IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: NAMBUYE, MWILU, & KIAGE, JJ.A)

CRIMINAL APPEAL NO. 416 OF 2007

BETWEEN

LEONARD OCHIENG AWICH.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nakuru

(Koome, J. as she then was & Kimaru, J) dated 24th March, 2006

in

H.C.CR.A. No 376 of 2001

****

JUDGMENT OF THE COURT

LEONARD OCHIENG AWICH (the appellant) appeals to this Court from a judgment of the High Court at Nakuru upholding the conviction and sentence of the Principal Magistrate's court at Kericho for attempted robbery with violence contrary to **Section 297 (2)** of the **Penal code-Cap 63** and that of possession of a firearm without a firearm certificate contrary to **Section 4(1)** as read with **Section 4(3)** of the **Firearms Act-Cap 114**.

The particulars of the first count were that on the 15th day of January, 2001 at Kipsitet area in Kericho District of the former Rift Valley Province, jointly with others not before the court while armed with a dangerous weapon namely a home-made pistol he attempted to rob ***ANYONA MOINDI*** of a Motor Vehicle Registration No **KAL 066 S** Isuzu Canter valued at Ksh 2 Million and at or immediately before or immediately after the time of such attempted robbery threatened to use actual violence to the said ANYONA MOINDI. The particulars of the second count were that at the same time and place he had in his possession one home- made pistol without a firearm certificate.

Following a trial, in which the learned magistrate found the appellant guilty on both counts and convicted him accordingly. The appellant was sentenced to death as by law provided on the main count with the

learned magistrate leaving the sentence on the second count in abeyance, albeit implicitly.

Aggrieved by the conviction and sentence, the appellant lodged an appeal at the High Court. The first appellate court Judges (Koome, J. (as she then was) and Kimaru, J. upheld the decision of the trial court and dismissed the appeal in its entirety. The concurrent findings of fact which led to the conviction of the appellant were that: - ***PW 1 ANYONA MOINDI (ANYONA)*** and ***PW 2 SHIKANDA EVANS (EVANS)*** who were a driver and salesman employed by Valley Bakery Limited were in the course of their duties on 15th January, 2001 delivering and selling bread using Motor Vehicle Registration number KAL 066 S-Isuzu (Canter) driven by Anyona. The duo was scheduled to make deliveries and sales at Kapsoit, Muhoroni and Koru before returning to Nakuru.

The trip to Muhoroni via Kapsoit and Koru was uneventful. However, matters took a different turn as the duo approached Kapsitet along the Kericho-Kisumu highway en route to Nakuru. According to Anyona, two men emerged from a nearby bush and flagged their Canter down. One of the two men retreated back to the bush as the Canter slowed down, a move which aroused his suspicions. Suddenly, the two strangers who had flagged down the Canter leapt at the cabin and used the open passenger window for leverage to hang thereon as one of them pointed a pistol at Anyona ordering him to stop. Evans urged Anyona to keep driving as he engaged the assailants in a scuffle in a bid to disarm the armed one.

Moments later, one of the robbers jumped off the Canter which had by then picked up speed as Evans successfully disarmed the remaining assailant and dragged him into the cabin where he was subdued and driven to a Chief's camp at Kapsitet. At the said camp members of the public were eager to lynch the appellant but were prevailed upon by Administration Police Officers to allow the law to take its course. They arrested the appellant before returning to the scene of the attempted robbery where the appellant's injured companion was found speechless. Police took the injured robber to the hospital where he succumbed to his injuries later.

The appellant's grounds of grievance are contained in a Supplementary Memorandum of Appeal lodged pursuant to **Rule 65 (2)** of the **Court of Appeal Rules** ('the rules') and those contained in a further Supplementary Memorandum of Appeal lodged pursuant to the leave of this Court granted on **9th May, 2016**. The grounds in question are similar and fault the learned High Court Judges for:-

- ***Failing to hold that the learned trial magistrate had not given any (sufficient) reason (s) for rejecting the appellant's defence during trial.***
- ***Rejecting the appellant's defence offered at trial when no proper basis existed for the rejection.***
- ***Upholding the use of improperly admitted evidence by the trial court, thereby sustaining a conviction based on legally insufficient evidence.***
- ***Holding that the case against the appellant had been proved to the requisite standard.***
- ***Upholding a manifestly illegal sentence.***

At the hearing, ***MR. H.J. OKEKE***, learned counsel, appeared for the appellant, while ***MR. J.K. CHIRCHIR***, learned Senior Principal Prosecution Counsel appeared for the State. Mr. Okeke structured his arguments on three grounds namely: - the appellant's defence, the ballistics report and the sentence meted out against the appellant. He submitted that: - Anyona testified that Evans had snatched the pistol from the appellant with the aid of the driver at the wheel, which he contended was implausible; there was no evidence that the person who allegedly fell from the Canter was not in fact knocked down by a different vehicle and that there was no reason to warrant the rejection of the appellant's defence. He conceded that the appellant had no objection to the production of a ballistic report by a police officer. In conclusion counsel urged that the appellant ought to have been sentenced to imprisonment for 7 years as prescribed under **Section 389** of the **Criminal Procedure Code** and not to suffer death.

In reply, Mr. Chirchir contended that the appellant's defence had been duly considered and rejected as unbelievable. He wondered why members of the public wanted to lynch the appellant as opposed to the driver of the Canter on the material date. He submitted that the case before the trial court was one of robbery with violence not murder, and that the prosecution's evidence was cogent in that regard. Counsel further submitted that the trial court had given the appellant an opportunity to object to the production of the ballistics report, an invitation which he declined. He submitted further that the offence in question was committed in broad daylight, and that the chain of events remained unbroken. He also submitted that Evans disarmed the appellant, pulled him into the Canter and drove to the nearest Police Post where he was arrested by ***PW 4 AP WELDON ROTICH ((CPL ROTICH)*** before being handed over to the Kericho Criminal Investigations Department (CID). He submitted that the appellant had a firearm in his possession and that **Section 389** of the **Criminal Procedure Code** was clear with regard to sentence so that the applicable provision is **Section 297 (2)** of the **Penal Code** which prescribes the punishment of death.

We have considered the record, the grounds of appeal, submissions by counsel and the applicable law. By dint of **Section 361 (1) (a)** of the **Criminal Procedure Code**, only matters of law fall for our determination. We refrain from interfering with the concurrent findings of fact by the two courts below unless such findings are based on no evidence or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See ***DAVID NJOROGE MACHARIA V R [2011] eKLR***.

We shall commence with the appellant's defence to the charges brought against him. Excerpts of the appellant's unsworn statement, the trial court's judgment and that of the first appellate court will suffice in this undertaking. The appellant had this to say in his defence:-

> ***"The Tosti vehicle- the vehicle in question came from Muhoroni direction towards Kericho direction. It passed me. It knocked someone walking ahead of me. The vehicle stopped. The driver and the turn boy examined the man they had knocked down. They asked me to board their vehicle to report to the police. I agreed. At Kapsitet Trading Centre, the turn boy… (sic) people at the center. He raised an alarm that he had caught a robber. He beat me up. He was joined by members of the public who beat me up till I lost consciousness".***

The trial court rendered itself thus:-

> ***"The accused does not dispute that he travelled in PW's (sic) vehicle for some distance to Kapsitet Trading Centre. His version is that PW 1 ordered him to report an accident caused by him (PW1)".***
>
> ***"The prosecution version is that the accused (appellant) and his companion jumped on to the complainant's vehicle and tried to hijack it by ordering him PW 1 to park beside the road".***

It settled the conflicting versions of events by stating that:-

> ***"I accept the evidence of PW1 and PW 2 that the accused (the appellant) was armed with a home-made pistol (EXH 1) and in the company of one other person. That accused (appellant) and his companion pointed the pistol at PW 1 and ordered him to park his vehicle KAL 066 S on the side of the road. The accused (appellant) threatened to use violence to PW 1 and PW 2 to steal the vehicle".***

On its part, the first appellate court rendered itself as follows:-

> ***"Although the appellant in his defence testified that he was an innocent bystander who had witnessed an accident and who was later falsely accused of having attempted to commit robbery, in our opinion the said testimony was self serving and did not dent the otherwise strong prosecution case against the appellant. We dismiss the said defence as a sham".***

What do we make of the foregoing excerpts? Simply put: the appellant's defence was duly considered and found to be baseless. We say so as the evidence relating to the events of the material date was direct and remained unshaken under cross-examination. We find and so hold.

We are of opinion that the ballistics report was properly admitted in evidence in accordance with **Section 77(1)** and **(2)** of the **Evidence Act**. From the record it is manifestly clear that the trial court asked the appellant whether he had any objection to ***PW 5 P.C. MARCOS MBITHI (P.C. MBITHI)*** producing the said document to wit:-

> ***"Court to accused- Have you any objection to the production of the ballistics report by the witness or you want to cross-examine the expert?"***

In response the appellant stated as follows:-

> ***"I have no objection if he produce (sic) the report of the expert. Do not want to cross-examine the expert"***.

The trial court was acutely aware of the provision of **Section 77 (3)** of the **Evidence Act** through which it could summon the maker of the ballistics report for examination. However, when the appellant's answer is read together with **Section 77 (2)** of the **Evidence Act** which allows a court to presume genuineness of the signature, office and qualification of the maker of a document, the need to summon the ballistics expert becomes moot.

On sentence we heard submissions from the appellant's counsel that the same ought to have been 7 years pursuant to **Section 389** of the **Penal Code** which provides as follows:-

> ***"389. Any person who attempts to commit a felony or a misdemeanor is guilty of an offence and is liable, <u>if no other 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 not be liable to imprisonment for a term exceeding seven years"***. (Our emphasis)

On this issue this Court's opinion in the recent of decision of ***<u>CHARLES MULANDI MBULA V REPUBLIC [2014],</u>*** with which we respectfully agree, suffices;

> ***"It is clear from a plain reading of Section 389 of the Penal Code that it applies only when no other punishment is 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 position in <u>Mulinge Maswili vs Republic</u> (Criminal Appeal No 39 of 2007) where we stated:***
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> ***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 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'.

The upshot is that we find and hold that both courts below properly discharged their respective mandates and have no reason to interfere with the conviction and sentence. This appeal lacks merit and is hereby dismissed.

Dated and delivered at Nakuru this 2nd day of August, 2016

R.N. NAMBUYE

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JUDGE OF APPEAL

P.M. MWILU

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR