IN THE COURT OF APPEAL

AT NAIROBI

CORAM: WAKI, G.B.M KARIUKI & J. MOHAMMED, JJ.A.

CRIMINAL APPEAL NO. 354 OF 2011

BETWEEN

IDD MOHAMMED SAIRIM

JOHN LEMASHON KISIKO.................. APPELLANTS

AND

REPUBLIC …....................... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (Ochieng & Achode, JJ) dated 13th November, 2011

in

H.C.CR.A NOs. 1152 & 1154 OF 2004)

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JUDGMENT OF THE COURT

Background

1. ***IDD MOHAMMED SAIRIM*** and ***JOHN LEMASHON KISIKO*** (hereinafter referred to as the 1st and 2nd appellants respectively), were convicted on two counts of the offence of attempted robbery with violence contrary to ***Section***

297 (2) of the Penal Code. The particulars of the first count were that on 2nd

April 1999, at Bora Bora Kamili Wholesale shop at Eastleigh, First Avenue within Nairobi Area, they, jointly with others not before the Court, while armed with dangerous weapons, namely pistols, attempted to rob ***ROSE KEMUNTO MATAGARO*** and at the time of such attempted robbery, used actual violence by shooting ***FLORENCE ONSONGO*** dead. On the second count, it was alleged that on the same date and venue, they attempted to rob ***JAMES MOSE***

MICHIRA, and at the time of the attempted robbery, shot and wounded ***ROSE***

KEMUNTO MATAGARO, JEREMIAH MATAGARO and ***JAMES MOSE MICHIRA.***

2. The brief facts of the case before the trial court were that James Michira,

(PW11), was working for Bora Bora Kamili Wholesalers. On 2nd April, 1999, at around 5pm, he was serving a customer when another customer came and requested PW13 for a bale of maize flour. PW13 asked PW11 to collect a bale of maize flour from the store. As he went downstairs to collect the flour, he heard PW13 shout that they were being killed. PW11 went back and a scuffle ensued between him, Florence Onsongo (hereinafter 'the deceased') and an assailant.

Eventually, PW11 managed to wrestle the assailant down to the floor, but in the ensuing scuffle, he was shot three times.

3. At this time, Jeremiah Matagaro, PW4, was heading to the shop to pick up his wife, PW13. As he neared the vicinity of the shop, he saw three people on the side of the road. He entered the shop and found his wife, PW13, struggling with an assailant. He saw one of the assailants shoot PW11 with a revolver. PW4 rushed forward and held the assailant and directed the muzzle of the revolver towards the floor. A struggle ensued between him and the assailant. As the struggle continued, he managed to wrestle the assailant on the floor. He felt a tap him on his shoulder and stood up, turned around and came face to face with a man in a Muslim cap. The man pulled out a revolver and shot PW4 on the chest and the left arm. PW4 attempted to grab the assailant but the assailant shot him again. At this point, the deceased rushed towards them and a second assailant shot her. At that moment, one of the assailants called out his accomplices and they walked away. PW4, PW11, PW13 and the deceased were taken to the hospital by members of the public.

Damaris Wanjiku Gichuhi, (PW5), testified that she had requested her brother, Salim Ali Kanyoza, (PW7), to fetch water for her. He took long to bring the water and so she went out to look for him. When she got outside her house, she saw PW7 talking to three people. PW7 informed her that the men had requested for drinking water. PW5 knew one of the three men, the 1st appellant, who she said was called Saitoti, but she did not know the other person, who she later identified at an identification parade as the 2nd appellant.

PW7 corroborated this version of events.

Rashid Mwinzi, (PW8), in his testimony stated that on the material day, at about 8pm, as he was approaching his house, he came across three people one of whom was wearing short jeans and was sweating profusely. He was later called to attend an identification parade during which he identified the 2nd appellant, who he testified had been shouting a lot and was staggering on the material day.

4. The evidence of Aziz Bakori Ahmed, (PW6), was that on the evening of 2nd

April, 1999, he was at his taxi base waiting for customers. He was approached and hired by a man called Kassanga who told him that he had a patient at Majengo Highrise. PW6 proceeded to Majengo and on reaching there, the said Kassanga returned with a man called Maina. They negotiated the price of hiring the taxi, went away and returned back with a patient. PW6 late identified the patient as the 2nd appellant herein. After he picked the 2nd appellant, he drove for a while. The 1st appellant (who PW6 testified was well known to him) stopped the vehicle and instructed him to ensure that he

„*delivered the people safely?*. In PW6's estimation, the 2nd appellant appeared sick and in a lot of pain.

5. After a full trial in which thirty two (32) prosecution witnesses were called, the trial court convicted 3 of the 4 accused persons (being the 1st and 2nd appellants and a third person), and sentenced them to death in respect of both counts of attempted robbery with violence. Aggrieved by that decision, the

1st and 2nd appellants preferred an appeal to the High Court. That appeal was dismissed, and they preferred an appeal to this Court, which made an order for rehearing of the first appeal in the High Court.

The appeal was reheard by

Ochieng and Achode, JJ., who upheld the conviction and sentences.

6. Aggrieved by that decision, the appellants have preferred an appeal to

this Court. They filed identical grounds of appeal faulting the High Court for:

i. *Failing to comply with section 77 (2) (c) of the old Constitution and section 50 (2) (c) of the Current constitution;*

ii. *Failing to comply with section 207 of the Criminal Procedure Code;*

iii. *Failing to observe that section 14 (1) of the Supreme Court Act 2011, was violated;*

iv. *Failure to observe that section 297 (2) of the Penal Code is in conflict with section 389 of the Penal Code;*

v. *Failing to evaluate and analyse the evidence on record; and*

vi. *Failure to comply with section 169 (1) of the Criminal Procedure Code as it was not known the date of delivery of the judgment.*

Submissions by counsel

7. Mr Mogikoyo appeared for the 1st appellant while Mr Onyatta appeared

for the 2nd appellant. The State was represented by Mr Omondi, the Senior Assistant Director of Public Prosecutions (SADPP).

Mr Mogikoyo submitted that the High Court did not analyse and evaluate the evidence as required; that the evidence on identification was not free from error as the 1st appellant was neither arrested at the scene, nor was he chased from the scene of the crime; that it was the report of PW6 which led to the arrest of the 1st appellant but PW6 was not at the scene of the crime; that the eyewitnesses to the crime did not give any evidence that led to the arrest of the appellant; that PW6 did not point out the appellant in court, and did not point out any of the people at the scene, or say what role the 1st appellant played during the robbery; that the evidence adduced was too general and was not probative; that the 1st appellant was a victim of mistaken identity since his arrest was caused by a person who was not an eye witness to the robbery; that the identification parades were all unsafe because the 1st appellant complained that he was the only person of Maasai extraction, and that he had a pierced ear, which would make him an easy prey for an unsure witness. Counsel submitted that as a result, the identification parades were of no value and ought to be set aside as they were prejudicial to the 1st appellant.

Counsel also argued that there was an apparent conflict between ***section 297 (2)*** and ***section 389 of the Penal Code***. He cited the case of ***<u>BONIFACE JUMA KHISA V R</u>, [2011] eKLR, CR.A. NO. 268 OF 2009,*** to buttress his argument. For these reasons, counsel urged us to allow the appeal, and quash

the 1st appellant's conviction and sentence.

8. For the 2nd appellant, Mr Onyatta, submitted that the identification of the 2nd appellant was improper since he was not arrested at the scene of the crime.

In addition, counsel took issue with the fact that PW11 and PW13 had stated that they were able to identify him at the scene, but they did not give descriptions to the police; that the identification of PW13

at the scene was not free from error, as the Police Office Standing Orders require that the identification be by touching, but the witness identified by pointing. For these reasons, counsel argued that the identification of the 2nd appellant was improper and the conviction could not stand on this alone.

9. The appeal was opposed by Mr Omondi on behalf of the State. He submitted that in a second appeal, such as the present one, the court could only interfere with concurrent findings of fact where those findings were based on no evidence. He urged that the first appellate court analysed the evidence on record and came to the conclusion that the identification of PW4, PW11 and

PW13 was free from error. In addition, while the evidence of PW6 was circumstantial, it clearly placed the 1st appellant within the proximity of the robbery. He further stated that PW13 clearly described the 1st appellant and the role that he played in the robbery, and since the robbery took sufficient time in broad daylight, the witness was properly able to identify the robbers.

Determination

10. In a second appeal such as this, the Court is enjoined to consider issuesof law. In ***DZOMBO MATAZA V R**, **[2014] eKLR, CR.A NO. 22 OF 2013)*** this duty was restated in the following manner:

> ***"As already stated, this is but a second appeal.***
>
> ***Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court. ... By dint of the provisions of*** *section 361(1)(a) of the Criminal Procedure Code* ***our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong."***

11. The first and main issue that comes up for determination is whether the identification of the two appellants was proper and free from error. It is common ground that the robbery in question took place in broad daylight. PW4, PW11 and PW13 were the eyewitnesses to the robbery. PW13 and PW11 were in the shop when a man who was later identified by PW11 as the 1st appellant came into the shop and asked for a bale of flour.

12. All four witnesses, PW4, PW6, PW11 and PW13 identified the two appellants in identification parades. In ***KINYANJUI & 2 OTHERS V R**, **[1989] KLR 60 at 75*** the High Court set out that the purpose of an

identification parade:

> ***"Is to give an opportunity to a witness under controlled and fair conditions to pick out the people he is able to identify, and for a proper record to be made of that event to remove possible later confusion."***

This decision of the High court was quoted with approval in this Court's

decision in ***SAMUEL KILONZO MUSAU V R**, **[2014] eKLR, CR.A NO. 153 OF***

2013, wherein the Court further stated that:

> ***"It is precisely for that reason that courts have insisted that identification parades must be fair and be seen to be fair. Scrupulous compliance with the rules in the conduct of identification parades is necessary to eliminate any unfairness or risk of erroneous***

identification. In particular, all precautions have to be taken to ensure that a witness's attention is not directed specifically to the suspect instead of equally to all persons in the parade. Once a witness has properly identified a suspect out of court, the witness is allowed to identify him in the dock on the basis that such dock identification is safe and reliable, it being confirmed by the earlier out of court identification."

13. The identification parade conducted in respect of the 1st appellant was conducted by Inspector Andrew Nyaundo (PW27). The identification form indicates that all the witnesses identified the 1st appellant by touching him; there were no remarks made by the witnesses, and that the 1st appellant was identified by touching, and that he was satisfied with the conduct of the parade.

14. The identification parade conducted in respect of the 2nd appellant was also conducted by PW27. In that identification parade the witnesses are listed as PW4, PW5, PW8, PW11 and PW13. The parade had 8 members. In that identification parade as well, it appears that PW5 and PW8, who also identified

the 2nd appellant by pointing at him said that they knew the witness prior to the parade.

15. Identification parade procedures are contained in the Police Force Standing Orders (Form P156). This form sets out a number of rules and procedures which must be followed during the carrying out of an identification parade. The appellants faulted the conduct of the identification parades on a number of fronts.

The 1st appellant argued that the identifying witnesses did not give a description of him before the identification parade was carried out; he was the only Maasai in the parade and had a distinctive feature i.e. pierced ears; the parade was carried out eighteen [18] days after the incident had taken place; and the names of the identifying witnesses were not indicated on the report.

The 2nd appellant's argument was that the witnesses identified him by pointing rather than by touching.

16. In response to these arguments, it was the prosecution's case that the identification parades were properly carried out; concerning the 1st appellant's claim of being the only Maasai person in the identification parade the prosecution's position was that there were two other Maasai in the parade and in any case, the witnesses did not notice that the 1st appellant had pierced ears and the officer conducting the identification parade did not notice this fact himself until after the identification parade, therefore, this issue did not prejudice the 1st appellant in any way.

