



REPUBLIC OF KENYA



KENYA LAW
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**Ndiwa v Republic (Criminal Appeal 290 of 2018)
[2024] KECA 45 (KLR) (25 January 2024) (Reasons)**

Neutral citation: [2024] KECA 45 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 290 OF 2018
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
JANUARY 25, 2024**

BETWEEN

NICHOLAS OGOLLA NDIWA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of the High Court of Kenya at Kisii
(Sitati & Korir, JJ.) dated 14th March, 2013 in HCCRA No. 176 of 2011)*

REASONS

Reasons for The Decision of the Court

1. When the appellant, Nicholas Ogola Ndiwa, appeared before us for the hearing of his appeal on 26th September, 2023, he withdrew his challenge against conviction and informed us that he only wished to challenge, as a matter of law, the life imprisonment sentence imposed on him. We allowed him to withdraw the appeal against conviction and proceed with the appeal against sentence only.
2. The respondent, through learned counsel, Mr. Okango, conceded to the appeal against sentence. Consequently, we allowed the appeal against sentence, set the appellant at liberty forthwith unless he was otherwise being lawfully held in prison and, under Rule 34(7) of the Court of Appeal Rules, 2022, reserved reasons for the decision. These are the reasons for that decision.
3. The appellant was the accused person in the trial before the Senior Resident Magistrate's Court in Rongo in Criminal Case No. 100 of 2011. He was charged with the offence of attempted robbery with violence contrary to section 297(2) of the Penal Code. The particulars of the offence were that on 14th May, 2010, at Winter Estate, Kidero Bara Sub location within Migori County, jointly with others not before court, being armed with offensive weapons, namely, pangas, wounded Susan Achieng Ochieng, with the intent to rob her.



4. The appellant pleaded not guilty to the charge and the case proceeded to full hearing. The prosecution called a total of three (3) witnesses and closed its case. The trial court found that the prosecution had established a prima facie case and placed the appellant on his defence. In his defence, the appellant gave unsworn testimony and called no witnesses.
5. At the conclusion of the trial, the learned trial magistrate, in a judgement dated and delivered on 2nd September, 2011, convicted the appellant and sentenced him to life imprisonment.
6. Aggrieved by the trial court's decision, the appellant filed an appeal against the conviction and sentence before the High Court via Kisii High Court, Criminal Appeal No. 176 of 2011.
7. The High Court dismissed the appeal and upheld the conviction and sentence in a judgment dated and delivered on 14th March, 2013.
8. The appellant was, again, dissatisfied with the decision of the High Court and lodged the present appeal to this Court. As aforesaid, his original appeal challenged both conviction and sentence. However, at the plenary hearing he withdrew his appeal against conviction. Consequently, he only argued his conviction against sentence on the single ground that the punishment inflicted was not only harsh and excessive but was illegal in view of the apparent conflict between section 297(2) and 389 of the Penal Code and our past jurisprudence on the question
9. The appeal was argued by way of written submissions by both parties. During the virtual hearing, the appellant appeared in person, whereas learned counsel, Mr. Okango, appeared for the respondent.
10. Briefly, the facts of the case as they emerged at trial and as confirmed by the appellant in his withdrawal of appeal against conviction were as follows. The appellant was a former employee of the complainant (PW1). On the night of 14th May, 2010, PW1 went outside her house for a short call at about 9.00pm. On her way back to the house, while she passed by the parking area where vehicles were parked, she saw people armed with pangas. The people accosted her and tried to push her into the house, at which point she screamed and attracted the attention of her husband (PW2) who dashed out of the house. With the help of neighbours, they managed to temporarily subdue one of the attackers who they identified as the appellant. However, after a brief struggle, the appellant freed himself and fled. The matter was reported to the police and the appellant was later arrested. He was charged with the offence of attempted robbery.
11. Even in allowing the appellant's appeal against sentence only to proceed, we are mindful of our remit as a second appellate court. Our jurisdiction is limited by dint of Section 361(a) of the Criminal Procedure Code to deal with matters of law only and not to delve into matters of fact which have been dealt with by the trial court and re-evaluated by the first appellate court. For purposes of this section, severity of sentence is defined as a matter of fact. See *Samuel Warui Karimi vs. Republic* [2016] eKLR.
12. The appellant relied on his written submissions in which he challenged the legality of the life imprisonment that was imposed on him. He argued that section 297(2) of the *Penal Code* which prescribes the death sentence, is in conflict with section 389 of the same, which requires that in an offence of attempt to commit a felony, the sentence should not exceed seven (7) years imprisonment. He relied on this Court's decision in *Evanson Muiruri Gichane vs. Republic* [2010] eKLR, Nairobi Criminal Appeal No. 277 of 2007, whereby the appellant had been convicted of attempted robbery with violence and sentenced to death. In that case, the Court observed that where there is an apparent conflict in law, that is, conflict between section 297(2) and 389 of the Penal Code, the same may be resolved by Parliament, but in the interim the appellant was entitled to the less punitive of the two sentences. In the result, the Court dismissed the appeal on conviction and allowed the appeal on



