



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & ODEK, J.J.A.)

CRIMINALA APPEAL NO. 33 OF 2016

BETWEEN

BONVENTURE ANZIENA MUKANGAI1ST APPELLANT

ELIJAH ABDALLAH NGANANI2ND APPELLANT

AND

REPUBLICRESPONDENT

(Appeal from the judgment of the High Court of Kenya

at Kakamega (Sitati & Mrima, JJ.) dated 31st July, 2015

in

HCCRA NOs. 148 & 150 OF 2014)

JUDGMENT OF THE COURT

The only issue we have to determine in this appeal is whether it was proper for the High Court at Kakamega (Sitati, Mrima, JJ.) to have confirmed on 31st July, 2015 the sentence of death imposed upon the appellants upon their conviction for the offence of attempted robbery with violence contrary to **section 297(2)** of the **Penal Code**, by the Chief Magistrate's Court in Kakamega on 9th December, 2004.

The appellants were found guilty of having attempted to rob one **Francis Masiya** on 19th June, 2004 at Kakamega Township while armed with a homemade pistol and at, or immediately before or immediately after the said attempt, they threatened to injure the said Francis Masiya.

The learned magistrate had also convicted them of the offence of possession of an imitation firearm contrary to **section 21(1)** as read with **section 34(1)** of the **Firearms Act**. This was on the said 19th June, 2004 at Mahanga Chemist in Kakamega. They were sentenced to 7 years imprisonment on that count but on their first appeal the High Court quite properly, held that in view of the death sentence imposed, the sentence of imprisonment should have been held in abeyance.

Even though the appellants' self-crafted memorandum of appeal raised some ten grounds of appeal, their learned counsel **Mr. Rodi** abandoned them and urged the single ground in the supplementary memorandum of appeal dated 29th July, 2019 namely;

“1. That the honourable Judge erred in law by failing to address the issue that section 297(2) of the Penal Code under which the appellants were sentenced is in conflict with section 389 of the same code.”

Counsel also filed written submissions and cited two decisions of this Court namely; ***EVANSON MUIRURI GICHANE -vs- REPUBLIC [2010] eKLR*** and ***DAVID MWANGI THUO -vs- REPUBLIC [2011] eKLR***, for the straight-forward proposition that given the provisions of **section 389** of the **Penal Code** to the effect that a person who attempts to commit an offence punishable by death or life imprisonment shall not be liable to imprisonment for a term not exceeding seven years, the sentence of death provided for attempted robbery with violence under **section 297(2)** is untenable and the appellants should have been given the benefit of the less severe sentence. The full text of the two sections

is as follows;

“297(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.

....

389. Any person who attempts to commit a felony or a misdemeanour 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.”

For the state, **Mr. Muia**, the learned Prosecution Counsel quite properly conceded the appeal on sentence and agreed that the sentence of death was unjustifiable in light of the express provisions of **section 389** of the **Penal Code**. That position has been quite firmly established by this Court in the two decisions cited, as well as several others. In **DAVID MWANGI MUGO** (supra) the Court indicated that *“it is manifest at once that there is an apparent conflict in those provisions”* and proceeded to hold that the sentence of death imposed for the offence of attempted robbery with violence was illegal, before quashing it.

We too, have no difficulty whatsoever quashing the said sentences for death for the plain reason that where there is a conflict in sentences available for the court to impose, as a matter of right an accused person must be extended the benefit of the less severe sentence. It is of course unacceptable that the conflict and confusion persists with **section 297(2)** still prescribing the death sentence when, by virtue of **section 389** of the **Penal Code**, the sentence for attempted robbery with violence, while the offence of robbery with violence itself carries the death sentence, should not exceed seven years. It behoves the Hon. Attorney General to move Parliament appropriately to amend **section 297(2)** and bring it into harmony and consonance with **section 389** of the **Penal Code**. To nudge him in that direction, we direct that a certified copy of this judgment shall be served to the Hon. the Attorney General forthwith.

In the result, this appeal succeeds. We quash the sentence of death and substitute it with a term of 7 years imprisonment to run from 9th December, 2004 when the appellants were first sentenced. The effect will be that the appellants, having served their term, shall be set at liberty forthwith, unless otherwise lawfully held.

DATED and delivered at Kisumu this 21st day of November, 2019

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

OTIENO ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR