witnesses, Serial No 88164 as alluded to by the ballistic expert and serial No H164, yet these glaring discrepancies were not explained by the prosecution. Reliance was placed in **Philip Muiriri Ndaruga Vs Republic, Criminal Appeal No 76 of 2012), 2016 Eklr**, where it was expounded that the

prosecution must prove their case beyond reasonable doubt.

27. Thirdly, the Appellant emphasised that none of the witnesses who testified in court identified him as the perpetrator of the attempted robbery and had all relied on hearsay evidence to place him at the scene of crime. There was thus no positive identification established to link him to the alleged crime. The prosecution had also failed to call vital witnesses, especially the wholesale watchman to prove their allegations. Reliance was placed in the case of ***Bukenya Vs Uganda (1972) & John Kenga Vs Republic, Criminal Appeal No 1171 of 1984, Nairobi High Court*** to emphasis on this point.

28. In addition, the appellant submitted that the proceedings were conducted in a prejudicial manner as he was neither informed of his right nor granted legal representation at state expense as he was facing a serious capital offence which attracted mandatory death sentence. This lapse had caused him substantial injustice and rendered the trial to be a nullity. Reliance was placed in **Jared Onguti Nyantika Vs Republic (2019)**

**Eklr & Daniel Mpayo Ngiyaya Vs Republic (2018) eKLR,** where it was emphasized that the accused had a right to representation at state expense if substantial injustice would otherwise result.

29. The Appellant also faulted the trial court for sentencing him to a term of twenty (20) years imprisonment, yet the offence attracted a maximum of seven (7) years by dint of the provisions of ***Section 389 of the Penal Code.*** Additionally, the trial court had also failed to apply the provision of ***Section 333(2) of the Criminal Procedure Code*** and the Kenya Judiciary Sentencing guidelines, 2016 to order that his sentence to run from the day of arrest and supported these arguments by placing reliance on ***Ahmed Abolfathi Mohammed Vs Republic (2018) Eklr & Bethwel Wilson Kibor Vs Republic (2009) Eklr.***

30. The Appellant thus urged this court to find that his Appeal had merit and be pleased to allow the same.

31. This Appeal was opposed by the state, who also relied on their submissions dated 15th December

2025. They emphasized that even though the incident occurred at night, the Appellant was arrested immediately after the attempted robbery as witnessed by PW5 and the chain reaction from the attempted robbery, screams for help and immediate arrest of the Appellant by members of the public excluded the possibility of error in identification and rendered the conviction to be safe.

32. Secondly the Appellants' contention that his sentence of 20 years was unlawful by virtue of ***Section 389 of the Penal code*** also was not tenable as ***Section 297(2) of the Penal Code*** provided a specific punishment of attempted robbery with violence. Reliance was placed in the case of ***Wasali Vs Republic (2024) KECA 1214 (KLR), where the court cited James Maina Magare & Another Vr Republic*** with approval and emphasised that ***Section 389 of the Penal Code*** was not applicable to offences of robbery with violence since a specific penalty had been provided.

33. On the third issue raised, it was the state's contention that even though the Appellant was not

represented at trial, he did not suffer any prejudice or substantial injustice as he followed the proceedings and got an opportunity to ask witnesses questions and also gave his defence. From the analysis of the said proceedings, there is no indication that the Appellant was prejudiced in any manner by the courts failure to comply with ***Article 50(2),(g)&(h) of the Constitution of Kenya***. Reliance was placed in ***William Oongo Arunda (Hitherto referred to as Patrick Odour Ochieng ) Vs Republic (2022) KECA 23 (KLR)*** where it was held that failure to inform the accused of his right did not vitiate his trial, where the said accused person fully understood and participated in the said trial.

34. On the final issue raised of failure by the prosecution to call the watchmen to testify, it was the state's submissions that PW4 and PW5 evidence and the circumstantial evidence adduced had covered the evidence, which the said watchman would have testified on. Reliance was placed on the case of ***Keter Vs Republic (2007) 1EA 135***, where it was held that the prosecution was not obliged to call a superfluity of witnesses

but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt.

35. The state thus urged the court to find that the Appellants conviction and sentence to be safe and proceed to dismiss this Appeal.

## E. ANALYSIS & DETERMINATION

36. The being the first appeal, this court is as a matter of law enjoined to analyze and re-evaluate a fresh all the evidence adduced before the lower court and to draw its own conclusion while bearing in mind that it neither saw nor heard any of the witnesses. ***See Okeno versus Republic (1072) EA 32, Pandya versus Republic (1957) EA 336) &Shantital M Ruwala versus Republic (1957) EA 570,*** where the court of appeal set out the duties of the first appellant court.

37. This court has examined the Record of Appeal, the grounds of appeal and given due consideration to the submissions by the Appellant and the respondent Counsel and find that the following issues arise for determination.

    a. ***Whether the ingredients of the offence of attempted robbery with violence were proved.***

***b. Whether the trial court failure to inform the Appellant of his rights under the provisions of Article 50(2),(g)&(h) as read with Section 43 of the legal Aid Act rendered the trial to be a nullity.***

***c. Whether the sentence passed was unlawful by virtue of Section 389 of the Penal code, which provides for a sentence of not more than 7 years and/or applicability of the provisions of Section 333(2) of the Criminal Procedure Code***

(i) ***Whether the ingredients of the offence of attempted robbery with violence were proved***

38. In criminal cases, the burden of proof lies with the prosecution, and they have to persuade the court either by preponderance of evidence or beyond reasonable doubt, that the material facts that constitute their whole case are true, thus consequently have established their case and deserve to have judgment given in their favour. See **Miller vs. Ministry of Pensions (1947) 2 All ER, 372, Republic Vs Edward Kirui (2014) eKLR, and Murugan & Another Vs State by Prosecutor, Tamil Nadu & Another (2008) INSC 1688**

39. The ***Section 297 of the Penal Code*** creates the offence of attempted robbery and provides the sentence as follows:

> "***297.<u>Attempted robbery</u>***
>
> ***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.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."***

40. An attempt to commit a crime is where the accused person takes steps to commit a crime, but for some reason, the intended crime does not come to

fruition. ***Section 388 of the Penal Code*** defines "attempt" as follows:

***Section 388 "Attempt defined"***

1. ***When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.***

2. ***It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfilment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.***

3. ***It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence."***

41. The above provisions must also be read with ***Section 295 of the Penal Code,*** which defines the offence of robbery as follows: -

> ***"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."***

42. Therefore, the aforestated provisions thus require that, for the offence of attempted robbery with violence to be established, it must be proved inter alia that the robber; -

***a) Attempted to rob the victim.***

***b) Was armed with a dangerous or offensive weapon.***

***c) Was in the company of one or more other person(s);***

***d) Assaulted, wounded, beat or threatened to use violence against the victim, in order to steal or resist an attempt to thwart the act of stealing.***

43. PW4 & PW5 clearly saw the Appellant as the assailant who attempted to rob them on the material night, while accompanied by three other armed assailants and when PW5 screamed for help, the neighbors gave chase and caught the Appellant red handed while armed with the rifle, which was produced as an exhibit before the court. He was also immediately fog marched back to the incident scene where the said PW4 and PW5 had proper time and opportunity to properly identify him and confirmed that he was amongst the persons who attempted to rob them.

44. Even though the Appellant strongly submits that the prosecution witnesses did not properly identify him, his arrest by the mob immediately thereafter in possession of the rifle corroborates his involvement in the said crime and leads to inescapable conclusion that he was one of the person who attempted to rob PW4 on the material night. See ***Mukungu v Republic [2002] 2 EA 482***, where the Court of Appeal citing ***Mutonyi v Republic [1982] KLR 2003***, held that:

> ***"An important element in the definition of corroboration is that it affects the***

***accused by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it: (See Republic v Manilal Ishwerlal Purohit [1942] 9 EACA 58, 61.")***

45. In light of the above evidence, the Appellants' contention that he was not properly identified, and/or that there were inconsistencies in the evidence adduced cannot hold and are rejected. Similarly, his contention that the prosecutions failure to call the watchman guarding PW4'S premises was fatal too cannot hold given the direct and circumstantial evidence connecting him to the said crime. See ***Keter Vs Republic (2007) 1 EA 135***.

(ii) ***Whether the trial's court failure to inform the Appellant of his rights under the provisions of Article 50(2),(g)&(h) as read with Section 43 of the legal Aid Act rendered the trial to be a nullity.***

46. The Appellant alleged that the manner in which the proceedings were conducted greatly prejudiced him as he was neither informed or given counsel to

represent him, yet he was facing a crime which attracted severe punishment. This lapse had caused him substantial injustice and rendered the said trial to be a nullity.

47. In ***William Odongo Arunda ( hithereto referred to as Patrick Odour Ochieng Vs Republic (2022) KECA 23 (KLR***), the Court of Appeal stated that;

> " ***It should be standard practice in every criminal trial for the accused person to be informed, at the onset, of his right to legal representation. The constitution demands it. In the present case, the record does not show that the appellant was informed by the trial court of those rights. However, quite apart from the fact that these matters were not raised before the trial court, from the way the appellant cross examined the prosecution witnesses and from his general conduct during the trial, it is not evident an injustice, nay substantive injustice, resulted from the omission by the trial court to inform the appellant fo his rights under Articles 50(2),(g) and 50(2),(h) of the Constitution. The failure by the trial court to inform the appellant of his rights in this case should not therefore be a basis for vitiating his trial. All in all, we re***

***satisfied that the conviction is well founded, and we have no basis for interfering with the same.”***

48. In **Owidi v Republic (Criminal Appeal E054 of 2022) [2023] KEHC 21977 (KLR) (23)** (Judgment) Wendoh J. persuasively stated as follows.

> ‘***Article 50 (2) (h) requires that an accused be informed of the right to be assigned counsel at the State expense if substantial injustice would otherwise result. He is also supposed to be informed of this right promptly. From the record, the appellant was not informed of the said right. However, the said right is not absolute. One has to demonstrate that substantial injustice would result to him if the right is not complied with”.***

49. I have gone through the entire proceedings and do find that even though the trial court did not comply with provisions of ***Article 50(2),(g)&(h) of the Constitution***, the Appellant fully participated in the trial, cross examined all prosecution witnesses and further gave his defence. At no point did he complain to the trial magistrate that he was unable to follow the proceedings and/or requested for help in any manner. It therefore cannot be said that he

was prejudiced as alleged nor did he suffer any substantial injustice.

(iii) ***Whether the sentence passed was unlawful by virtue of Section 389 of the Penal code, which provides for a sentence of not more than 7 years and/or applicability of the provisions of Section 333(2) of the Criminal Procedure Code***

50. On this ground, the Appellant did contend that his sentence was unlawful as the charge of attempted robbery attracted a maximum sentence of seven (7) years by dint of ***Section 389 of the Penal code***. The Appellants' contention though ingenious doesn't hold true, as the said ***section 389 of the penal code*** does not apply to the offence of robbery with violence, whose penalty is provided for under ***Section 297(2) of the Penal Code***. In ***Wasali Vs Republic (2024) KECA 1214(KLR)***, the court of Appeal held that;

"These two provisions were considered by this court in ***James Maina Magare & Another Vs Republic ( 2012) eKLR*** and starting with Section 389, this is how the court unraveled the provision.

***15. In our view, three things stand out from a reading of this section. Firstly, this section sets out a general offence of an attempt to commit a felony or a misdemeanor. This is an implied recognition that there are instances where specific offences have been provided for in the Penal Code, but no specific provision made for an attempt to commit such an offence. Secondly the Section recognizes that there are situations where no punishment has been provided for an attempt to commit specifi offences, and the section therefore provides a formula for sentencing where no other punishment is provided for such attempt. Thirdly, a specific sentence term of imprisonment not exceeding seven years has been provided, where the offence attempted is one punishable by death or life imprisonment. The latter part of Section 389 of the Penal Code which provides for the specific sentence, must be read in conjunction with the words "if no ther punishment is provided" and " but so that" in the preceding part of that section. In other words, the specific punishment in cases where the offence attempted is one punishable by death or life imprisonment, is only applicable where the legislature has not provided any other sentence for such an attempt."***

51.The court further went on to hold that;

> " ***The upshot of the above is that the appellant herein, having been charged with the offence of attempted robbery with violence under Section 297(2) of the Penal Code, which section clearly provides for a sentence of death, Section 389 of the penal code which is a penalty section for attempts to commit a felony or a misdemeanor where no other punishment is provided, was not applicable to the appellant as he was liable to be sentenced under section 297(2) of the Penal Code. That section provides for a mandatory death sentence which as stated by the supreme court in Republic Vs Gichuki Mwangi; Initiative for Strategic litigation in Africa (ISLA) & 3 Others ( Amicus Curiae ) (2024) 23 KLR, the trial court had no option but to impose***.

52. The Appellant was sentenced to serve a term of 20 years, which sentence was illegal, but the court will leave it at that since there is no cross Appeal filed to have the same enhanced.

53. On Applicability of ***Section 333(2) of the Criminal procedure Code***, it is settled law that the Appellant was entitled to benefit from the

same. Refence is made to the case of ***Ahamad Abolfathi Mohammed & another v Republic (2018) eKLR*** Pages 63 , where the court of Appeal held that;

> ***"..By dint of Section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced... "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody.....It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person.***

54. The Appellant was arrested on 18.02.2024 and was held in custody until 15.05. 2025 when he was sentenced to serve 20 years imprisonment having been found guilty of the offence of attempted robbery. The trial Magistrate erred in not computing the time spent in custody and thus the sentence period is reviewed and will start to run

from 18.02.2024, when the Appellant was first arrested.

## ***F. DISPOSITION***

55. The upshot, having considered the entire record of appeal and parties submissions, I do find that the Appeal as against both conviction and sentence fails and is hereby dismissed.

56. The appellant's sentence of 20 year will start to run from 18/2/2024 when he was arrested.

57. Right of Appeal 14 days.

58. It is so ordered

Judgment read, signed and delivered in Open Court at **MARSABIT** this **16th** day of **FEBRUARY 2026**.

**FRANCIS RAYOLA OLEL**

**JUDGE**

**Delivered** on the **virtual platform, Teams** this **16th** Day of **FEBRUARY 2026.**

In the presence of:-

.....Appellant

.....For O.D.P.P

.....Court Assistant