sentence to the extent that the death sentence was substituted with a prison term equal to the time already served, as the appellant had already served a prison term of six (6) calendar years from the date of his conviction. The appellant also relied on this Court’s decision in the case of Boniface Juma Khisa vs. Republic, Criminal Appeal No. 268 of 2009, which followed the same jurisprudence with regard to the conflict of section 297(2) and 389 of the Penal Code.

13. The appellant urged this Court to examine the conflict between the said two sections of the Penal Code and find that the same violated the appellant’s fundamental rights. He further urged that reconciliation between the said two sections of the Penal Code would ensure fair treatment of all accused persons as envisaged by Article 50(2)(p) of the Constitution and the embodiment of other rights articulated under Articles 27(1)(2), 28 and 19(2) of the Constitution.
14. On the other hand, the respondent, in its written submissions conceded the appellant’s appeal against sentence and relied on the High Court cases of Peter Muindi & Another vs. Director of Public Prosecution [2019] eKLR and Mwangi v Director of Public Prosecution (Constitutional Petition No. 159 of 2019) [2021] KEHC 113 (KLR), which followed the jurisprudence in the case of Evanson Muiruri Gichane vs. Republic [2010] eKLR, Nairobi Criminal Appeal No. 277 of 2007.
15. The two conflicting sections of the Penal Code provide as follows:

Section 297(2):

- (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.

Section 389:

Any person who attempts to commit a felony or a misdemeanor is guilty of an offence and is liable, if no other punishment is provided, to one-half of such punishment as may be provided for the offence attempted, but so that if that offence is one punishable by death or life imprisonment he shall not be liable to imprisonment for a term exceeding seven years. (emphasis supplied).

16. In Evanson Muiruri Gichane v Republic [2010] eKLR, Nairobi Criminal Appeal No. 277 of 2007 supra, this Court wrestled with this apparent conflict and held as follows:

“We have considered this ground of appeal and submissions by both Mr. Monda and Mr. Odhiambo and we are of the view that indeed, there may be a contradiction between sections 297(2) and 389 of the Penal Code. The section under which the appellant was convicted provides for death sentence while section 389 provides inter alia:-

“--- but so that if that offence is one punishable by death or life imprisonment he shall not be liable to imprisonment for a term exceeding seven years.”

The appellant was convicted of an offence (attempted robbery with violence) punishable by death. In terms of section 389 of the Penal Code the appellant shall not be liable to imprisonment for a term exceeding seven years. But he was sentenced to death. The apparent



conflict in the law may only be resolved by Parliament. But the appellant is entitled to the less punitive of the two sentences. We find merit in Mr. Odhiambo's submission...

We think we have said enough to conclude that the appeal against conviction is unmeritorious while the appeal against the legality of the sentence has merit. Accordingly, this appeal is dismissed as regards the conviction of the appellant but we allow the appeal against the sentence to the extent that we substitute the death sentence with a prison term that will result in the appellant's release from prison since the appellant was convicted and sentenced on 5th March, 2004 and should have been sentenced to imprisonment for a term not exceeding seven years."

17. We are further guided by the decision of this Court in Boniface Juma Khisa vs. Republic, Criminal Appeal No. 268 of 2009 supra, as cited by the appellant, wherein it was held that there is a conflict between section 297(2) and 389 of the Penal Code and once there is 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. Consequently, taking into consideration the conflict between section 297(2) and 389 of the Penal Code and taking into consideration the concession by the State, we considered this to be a fit case to set aside the life imprisonment imposed. We, therefore, substituted the sentence of life imprisonment with a sentence equal to the time already served (which was about twelve years) and ordered that the appellant be set at liberty unless otherwise lawfully held. Those, then, were the reasons for our decision rendered on 26th September, 2023.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF JANUARY, 2024.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