17. In a case very similar to the instant one, ***DOUGLAS KINYUA NJERU V R, [2015] eKLR***, the Court of Appeal extensively analysed a number of other decisions and stated the law with regard to identification parades. It stated the following:

> ***"20. Identification parades are meant to test the correctness of a witness's identification of a suspect. See this Court's decision in*** *John Kamau Wamatu v R, CR Nos. 68 & 69 of 2008.* ***In*** *Mwangi Mahita v R, (1976-80) 1KLR 153* **this Court held:**
>
> > ***Whether or not a parade is so irregular as to necessitate being disregarded is, in our view, a question of degree which has to be decided in the light of the circumstances of each case.***
> >
> > ***…***
>
> 22. ***In*** *Nathan Kamau Mugwe v R, CR No. 63 of 2008* ***this Court faced with a similar situation expressed itself as follows:***
>
> - ***In either of the two cases, the parade cannot be held to have been invalid merely because the***

witnesses had not previously given a description of the suspect. The relevant consideration would be the weight to put on the evidence regarding the identification parade. We reject the contention that because James had not given to the police a description of the appellant, his evidence with regard to the identification parade ought to have been rejected.

23.***Based on the foregoing, we are of the considered view that the failure to give the description did not invalidate the identification parade. We find the issue that falls for our consideration is the weight to be attached to the said identification evidence."***

18.***Standing Order 6(iv) (d) and (n)*** state as follows:

"6. (iv) Whenever it is necessary that a witness be asked to identify an accused/suspected person, the following procedure must be followed in detail:

…

d. *The accused/suspected person will be placed among at least*

eight persons, as far as possible of similar age, height, general appearance and class of life as himself. Should the accused/suspected person be suffering from a disfigurement, steps should be taken to ensure that it is not especially apparent;

…

❒ *The parade must be conducted with scrupulous fairness, otherwise the value of the identification as evidence will be lessened or nullified;"*

From the above, we note that the court considers the guiding principle to be whether the identification parade was conducted with scrupulous fairness.

This is a question of fact which depends on the circumstances of each case.

19. Similar standards apply in England as the authors state in **Archbold Criminal Pleading, Evidence and Practice** (2005) Sweet & Maxwell at page

1436:

"While it is important that the codes of practice (code of practice for the identification of persons by police officers, also known as Code D) should be observed, it is equally important to see whether any unfairness resulted from a breach. When there is a breach, the trial judge, having heard submissions, should exercise his discretion whether or not to allow the evidence given, by applying the test prescribed by *section 78 of the Police and Criminal Evidence Act 1984****:*** **R v Grannell, 90 Cr. App. R. 149, CA.** ***<u>The fundamental issue, whether the code applies or not, is whether the identification would have such an adverse effect on the fairness of the proceedings that it should be excluded</u>:*** **R v Hickin [1996] Crim L.R. 584, C.A.; R v Malashev [1997] Crim L.R. 587, CA.** ***Where insufficient regard is had to fair identification practices and adducing reliable identification evidence, the discretion to exclude evidence under*** *section 78* ***is likely to be exercised and convictions will be liable to be treated as unsafe:*** **R v Popat [1998] 2 Cr. App R. 208, CA.** [Emphasis added]

Having regard to the foregoing, we are satisfied that in the circumstances of this case, the identification parades with regard to both appellants were fairly conducted and were correctly accepted in evidence by the two courts below.

20.On the question of whether there is a conflict between ***sections 297(2) and 389 of the Penal Code***, the said sections of the law provide 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. 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."***

21. A plain reading of ***s389*** suggests that it only comes into operation where no other punishment is provided. ***S297 (2)*** clearly prescribes the sentence for attempted robbery with violence as death.

22. The Court of Appeal has had occasion to deliberate on any potential conflict between ***sections 297(2) and 389 of the Penal Code***. In the recent decision of ***CHARLES MULANDI MBULA V R, [2014] eKLR*** the Court wascategorical that there is no conflict at all between ***sections 297 (2) and 389 of***

the Penal Code; the court stated as follows:

> ***"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 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."*** (Emphasis in Original)

This decision was followed by this Court in the case of ***DICKENS ODARI BIGE***

& ANOTHER V R, [2014] eKLR.

23. Based on the above it is clear that there is no conflict between the two provisions of the law and accordingly the sentence meted out by the trial court and upheld by the High Court is lawful and shall stand. On the whole, this appeal is devoid of merit and is hereby dismissed.

Dated and delivered at Nairobi this 12th day of June, 2015.

P. N. WAKI

JUDGE OF APPEAL

G. B. M. KARIUKI

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

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

DEPUTY REGISTRAR