IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, G.B.M. KARIUKI & KANTAI, JJ.A.)

CRIMINAL APPEAL NO. 73 OF 2015

BETWEEN

JAPHETH CHEGE MWANGI …….. APPELLANT

VERSUS

REPUBLIC …….. RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nairobi (Odunga & Muchemi, JJ.) dated 9th December, 2013

in

HC. CR.A. 673 OF 2010)

****

JUDGMENT OF THE COURT

The appellant, **Japhet Chege Mwangi**, was charged before the Chief Magistrate's Court at Thika with the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code**. Particulars being that on 23rdJanuary, 2010 at Twiga Village in the then Thika District with another not before court robbed **Joseph Mwangi** of a motor cycle KMCF 174Q make Captain valued at Shs.78,500/= and that at the time of that robbery they used actual violence against the said Joseph Mwangi.

A trial took place before the learned Senior Resident Magistrate (B.A. Owino) who in a judgment delivered on 18th October, 2010 held that:

> ***"From the foregoing facts, I find that the charge herein has not been proven but the evidence reveals that there was intent to rob. I acquit the accused of the charges herein but I find him guilty for the offence of attempted robbery with violence contrary to section 297(2) P.C. He is accordingly convicted of the same under section 215 CPC."***

The appellant was subsequently sentenced to death.

A first appeal to the High Court of Kenya at Nairobi (**F. N. Muchemi and G.V. Odunga, JJ.)** failed in the judgment delivered on 9th December, 2013. It is that decision of the High Court.

When the appeal came before us for hearing on 18th April, 2016 learned counsel for the appellant Mr. Amutala Robert consolidated the 5 grounds set out in the memorandum of appeal filed on 16th February, 2016 into one ground to wit:

> ***"THAT the learned trial Judges faulted in point of law failing to note that the trial court substituted the charge of robbery with violence with a major offence with a major offence (sic) of attempted robbery with violence without the appellate (sic) being given an opportunity to plead to the said attempted robbery with violence charge."***

The brief background to this matter and on which concurrent findings of fact have been made by the courts below were that on 23rd January, 2010 Joseph Muriithi Mwangi (Mwangi) (PW1) was going about his business of operating a motor cycle as a taxi. At 4.00 p.m. he was approached by the appellant who hired him to go to a stated place to collect eggs. Enroute the appellant asked Mwangi to stop as another man was to join them on the same mission. They were now three on the bike but in the course of the ride the helmet was suddenly pulled off from Mwangi's head and one of the men grabbed him by the neck. This led to a loss of balance and all of them plus the bike fell to the ground. A struggle ensued attracting the attention of members of the public. The appellant and his accomplice tried to flee the scene but they were surrounded by the said members of the public who beat them senseless. The appellant was arrested at the scene while his accomplice died of the injuries suffered.

These facts were confirmed by the two police officers **Corporal Eric Mugendi (PW3)** and **P.C. Josphat Wafula** who arrived at the scene as memebers of the public were beating up the appellant and his accomplice. The injuries suffered by Mwangi were confirmed by Jean Munene(PW1) a registered Clinical Officer attached to Ruiru hospital.

The trial court found that a *prima facie* case had been established and in an unsworn statement of defence the appellant stated a number of things amongst them that Mwangi was riding the motor cycle very fast, that they had been involved in an accident where the appellant was injured and lost consciousness and that when he came to he found himself in hospital from where he was picked by the police, arrested and charged with an offence he knew nothing about.

As already stated the trial court was satisfied that the charge had been proved as required in law and this finding was confirmed by the High Court in the first appeal.

Mr. Amutala, learned counsel for the appellant submitted that the offence the appellant was charged with was not proved and that the trial magistrate erred as did the High Court when the appellant was convicted on an offence that was not originally charged. According to counsel the prosecution case was therefore not proved to the required standard or at all. Counsel cited the provisions of **Sections 179** and **214** of the **Criminal Procedure Code** and submitted that the trial court could only convict for a lesser offence which an offence under **section 297(2)** of the **Penal Code** was not. According to counsel an offence under **section 297(2)** of the **Penal Code** carried the same sentence as an offence under **section 296(2)** of the **Penal Code** and that the trial court was wrong to act as it did. Counsel finally submitted that the said action of the trial court and which was not dealt with by the High Court prejudiced the appellant who in the event lost a legitimate right which he was entitled to.

Ms. Maina Principal Prosecution Counsel in supporting the conviction and opposing the appeal submitted that the trial court was entiteld to proceed as it did as a plea was not necessary for the offence with which the appellant was convicted in the circumstances.

We have considered the record of appeal, submissions made and the law.

The point taken in this appeal on whether the trial magistrate was entitled to convict on a charge of attempted robbery with violence contrary to **section 297(2)** of the **Penal Code** when the charge preferred against the appellant was robbery with violence contrary to **section 296 (2)** of the **Penal Code** was not taken at the High Court.

We are permitted to only consider issues of law in a second appeal such as this one. See **section 361(a) Criminal Procedure Code** and the plethora of judicial pronouncements on the issue from this Court in such cases as **Njoroge v Republic [1982] KLR 388** or **Thiongo v Republic [2004] 1 EA 333.**

The trial magistrate found as we have already stated that the offence of robbery with violence had not been proved but proceeded to convict the appellant for attempted robbery with violence. Was the trial magistrate entitled to do this? **Section 180 Criminal Procedure Code** is in the following terms:

> ***"When a person is charged with an offence, he may be convicted of having attempted to commit that offence although he was not charged with the attempt."***

Learned counsel for the appellant relied on **Section 179 Criminal Procedure Code** to fault the lower courts for holding that the appellant could be convicted for the offence when the charge laid and which the prosecution prosecuted was an offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. **Section 179 Criminal Procedure Code** whose side note is **"when offence proved is included in offence charged"** permits a trial court to convict for a minor offence where a combination of particulars of an offence are not proved but only some particulars of that offence are proved. The other provision that would appear to be relevant to the subject under consideration is **Section 389** of the **Penal Code** which provides that a 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. In case of an offence punishable by death or life imprisonment sentence is capped at a term not exceeding seven years.

This Court had the occasion to consider the effect of **Section 389** of the Penal Code in the recent decision of **Charles Mulandi Mbula v Republic [2014] eKLR where** the court stated:

"It is clear from a plain reading of Section 389 of the Penal Code that it applies only where no other punishment is expressly prescribed in the penal statute. Section 297(2) of the Penal Code provides for a specific penalty for attempted robbery with violence, and is thus ousted from the remit of Section 389 of the Penal Code. This Court has clarified this interpretation in Mulinge Maswili vs. Republic (Criminal Appeal No. 39 of 2007), where we stated:

The general penalty for offenses 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 herein. Hence the inclusion of the phrase "if no other punishment is provided." (Emphasis in Original).

Section 297(2) of the **Penal Code** has a specific sentence – that of death – for an offender convicted of an offence under that Section and neither of the provisions of **Section 179** of the **Criminal Procedure Code** nor **Section 389** of the **Penal Code** would have an effect here.

It will therefore be seen that the law allows a trial court to convict for an attempt if the charge such as robbery with violence here is not proved. The trial magistrate was entitled to find that the appellant was guilty of the offence of attempted robbery with violence under **Section 297(2) Penal Code** where the

appellant was charged with an offence under **section 296(2)** of the **Penal Code**. The upshot of this is that this appeal has no merit and is accordingly dismissed.

Dated and delivered at Nairobi this 19th day of May, 2016.

M. WARSAME

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JUDGE OF APPEAL

G.B.M. KARIUKI

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR