IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, WARSAME & MAKHANDIA, JJ.A

CRIMINAL APPEAL NO. 686 OF 2010

BETWEEN

MICHAEL KIMANI KUNGU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nairobi,

(Achode, J) dated 5th December, 2011

in

HC. CR. A. 315 OF 2007)

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JUDGMENT OF THE COURT

Incidences of robbery with violence and robbery in general in this country are rampant. Some robberies succeed and some hit a dead end. A question then arises where the robbery fails but violence prevails and innocent lives are lost. This was the case in the present appeal.

The appellant, **Michael Kimani Kungu** was charged with one count of attempted robbery with violence contrary to Section 297(2) of the Penal Code before the Chief Magistrate Court at Kibera. The particulars of the offence were that on the 6th May, 2004 at Kandisi village, Ongata Rongai Township in Kajiado District within the then Rift Valley Province jointly with others not before court while armed with dangerous weapons namely a pistol attempted to rob Appolo Jakait of personal effects and at or immediately before or immediately after the time of such attempted robbery, shot and killed the said Apollo Jakait.

The appellant also faced a second count of attempted suicide contrary to Section 226 of the Penal Code, particulars being that on 2nd September, 2005 at Ongata Rongai Police Station cells in Kajiado District within the Rift Valley Province he attempted to kill himself by hanging with a rope around the neck. He pleaded not guilty to both counts and his trial ensued. After the trial in which the prosecution called 14 witnesses and the appellant testified in his own defence, the brief facts of the case that emerged were as follows:

PW1, **PC Hudson Henry,** Pastor Orapa and his uncle, the deceased, were on their way home from work on 6th May, 2014 at about 7:30pm. The driver dropped them off about 100m from their house and they had to walk up the hill to get to their house. While walking they heard people talking from the opposite direction coming towards them. They were three people. They approached them and asked them to stop. One of the people pointed a gun at the deceased. PW1 removed his gun. The person with the gun tried to shoot him but the deceased held his hand and a struggle ensued. A bullet was fired and the deceased fell down next to PW1. PW1 shot at the person six (6) times, when he turned to the others, they all ran away uphill. The deceased died on the spot and was taken to Chiromo Mortuary. That the aim of the attack was robbery. PW1 went for an identification parade and was able to identify the appellant as one of the people he had seen that night. He was able to see him with the aid of security lights about 50meters away. The appellant had ordered him to lie down and not make a noise.

PW2, **Corporal David Ekono** was on duty on 20th September, 2005 at about 6:30am when he was informed that one person had fallen inside the cell toilet. On checking he found that the appellant had in attempt to commit suicide tied a rope around his neck and on a water pipe. PW5 cut the rope, he was given first aid and taken for treatment. PW3, **Mary Nyokabi** saw the appellant go to Ngonyo's house on 6th

May, 2004 at about 6:00pm. Ngonyo was one of her tenants and stayed with one Kereya. She heard from children the following morning that Kereya had been killed. Ngonyo's sister came and carried things from the house and when the police came they found nothing. That the appellant also used to visit her brother who stayed in one of the rentals often. She identified the appellant from among Kereya's friends during the identification parade.

PW4, **PC James Wambua** was at work on 19th September, 2005 when an informer informed him of the whereabouts of the appellant whom they had been looking for a while after receiving information that one of the robbers who was shot had left his house with him. He put a plan in motion and at midnight he and other police officers arrested the appellant and the person who was accommodating him. Nothing was recovered from the appellant at the time of arrest. PW5, **PC Peter Cherono** corroborated PW2's evidence on the appellant's attempted suicide. PW6, **Teresia Ngonyo** stayed with Kereya at her sister's place.

She was the girlfriend. On 6th May, 2004 Kereya left the house at about 6:00pm but never came back. The following day she was told that he had been killed at Kandisi. That the appellant was Kereya's friend whom they used to call Mika. He used to come over often. She did not see him or his wife again after the incident. PW7, **CIP Lawrence Ndhiwa** examined the revolver produced in evidence and found sufficient pin marking and breech markings to form the opinion that the fired cartridge was from the said firearm. PW8, **CIP Alfred Mithua** and PW9, **IP Philip Mwangi** conducted an identification parades at Ongata Rongai police station where PW3 and one Anderson Masake positively identified the appellant by touching.

PW10, **IP Moses Mwangi** was on patrol on the material night when a call came through over an incident at the river. He proceeded to the scene, and saw the deceased lying down dead. He interrogated PW1 and the pastor. There was another person groaning nearby holding a pistol. The person had a gunshot wound and was on the verge of death. He called scenes of crime who came and took pictures. Upon investigations he learnt that the dead assailant was Moses Kereya, a friend of the appellant with whom they had been together prior to the incident. The police officers went in search of the appellant without success, he had escaped. He attended the deceased's post mortem and the bullet from the body was confirmed to have been from the pistol Kereya was holding. PW11, **PC Joseph Mutie Mwendwa** was the Scenes of Crime Officer who took photographs of the crime scene. PW12, **Johnson Musyoki** gave ballistic evidence in respect of a report made by one Donald Mbogo, his boss who could not be traced. The report indicated that the seven rounds of ammunition were firearms within the meaning of Firearms Act. PW13, **PC Josiah Rotich** was the investigating officer upon PW10's transfer. Upon completion of the investigations, he caused the arrest of the appellant on 20th September, 2005. Lastly, PW14, **Dr. Jane Wasike** performed the post mortem in respect of the body of the deceased on 17th May, 2004. He had a gunshot wound on the anterior chest wall, which lacerated the anterior chest wall, fractured the third left rib, perforated the left lung, heart and left ventricle, hymothorax and fracture of the 5th and 6th thorax spine with laceration on the spinal cord. She formed the opinion that the cause of death was chest and spine injury as a result of a gunshot wound.

Put to his defence, the appellant stated that he was arrested on 20th September, 2005 while at his cousin's place. He was from work. He was asked for money but did not have any and was taken back to the cells. An identification parade was conducted and he signed the forms. He was then charged with an offence he did not know.

The trial court examined the above evidence and came to the conclusion that the evidence by PW1 and PW6 made out a strong case of the appellant's involvement with Kereya who was gunned down at the scene of the attempted robbery. This coupled with PW1's evidence of identification of the appellant was a strong indication that the appellant was in the company of Kereya as they attempted to rob the deceased and even killed him. The trial court was satisfied that the identification parade was well conducted and that lighting at the scene favoured the identification. The appellant's defence was found to be a mere denial and that the prosecution had established its case beyond reasonable doubt as the evidence gathered all pointed a finger at the appellant. He was found guilty, convicted and subsequently sentenced to suffer death on the first court but was discharged under Section 35(1) of the Penal Code on the 2nd count. Aggrieved, the appellant lodged an appeal to the High Court of Kenya at Nairobi. By a Judgment dated 5th December, 2011 **(F. A. Ochieng and L. A. Achode JJ,)** the appeal was dismissed in its entirety.

Dissatisfied, the appellant lodged the present appeal which is his second and perhaps last. Through the firm of **Ondieki & Ondieki Advocates**, the appellant has filed a supplementary memorandum of appeal in which he raises a total of eleven grounds. He complains that the High Court erred in law by failing to appreciate that: punishment for attempted robbery with violence within the meaning of Section 389 of the Penal Code was seven years; his Constitutional rights were violated; failed to re-evaluate the entire evidence and draw its own conclusions; relying on identification evidence that did not meet the required legal threshold; convicting him on circumstantial evidence that was purely premised on suspicion; misapprehended the facts and applied wrong legal principles to the prejudice of the appellant; charges were never proved beyond reasonable doubt; not considering the appellant's defence; and shifting the burden of proof to the appellant.

In his written submissions, which **Mr Kerosi,** learned counsel for the appellant opted to highlight, it was submitted that as the appellant was charged with attempted robbery with violence. Under Section 389 of the Penal Code that deals with attempts to commit offences provides the maximum sentence to be 7 years imprisonment. Counsel submitted that the appellant ought to have been sentenced under this section as he was charged with an attempt to commit robbery with violence and he should therefore not have been sentenced to death. With regard to constitutional violations, it was submitted that the appellant was arraigned in court 34 days after his arrest which was unconstitutional as Section 72(3) (b) of the repealed constitution that was then in force required a suspect arrested on a capital offence to be arraigned in court within 14 days. No explanation was proffered for the delay by the prosecution.

On suspicion counsel submitted that the mode, place and time of arrest showed that there was no nexus between the appellant and the alleged offence. Upon arrest, nothing was recovered from him and there was no tangible evidence linking the appellant to the offence hence, the appellant was arrested and prosecuted on suspicion and suspicion however strong cannot form a basis for a conviction.

Turning on identification, it was submitted that PW1 did not give a clear description of the attackers. Further that the distance from the house where the offence was committed was given as being 100 metres away. To the appellant it is impracticable to identify someone from that distance more so at night and it was dark on the fatal night. That the police identification parade was not properly conducted as the identifying witness had already seen the appellant in the crime office before the parade. In any event the said identification parade was conducted 1 ½ years after the incident and was therefore of no probative value.

As to whether the charges were proved beyond reasonable doubt, it was submitted that because the investigating officer never testified, it followed that the charges were never proved beyond reasonable doubt. Turning on the question of the appellant's defence, counsel submitted that the appellant's defence was plausible and ought to have been believed and acted upon. Finally, on the question of critical witnesses being left out, it was the appellant's submission that one critical witness was the investigating officer, yet he was never called to testify. In support of all these submissions, the appellant filed relevant authorities and case digest that we have carefully read and considered.

For the respondent, **Mr. Obiri,** learned Assistant Deputy Director of Public Prosecutions submitted that the sentence imposed on the appellant was legal. That Section 389 of the Penal Code can only be invoked where an accused commits a felony or misdemeanor and no sentence is provided. However in this case, the sentence for attempted robbery with violence is provided for in Section 297(2) of the Penal Code and it is death. On constitutional violations, it was submitted that the appellant's remedy lies in damages and not an acquittal.

Regarding identification of the appellant, counsel submitted that PW1 testified that the scene of crime was well lit. His testimony was corroborated by PW7 who went to the scene soon after the incident and confirmed that the scene of crime was well lit. Counsel further submitted that PW1 was able to identify the appellant at the scene. The question of mistaken identification does not therefore arise. Conceding that the investigating officer was never called to testify, counsel nonetheless submitted that his evidence was not critical to the conviction of the appellant. He went on to submit that in any event no number of witnesses are required to prove a fact in terms of Section 143 of the Evidence Act.

As this is a second appeal, our consideration is limited to matters of law only. Otherwise, we are generally bound by concurrent findings of facts by the two courts below departing therefrom only in the rarest of cases where for instance such findings are not based on any evidence or proceeded from a misapprehension of the evidence or are plainly untenable. See **Karingo V Republic (1982) KLR 219** and Section 361 of the Criminal Procedure Code.

We have carefully perused the record of appeal and considered the impugned judgment of the High Court in the light of the criticism levelled against it, submissions by counsel, authorities and the law. The main issues for determination are whether the prosecution proved its case beyond reasonable doubt, whether the appellant was properly identified and if so whether Section 389 of the Penal Code should have been considered in sentencing the appellant.

It is trite that for a crime to be committed, there must be the intention, preparation and actual commission of the crime. If the attempt is successful, then the crime is complete. If the attempt fails, the crime is not complete but the law will still punish the act. An attempt is made punishable because every attempt, although it fails of success, must create an alarm, which, of itself, is an injury, and the moral guilt of the offender is the same as if he had succeeded. (See: **Ibrahim Omondi Okumu v Republic [2019] eKLR).** Section 388 of the Penal Code states as follows:

> "**(1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, 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 fulfillment 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**."

Section 297(2) is a replica of Section 296(2) of the Penal Code. There is no difference in the penalty provided between the offence of robbery with violence and that of attempted robbery with violence. It is the only offence which provides for the same sentence for both the full act of robbery with violence and the unfulfilled act of attempted robbery with violence. To prove the offence of robbery with violence, the element of stealing must be proved coupled with one or all of the other elements set out in section 296(2), namely that the offender was armed with a dangerous or offensive weapon or instrument; was in the company of one or more others; or immediately before or immediately after the time of the robbery he wounded, beat, struck or used other personal violence on the victim. This position was expounded further by this Court in the case of **Johana Ndungu v Republic [1996] eKLR,** where it stated thus:

> ***"In order to appreciate properly as to what acts constitute an offence under section 296(2) one must consider the sub-section in conjunction with s. 295 of the Penal Code. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in s.* 296(2)…"**

In the instant case, there was evidence that the appellant was among three assailants who attacked the deceased. PW1 and two others, and that the attack was with a view to steal from them. He was arrested a year and a half later when he emerged from hiding. This explains why the identification parade was conducted one and a half years after the incident. PW1 testified to the effect that the incident occurred on the material day at around 7:30pm and the scene of crime was well lit by security lights from neighbouring houses. PW1 was able to identify the appellant by his appearance and also recognized him as the one who had ordered him to lie down and keep quiet during the incident. He was later able to identify him from police identification parade. This testimony was corroborated by that of PW7.

In upholding the appellant's conviction based on identification, the High Court faithfully discharged its duty as the first appellate court to independently re-appraise the whole evidence guided by the case of **Gabriel Kamau Njoroge v Republic [1982-88] 1 KAR 1134**. The learned Judges acknowledged that identification was by a single identifying witness. They took a careful judicious approach appreciating that evidence of visual identification can bring about a miscarriage of justice and that it was of vital importance that it is examined carefully to minimize the said danger. They reverted to the case of **Wamunga v Republic [1989] KLR 424** in which case this Court stated thus:

> ***"Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification."***

It is also apparent that the appellant kept company of known felons. For instance his colleague who was killed in the attempted robbery had recently prior to the incident left prison after serving term. He was also seen in their company on the evening of the incident and shortly thereafter he disappeared from the village without a trace, this act of escaping was in itself an inference of guilt. As the learned Judges rightfully observed, the appellant having kept the company of ex-convicts in itself did not mean that he was a felon or had committed the crime but rather having in his company one of those ex-convicts who was moments later gunned down during the attempted robbery and PW1 having seen him at the scene of crime, placed the appellant at the said scene of crime. We cannot overemphasize that the High Court was thorough in its analysis of the evidence as a whole and its conclusions cannot be faulted. The deceased died after being shot by the appellant who was armed, and also that the deceased suffered the gunshot in the cause of the attempted robbery. One of the attackers was also killed thus the appellant was in the company of other people besides himself and they had a common intention of robbing PW1 and his colleague. We find that the evidence against the appellant was overwhelming and his guilt was proved beyond any reasonable doubt. Therefore, the appeal against conviction must failed and is accordingly dismissed.

As regards sentence, the appellant contends that the death sentence meted on him was excessive since the offence of attempted robbery with violence is dealt with under Section 389 of the Penal Code and is punishable by seven (7) years imprisonment. The respondent counters this argument by stating that Section 389 can only be invoked in instances where the accused person commits a felony or misdemeanor and no sentence is provided under the section he is charged under. However this is not the case here given that the section under which the appellant was charged provides that the punishment for attempted robbery with violence is death. Section 297(2) of the Penal Code under which the appellant was charged provides *inter alia:*

> **"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 of the Penal Code on the other hand provides that:

> **"Any person who attempts to commit a felony or a misdemeanor is guilty of an offence and is liable, <u>if no other</u> <u>punishment is provided,</u> 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 <u>not be liable to imprisonment for a term exceeding</u> <u>seven years</u>**." (Emphasis ours).

A plain reading of Section 389 shows that it was intended to apply to matters where no other punishment was expressly prescribed in the Penal Code. Section 297(2) **of the Penal Code** under which the appellant was charged provides for a specific penalty for attempted robbery with violence hence it is ousted from the remit of Section 389 of the Penal Code. It is worth noting that at no given time during trial did the appellant contend that he had been charged under the wrong provisions of the law, he knew all along the charge he was facing and the penalty it carried. He therefore cannot then ask this court to review his sentence in light of Section 389 of the Penal Code. The appellant referred this Court to the case of **<u>Evanson Muiruri Gichane v Republic,</u> [2010] eKLR** in which the facts were as follows:

