IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI, PCA, KIAGE & J. MOHAMMED, JJ.A.)

CRIMINAL APPEAL NO. 123 OF 2010

BETWEEN

CHARLES MULANDI MBULA…..……..……...… APPELLANT

AND

REPUBLIC ……..…..…….. RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nairobi (Ojwang' & Warsame, JJ. (as they then were) dated 1st October, 2009)

in

H.C.CR.A. NO. 580 OF 2007)

****

JUDGMENT OF THE COURT

1. This is an appeal by **Charles Mulandi Mbula** (hereinafter the Appellant) from the judgment of the High Court upholding and affirming the conviction and sentence by the trial Senior Resident Magistrate's court in respect of a criminal charge of attempted robbery with violence contrary to **section 297(2) of the Penal Code.**
2. The particulars of the charge are that on the **17th day of July 2005,** at Dandora Phase V Estate in Nairobi, while armed with an offensive weapon, namely a club, attempted to rob **Jethro Mwitusia Motongori** of a mobile phone and cash and at or immediately before or immediately after the time of such attempt, used actual violence to the said **Jethro Mwitusia Motongori.**
3. The Appellant was arraigned before the Senior Resident Magistrate - Makadara in Nairobi on the **3rd August 2006** and charged with the offence of attempted robbery with violence contrary to Section 297(2) of the Penal Code, where he pleaded not guilty. Following trial, the learned Magistrate found him guilty and convicted him accordingly. The Appellant was subsequently sentenced to death.
4. The Appellant, aggrieved by the conviction and sentence, filed an appeal to the High Court against his conviction and sentence. At the High Court, he contended that the trial court erred in finding circumstantial evidence to corroborate his identification. The Appellant also contended that his constitutional rights had been violated.
5. The learned Judges (**J.B. Ojwang J** (as he then was) and **M.A. Warsame J** (as he then was)), guided by the principle of recognition, upheld the decision of the trial court and dismissed the

appeal in its entirety. He now brings this second appeal to this Court.

6. In the Appellant's grounds of appeal in the Supplementary Memorandum of Appeal dated the **14th June 2012,** he urges this Court to find:

"(1) THAT the learned Judges of the High Court erred in law in affirming the conviction of the Appellant based on recognition /identification whereas the circumstances favoring a positive identification were difficult and were not free from possibility of error…

(2)…

(3)…

(4) THAT the learned Judges of the High Court erred in law in affirming the conviction of the Appellant whereas the Appellant was arraigned in Court 18 days after his arrest there being a delay of 4 days in contravention of section 72(3)(b) of the old Constitution thus rendering the trial a nullity.

7. The record before this Court may be summarized as follows. It was the prosecution's case that on the material date, the complainant, **Jethro Mwitusia Motongori,** a pastor with Glory Mission, was walking towards the church early in the morning at around 6.30 a.m. Suddenly, someone tugged at his trousers from behind. When he turned, he saw a person whom he immediately recognized as familiar; he had seen him around the neighbourhood often but did not know his name; and that this person was the Appellant herein. The assailant ordered the complainant to surrender his cell phone and while so doing, the appellant violently hit him with a club on the head and shoulder. The complainant then ran into the church bleeding, with the appellant giving chase.
8. According to evidence by **Prosecution Witness 3, Dr. Zephania Kamau,** the complainant sustained serious injuries and was admitted at the Kenyatta National Hospital where he was confined for three weeks. The complainant had extra-dural and intra-cerebral haeumatoma. It was the witness's opinion that the injury had been caused by a blunt object. He classified the injury sustained by the complainant as grievous harm.
9. Further, it was the prosecution's evidence, adduced through **Prosecution Witness 2 Police Inspector Samson Ogeto,** that the Appellant was arrested almost immediately after the attack. He told the court that he found a club, likely to have been used in the attack, in the Appellant's house.
10. In his defence, the Appellant said in his unsworn statement that on the material date, he left his house in the morning to go to work. On the way, according to the Appellant's statement, he met police officers who ordered him to take them to his house. They conducted a search in the house, whereupon he was arrested and charged with the offence.
11. It follows, from the record before us, that the case against the Appellant turned largely on identification by a single witness. The learned Magistrate noted that the arrest of the Appellant had taken place at sunrise; his arrest took place almost immediately after the incident. Further, the complainant was able to see the Appellant clearly. This evidence was corroborated by the finding of the weapon used in the attack in the Appellant's house. It is against this evidence that the Appellant objects.
12. This appeal came up for hearing before us on the **16th October, 2013.** At the hearing, the Appellant was represented by **Mr. Ogesa Onalo,** whereas the State was represented by **Ms. Mary Oundo, Assistant Director of Public Prosecution.** At the hearing, learned counsel for the Appellant confined himself mainly to the ground in the supplementary memorandum dated the **9th July, 2013** thus:

"(1). THAT the learned trial Magistrate and the learned Judges of the High Court erred in law by failing to consider the provisions of section 389 of the Penal Code Cap 63 Laws of Kenya.

13. He submitted that whereas **section 297(2) of the Penal Code** provides for death sentence under conditions prescribed thereunder, **section 389(1) of the Penal Code** sanctions a sentence of a maximum of 7 years for the inchoate offense, yet the Appellant had been sentenced to death upon conviction**.** Finally, counsel averred that the evidence adduced by the complainant of recognition

of the Appellant had not been corroborated. He urged the Court to allow the appeal.

14. Counsel for the Appellant submitted that whereas both the trial court and the High Court held the view that this was a case of recognition, the conditions were not conducive to recognition of the Appellant. **Mr. Onalo** contended it was not possible to recognize the Appellant facially at 6.30 a.m., in the absence of electric lights. He contended further that no features of recognition had been stated to the court, which goes to show that there was no identification.

15. In opposing the appeal, **Ms. Oundo** argued that the crime of attempted robbery with which the Appellant had been charged had been done in daylight; that the Appellant was armed with a club, which was recovered on the Appellant upon arrest; and that he had been recognized. Counsel averred that such recognition was safer than identification. Finally, on **section 389 of the Penal Code,** prosecution counsel argued that any person who is found guilty of an attempt to commit a felony shall not be liable to imprisonment for a term exceeding seven years, only if no other punishment is provided; where the offense is punishable by death or life imprisonment, this provision does not apply. In support of her case, **Ms. Oundo** relied on this Court's case of ***Mulinge Maswili vs. Republic (Criminal Appeal No. 39 of 2007)*** arguing that this Court has clarified that **section 297(2) of the Penal Code** provides for the punishment of death penalty for attempted robbery, where violence is used. She submitted that where there were other elements such as injury, the charge would still stand even if the weapon was not described as either "dangerous" or "offensive".

16. This Court has considered the record, the grounds of appeal, the submissions by counsel and the applicable law. This being a second appeal, we will address only points of law by dint of **section 361 (1) of the Criminal Procedure Code** and our own decision as in ***Karingo v Republic [1982] KLR 213***:

"A second appeal must be confined to points of law and the Court of Appeal will not interfere with concurrent findings of fact of the two lower courts unless they are shown to have not been based on evidence."

17. We are further cognisant of this Court's decision in ***M'Riungu v Republic [1983] KLR 455***, in which we stated as follows:

"Where a right of appeal is confined to questions of law an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat the findings of fact as holdings of law or mixed finding of fact and law and it should not interfere with the decision of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law."

18. We have evaluated the record before us and this Court finds that the subordinate court properly applied and the High Court evaluated the evidence from the prosecution witnesses **Jethro Mwitusia Motongori *(PW1)***, **Police Inspector Samson Ogeto (PW2)**, and **Dr. Zephania Kamau (PW3)**, in their full context and circumstances**.**

19. This Court takes note that in the trial, the learned Magistrate found that the arrest of the Appellant had taken place at sunrise; while walking to church, PW1 was attacked by a person, who he recognized as the Appellant; the attacker demanded money and a cell phone, and violently hit him on the head and shoulder with a club; the Appellant's arrest took place almost immediately after the incident. This record before us shows that this evidence was corroborated by the finding of the weapon, a club, used in the attack, in the Appellant's house. **Inspector Ogeto (PW2)** testified that accompanied by other officers, he went to the Appellant's house, across the road from the scene of attack, immediately after the crime was reported and found the Appellant. The Appellant admitted he had a club, which he surrendered to the police. The complainant confirmed that his phone was not stolen, but the Appellant had attempted to steal it. It was **Inspector Ogeto's** evidence that the Appellant was later positively identified by the complainant.

20. Having reviewed the record before us, this Court is convinced that the evidence on record supports the prosecution's case. In our view, the evidence tendered against the appellant at the trial court was watertight and unchallenged. Identification of the Appellant as the attacker was positive

and the weapon used was found in his house. The totality of the circumstances adds further to this evidence as to reach the threshold of proof beyond reasonable doubt. With regard to the element of attempted robbery under **section 297(2) of the Penal Code**, the record supports the finding that at the time of committing the offence, the Appellant was armed with a club, which he used to hit the complainant on the head and shoulder, causing him serious injury. This brings the club within the meaning of "dangerous" or "offensive" weapon under **section 297(2) of the Penal Code,** and therefore the offence with which the Appellant was charged, thereunder.

21. It now remains to consider the issue of the legality of the sentence as argued by the Appellant. The Appellant was charged and convicted of attempted robbery with violence contrary to **section 297(2) of the Penal Code.** This Court was urged to find that the applicable sentence is a term of imprisonment not exceeding seven years under section **389 of the Penal Code. Section 297(2) of the Penal Code** provides that:

"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 provides that

"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." *(Emphasis supplied)*

22. 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 therein. Hence the inclusion of the phrase "if no other punishment is provided." (*Emphasis in Original****)***

23. Finally, regarding custody of the appellant for a period over 18 days before being arraigned in court four days after the constitutionally required period, the position in law is now well settled. In the case of ***Julius Kamau Mbugua vs Republic Criminal Appeal No. 50 of 2010*** the Court addressed ***sections 72(3)(b)*** and ***77(1)*** of the repealed Constitution thus:

"The underlying question arising in this appeal is whether an unconstitutional extra judicial

incarceration by police before the suspect is charged in court either entitles the suspect not to be tried for the offence for which he was arrested, or, if tried, whether he is entitled to a discharge or acquittal. Simply put in another way, whether a breach of Section 72(3)(b) by depriving a suspect of his personal liberty by police before being charged in court entitles the suspect to go scot-free for the offence allegedly committed or about to be committed. This is a fundamental question of great public importance

[…]

In our view, the right of a suspect to personal liberty before he is taken to court under Section 72(3) (b) are clearly distinct from the rights of an accused person awaiting trial under Section 77(1).

The main difference is that the breach of right to personal liberty is not trial-related. It is a right to which every citizen is entitled. It is the function of the Government to ensure that citizens enjoy the right. The duty is specifically on the police where the suspect is in police custody. If, by illustration, police breach the right to personal liberty of a suspect by unreasonable detention in police custody there is a right to apply to the High Court for a writ of Habeas Corpus to secure release (see Section 389(1)(a) of Criminal Procedure Code and Section 84(1) of the Constitution).

In addition, Section 72(6) provided a remedy by way of damages to a person who is unlawfully arrested or detained."

24. In the result and for the reasons we have endeavoured to give, the Appellant's appeal lacks merit, and it is accordingly dismissed. It is so ordered.

Dated and delivered at Nairobi this 31st day of January, 2014.

P. KIHARA KARIUKI

……..…….

PRESIDENT, COURT OF APPEAL

P.O. KIAGE

……..

JUDGE OF APPEAL

J. MOHAMMED

……..

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

hg