> ***"On 5th September, 2003 at about 3.15 p.m. three people arrived at the gate of the home of Kennedy Kamwathi (PW5) along Riverside Drive claiming that they had been sent by Mr. Kamwathi to carry out fumigation exercise in his compound. Kamwathi's laundry man, Ernest, opened the gate for the three men, despite protests from Kamwathi's other employees – Phillip Etale (PW4), a shamba boy and Philip Ombuya (PW1) a cook. Once inside the compound the three men and Ernest grabbed Ombuya and Etale and threatened the two domestic workers with knives. Etale (PW4) screamed for help, which screams attracted the attention of other workers in the neighbouring compounds. Those workers included William Shivachi (PW2). The three men panicked and two of them jumped over the hedge but the third person who is the appellant was not so lucky to escape. He was cornered as he tried to escape, arrested and escorted back to the compound of Kamwathi. Police officers were called to the scene and re-arrested the appellant whom they escorted to Kileleshwa Police Station and subsequently charged with attempted robbery contrary to* section 297 (2) *of the Penal Code."***

The court in discharging the appellant in the said case from the death penalty and sentencing him in accordance with Section 389 of the Penal Code stated thus:

> ***"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 have also had the occasion to look at the case of **<u>Mulinge Maswili v</u> <u>Republic,</u> [2012] eKLR** where this Court when faced with a similar issue rendered itself as follows:

> ***"The general penalty for offences attempted is given as half of the sentence for the completed offence. There is, however, an exception regarding those offences which carry the death penalty or life imprisonment. For such offences, the court is given discretion to mete out sentences not exceeding seven years imprisonment, and even for those ones, there is a further exception. For attempted offences for which separate and distinct punishment is provided, section 389, above, would not apply. In the former category are offences like murder contrary to section 203 as read with section 204 of the Penal Code respectively. Such an***

offence carries the death penalty. The offence of attempted murder, does not have a separate distinct punishment. That being so, and because there is no way one can half the death penalty, the trial court has the discretion to mete out a sentence not exceeding seven years imprisonment.

In the latter category, namely, the offences attempted which carry a separate and distinct sentence that is where the offence of attempted robbery with violence falls. Parliament in its wisdom considered it essential to provide specific sentences for the offences attempted. To obviate conflict section 389 of the Penal Code was worded in such a way as to create an exception to the general penalty provided therein. Hence the inclusion of the phrase "if no other punishment is provided."

We find that the circumstances in the "**Evanson case**" were different from the present case. In the instant case two innocent lives were lost, the offence was aggravated and heinous compared to the **"Evanson case"** where no one was injured. Moreover, the decision in the "**Mulinge case**" was rendered in 2012, whereas the decision in the **"Evanson case"** rendered in 2010. To our mind the latter decision reflects the proper position of the law, that the offence of attempted robbery under section 297 (2) does not fall under the general penalty for attempting to commit a felony under section 389 P.C as the sentence is clearly provided under section 297(2) of the Penal Code.

Finally, with regard to keeping the appellant in police custody for a period in excess of 34 days before arraigning him in court contrary to the constitutionally required period of 14 days, the position in law is now well settled. In the case of **Peter Otieno Odiyo -V- R (2017) eKLR** it was held that:

"Noteworthy is the fact that there is no law which expressly bars the prosecution of an accused person brought to Court after the expiry of the 24 hours as provided under Article 49 (f)(i) of the Constitution. The right to be arraigned in court within 24 hours of arrest was not designed to avoid trials on the merits, but rather, to deter the unconstitutional extra judicial detention of suspects by the police. It is a right to be taken to court as soon as it is reasonably practicable.

Guided by this reasoning, it is the view of this Court that to allow this appeal on the grounds of arraignment after 24 hours will be disproportionate and inappropriate. The delay in the arraignment of the Appellant in this case was not so long and extended as to lead to an outright negation of his rights to a fair trial as provided under Article 50 of the Constitution. The Appellant further failed to adduce any evidence to support his claims of being denied a fair trial in accordance with Article 50 of the Constitution. From the record of the trial court, the Appellant was fully aware of the proceedings. The appropriate remedy for the Appellant in this case is as prescribed by the Constitution under Article 23 (3). The Appellant would be entitled to a declaration and an award of damages in the form of monetary compensation from the person or authority in breach of this right."

The allegation of violation of rights does not mean that the appellant could not face trial. His remedy lies elsewhere; which is compensation by an award of damages in terms of Article 23 (3) of the Constitution for such violation. In any event the appellant did not raise any such complaint in the trial court for the prosecution to be given chance to explain the delay.

From the foregoing and for the reasons we have strived to give, we find that the appeal lacks merit, and it is accordingly dismissed in its entirety.

Dated and delivered at Nairobi this 19th Day of June, 2020.

H. OKWENGU

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR