



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ.A)**

**CRIMINAL APPEAL NO. 85 OF 2009**

**BETWEEN**

**COLLINS KISANDA ODUOR .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

**(An appeal from a Judgment of the High Court of Kenya at Kisii (Musinga & Karanja, JJ.) dated 26<sup>th</sup> February, 2009 In H.C.CR.A. NO.18 OF 2008)**

**JUDGEMENT OF THE COURT**

The record before us shows that **Tisiana Wanjiku Mburu (PW1)** in the Criminal Case Number 1135 of 2006 in the Senior Resident Magistrate's Court at Rongo, was the wife of one **Leonard Mburu Mwangi**. They were doing business in Rongo Township of Migori District and lived there. On the night of 18<sup>th</sup> and 19<sup>th</sup> August, 2006, at about 4.30 am they were asleep in their house. She heard a loud noise like that made by an electricity spark. She woke up and shone a torch only to find that her husband Leonard was not in the bedroom. That was the time when he used to wake up and that was the time when bread from Kisumu was usually delivered to their shop. Tisiana was not aware as to when her husband went out of the bedroom. She went out of the bedroom and she heard her husband telling her to switch off electricity main switch. She complied. She then went outside, and saw a red torch. She suspected presence of strangers within their compound. She went back to the bedroom and locked the door. She thereafter saw some movements outside through the window. She was terrified, but decided to open the door to check what was happening. She heard two gunshots and heard her husband crying for help and heard more gunshots. She went back to the house and heard her husband's voice fade away. She peeped through a hole and saw people holding each other, but as those people had headgears she could not identify them, but she observed that one of them looked injured and was being helped by another. Thereafter she heard as if the strangers were going away by climbing the vehicle, but she could not identify any of the attackers. Because she was scared, she could not go out and stopped the children also from going out much as they wanted to go out to help their father. She went to the shop side of that building and contacted their neighbor called **Haji**, but one of the petrol attendants called **Said**, on hearing her shouts woke up **Harad Adan (PW2)** who called police at Kamagambo Police Station. **Chief Inspector Josephat Kiarie** of Kamagambo Police Station, who had also been alerted by **IP Lubanga**, assembled a team of police officers and rushed to the scene. Tisiana opened the door and one of the police officers **PC Muluma (PW5)** accompanied her to where her husband lay at the car park. He was already dead. Earlier that night a petrol attendant at a petrol station nearby had also been assaulted. He was **Domisiano Masese Ratemo (PW3)**, but that was the complainant in another charge in respect of which the appellant was acquitted. It is only relevant for purposes of establishing that robbers were on

the loose that night and as part of circumstantial evidence. The deceased's daughter, **Ruth Nyambura Mburu (PW4)** was in the same- house as Tisiana, but for reasons that will be clear herein later, her evidence should not have been relied upon in this case. Be that as it may, upon arrival of the police at the scene and upon finding Leonard dead, the police commenced investigations. PC Mulama and CIP Kiarie noticed a trail of blood from the scene which was surrounded by a perimeter wall. They continued tracing the blood stains to outside the perimeter wall and after tracing it for about fifty (50) meters from the scene, they saw somebody limping. They approached that person who on seeing them fell down claiming he had been shot by thugs. He had a brown jacket with blood stains. Mulama knew him as he had had some encounters with him earlier before that date. He identified him as the appellant in this appeal. On searching the area immediately around him the police recovered a somali sword about five meters away from him. That sword had blood stains on both sides. He had a wound on the left leg which looked like having been inflicted by a gunshot and that wound was still fresh and bleeding. He was arrested and taken to Kamagambo Police Station. Blood samples were taken from the scene, from the deceased, and from the appellant; six cartridges were recovered from the scene. The body of the deceased was taken to Kisii District Mortuary.

On 21<sup>st</sup> August, 2006, **Dr. P.M. Ajuoga (PW9)** carried out postmortem examination on the body of the deceased at Hema Hospital Mortuary. The doctor formed the opinion that the cause of death of Leonard was internal haemorrhage due to ruptured heart, lung and spleen and that the same rupture was caused by bullets. Later, after sometime, another person was arrested on the same complaint; but as that other person was acquitted, we will not go into matters pertaining to him save where necessary. **Stephen Matinde Joel (PW12)** received specimen in respect of blood samples taken from the appellant, the deceased, sword (panga), soil, together with other blood stained cotton wool. He examined them and found that whereas the blood samples of the appellant was that of group B and that of the deceased was of group O, the panga or sword found near the appellant had blood group O on it and the coat the appellant had worn the night he was arrested had blood group O. The blood collected from the soil which dropped and resulted in tracing the appellant was that of the appellant, namely of group B. The report as regards cartridges picked at the scene and the live ammunition found at the petrol station nearby showed that the same were fired from one gun namely ceska pistol. The appellant together with his colleague arrested later were thereafter charged with two offences of Attempted Robbery with violence contrary to **Section 297 (2)**. As he was acquitted in respect of the second charge, we will not reproduce that charge in this judgment. The first count the particulars of which we produce were that:

**"On the 19<sup>th</sup> day of August, 2006 at Rongo Town in Migori within Nyanza Province jointly with others not before court while armed with dangerous weapons namely pistols, torches, and simis attempted to rob Leonard Mburu Mwangi and at or immediately before or immediately after the time of such attempted robbery shot dead the said Leonard Mburu Mwangi."**

The appellant pleaded not guilty to the charge, and on being put to his defence at the end of the prosecution's case, his defence, given on oath was that on 18<sup>th</sup> August, 2006, at 6.30 pm he went to Rongo to take a drink at a bar. He drank a lot of beer till he got so drunk that he did not know when he left the bar. All he could remember was that he left the bar, staggered for sometime till he fell down and slept near a road. Later he saw torches and he was attacked by thugs and shot. He fell unconscious. He woke up at Rongo Police Station and realised that he had been shot. Later, PC Mulama, with whom he had had grudges when they met at Homa Bay, came to the cells and pointed him out as they had had differences over a girl at Homa Bay. He was taken for treatment at Kisii District Hospital. He denied the charge and maintained that he was a victim of attack by thugs coupled with injuries inflicted by PC Mulama and his team.

The learned Senior Resident Magistrate (D.Kemei) in a lengthy and detailed judgment delivered on 22<sup>nd</sup> February, 2008, found the appellant guilty of the offence which was the subject of the first count. He was convicted and after considering mitigating factors, was sentenced to death. In doing so, the learned Senior Resident Magistrate addressed himself thus:

*"However as regards the 1st accused herein I find the prosecution has proved it (sic) case in count one against him beyond any reasonable doubt. The prosecution witnesses gave consistent cogent and corroborative evidence and further which was strengthened by the circumstantial*

*evidence gathered at the scene which linked him to the crime. The defence evidence has not shaken that of the prosecution which is overwhelming against 1st accused herein whom I find guilty as charged in count one and is convicted accordingly under section 215 of the criminal procedure code."*

The appellant felt dissatisfied with that conviction and sentence. He appealed against it in the High Court vide Criminal Appeal No. 18 of 2008. That appeal was heard by Musinga, J. (as he then was) together with Karanja, J. In a Judgment delivered at Kisumu on 26<sup>th</sup> day of February, 2009, the learned Judges of the High Court dismissed it saying in the last two paragraphs:

**"The learned trial magistrate properly analysed the evidence and rightly rejected the appellant's defence. He observed that the prosecution had relied on circumstantial evidence which he stated was a collection of facts which, when considered together can be used to infer that a person committed an offence. It is trite law that in a case depending exclusively upon circumstantial evidence the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of any other explanation or any other hypothesis than that of guilty- see Mwita vs Republic (2004) 2 KLR 60.**

**Having weighed the totality of all the circumstantial evidence that was adduced by the prosecution witnesses against the appellant's defence we find that the inculpatory facts are not compatible with the professed innocence of the appellant. We find that the appellant was properly convicted and sentenced accordingly. We therefore dismiss this appeal in its entirety."**

The above concurrent decisions are the genesis of this appeal before us premised on seven grounds of appeal filed by the appellant's former advocate Maureen Okumu and one ground filed by the appellant's current advocate Miriam Bikeyo. The grounds in the main Memorandum of Appeal were in a nutshell that the first appellate court failed to revisit the evidence afresh, analyse it and reevaluate it as is required by law; that it failed to consider the grounds of appeal preferred before it; that it erred in admitting and considering evidence on identification parade whereas the same parade was not conducted in compliance with the forces standing order Rules; that it erred in holding that the blood at the scene was that of the appellant whereas no DNA test was carried out; that it relied on defective charge sheet to convict the appellant; that it erred in failing to consider that the weapon allegedly used was not found at the scene and the sword found could not have inflicted the injury that caused the death of the deceased and that it failed to consider that the exhibits allegedly recovered at the scene were not dusted for finger prints. The only ground in the supplementary Memorandum of Appeal read:

**"The appellate court misdirected itself in not considering, on its own motion, the law relating to sentence where the offence was one of the attempt to commit a felony as opposed to an offence which was complete."**

Ms. Bikeyo, the learned counsel for the appellant addressed us at length on the first and fifth grounds in the original Memorandum of Appeal which were as we have stated on failure to revisit, reanalyse and reevaluate the evidence on record; and that the charge was defective, together with one ground in the supplementary Memorandum of Appeal, we have reproduced herein above. She abandoned all the other grounds. On first ground, Ms. Bikeyo's take was that the first appellate court failed as was required of it, to revisit the evidence afresh, analyse it, reevaluate it and reach its own conclusion, but always being aware that the trial court saw and heard the witnesses and thus giving allowance for that. In support of her contention, she cited the evidence of Mulama which she said contradicted that of Kiarie as to the distance between where the appellant was found and the scene, with one saying it was 150 meters whereas the other said it was 50 meters only. On ground 5, she submitted that the court erred in relying on blood group comparison without any DNA testing as blood group O is very common and thus being of that blood group cannot of itself mean one is linked to the offence where blood testing is crucial like in this case. Lastly, she submitted that the death sentence spelt out in **Section 297 (2)** was not lawful

as the provisions of **Section 389** are clear on sentencing in respect of charges in respect of attempts. She asked us to allow the appeal.

Mr. Abele, the learned Assistant Director of Public Prosecutions, while opposing the appeal on conviction felt the evidence of Ruth Nyambura Mburu, being that of a child and having been given without *voire dire* proceedings should be expunged from the record. He felt however, that even without that evidence, there is still sufficiently strong prosecution evidence to afford a conviction as blood group of the deceased matched the blood samples found on the appellant's jacket and on the sword found near the appellant. He felt the conviction was safe. On sentence he agreed that **Section 389** is clear that death sentence in the offence that was before the two courts which was attempted robbery with violence could not be supported and he urged us to uphold the conviction but interfere with the sentence.

We entertain no doubt whatsoever, in our minds that this was a case that could have only been approached vide the application of the principles of proof vide circumstantial evidence. No witness testified as to having seen the appellant commit this heinous offence. Tisiana who could have seen the attackers was naturally scared stiff and did not go to where her husband was being attacked. The best she said she saw was when she looked through a hole and saw one thug helping another who appeared to her to have been injured, but she could not identify the two. However, based on her evidence, it did appear that one of the thugs was shot in the course of the attack. Domisiano Masese Ratemo (PW3) was attacked at a petrol station nearby earlier and was the subject of the second count in respect of which the appellant and his co-accused were acquitted. He was able to identify the appellant as one of his attackers who injured him and was able to point him out at an identification parade organised by **Inspector Charles Bundi (PW11)**. That however was identification in respect of an offence at a different scene though very close to the subject scene in this appeal and further the trial court did not rely on it and so acquitted the appellant. However, it shows that the appellant could have been within the vicinity or somewhere within the general area where the deceased was attacked and shot dead. Nonetheless, that evidence does not in itself point at the appellant as the person who must have attacked the deceased for there could still have been more than one gang of thugs roaming Rongo town that night and the gang that attacked the deceased could very well have been different.

In short, in the circumstances of this case, proof was through circumstantial evidence as no direct evidence was offered before the trial court. The law is now well settled and it is found in several pronouncements of this Court, that such proof must be water tight and the chain that links all such evidence must be complete and not broken at any stage. In short before a conviction is based on circumstantial evidence, the court must be satisfied beyond reasonable doubt that the inculpatory facts are incompatible with the innocence of the accused and incapable of any other explanation or any other hypothesis than that of the accused's guilt. In the case of **Mwita vs Republic (2004) 2 KLR 60**, this Court stated:

**"It is trite that in case depending exclusively upon circumstantial evidence the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than the guilt, see Simon Musoke v R (1958) EA 715 where the following extract from Teper v R (1952) AC 480, 489 was quoted (1958) EA at page 719**

**"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."**

In this case, the deceased was attacked around his house which was surrounded by a wall at about 4.30 am. It is not certain why he went out of his bedroom that early but the evidence from Tisiana, his wife was that he used to wake up and go for shower at that time. Further evidence was that bread was brought to their shop from Kisumu about that time. There was also evidence that he owned matatus. Whatever made him go out of his bedroom that early, he was nevertheless within his compound where he was attacked. Tisiana saw one of the attackers being helped by another as he was apparently injured. She contacted the next neighbour to call police and Adan who also had his own source of information

contacted police. Police arrived at the scene apparently without much delay for when they arrived at the scene Tisiana had not gathered courage to go to where her husband lay dead. When police arrived, they noted a trail of blood which started from the scene and when they followed it, it continued upto where the appellant was. The appellant on seeing the police fell down and said he was injured by thugs. However, the jacket he was wearing was blood stained and not far from him a sword was found which also had blood stains. The blood on the ground which must have been drops of blood were recovered by police, when the blood on the coat or jacket of the appellant and blood on the sword were subjected to analysis, it was found that although the appellant's blood was that of group B, the coat he was wearing, and the sword had blood stains of blood group O which was the deceased's blood group. In effect, the appellant's coat that he was wearing that night and the sword which was found near him that night had been in contact with a person who was of human blood group O. The blood drops on the soil forming the trail, was that of the appellant's blood group B, meaning the appellant walked away from the deceased for that trail of blood started near the deceased. It is true as Ms. Bikeyo says, that blood group O is common in that many people are of blood group O, but in this scenario, it was upto the appellant who was wearing the coat and was near where the sword was, to explain pursuant to the provisions of **Section 111** of the Evidence Act as to how his coat came into contact with another person other than the deceased whose human blood was of group O as the deceased. He also had to explain as to how his blood started dropping from where the deceased lay dead and continued dropping upto where he was found by the police. These were matters within his special knowledge. He did not give any such explanation. It is also true as Ms. Bikeyo says that there was no proof that the sword had cut the deceased, but whoever held it must have been near the deceased or must have intended to use it upon the deceased at the time the deceased was shot and that could also explain how the appellant came to be also injured on the ankle. Further, there was evidence that there were no houses near that place where the appellant was found and the scene of this crime. Of course, one cannot forget the evidence of Ratemo that he identified the appellant as his attacker at a petrol station nearby although the trial court never relied on it for conviction. As we have stated though that was a different incident, it nonetheless was an indication that the appellant could have been within that general area.

In our view, without the explanation of the appellant as to where his coat gathered the blood of the same group as that of the deceased, the only inference that any reasonable court can draw from the above facts is that the appellant was one of the attackers. Also without any explanation as to how his blood started dropping from where the deceased was, the only inference is that he was near the deceased when he was injured. The trial court, as we have stated carefully and in detail narrated and analysed the evidence that was before him and which he accepted as credible and came to the conclusion that the appellant was one of those who attempted to rob the deceased and who killed him in such attempt. The first appellate court also, in our view, revisited the evidence, analysed it, evaluated it and came to the same conclusion and we see no reason to interfere with the two concurrent findings on these matters of facts as pursuant to the provisions of **Section 361 (1) (a)** of the Criminal Procedure Code ours is to delve into the matters of law and not of facts unless we are sure that the lower courts misapprehended the facts or that their judgments were simply perverse in which case the same would be treated as matters of law. We have not been shown where they misapprehended matters of facts. The issue as to whether the distance from the scene to where the appellant was found was 50 or 150 meters is a matter of fact and is a matter for the trial court and the first appellate court to resolve. They did that and we have the duty to be loyal to their findings on such issues.

In short, on the issue of conviction, we entertain no doubt in our minds that the circumstances obtaining leading to the appellant being found guilty of the offence as charged in count 1 left no other hypothesis other than that the appellant was one of the attackers of the deceased that night and was thus convicted on sound grounds.

We now come to the issue of sentence. Both Ms. Bikeyo and Mr. Abele who conceded the appeal on this issue, were of the view that provisions of **Section 389** of the Penal Code does not allow the court to sentence a person found guilty of the offence under **Section 297 (2)** to death as that section provides, according to them for no more than maximum seven years imprisonment. The decision of this Court in the case of **Evanson Muiruri Gichane vs Republic**- Criminal Appeal No. 277 of 2007 was cited in support of that submission. We have anxiously considered these submissions by the two learned

counsel. It must be noted that that decision was made on 10<sup>th</sup> December, 2010. **Section 297 (2)** of the Penal Code under which the appellant was charged provides:

**"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."**

**Section 389** of the same Penal Code provides:

**"Any 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, 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."**

The above two provisions are the ones this Court differently constituted considered and reached a conclusion that **Section 297 (2)** lacked legality. In our considered view that decision was per incuriam as it did not consider that **Section 389** could not have treated the offence of attempted robbery with violence which is in itself an attempt offence to be a different offence punishable by death. That section could not have treated attempted robbery as a separate offence punishable by death. Further, in our respectful view, that decision did not consider that as in respect of the provisions of **Section 296 (2)**, the Parliament deliberately wanted to punish attempted robbery with violence severely and thus removed it from the other offences of attempt by making specific provision for sentence in respect of those who commit it. This was done in the same spirit that robbery with violence under **Section 296 (2)** was removed from simple robbery under **Section 296 (1)** as read with **Section 295** so that like robbery with violence attempted robbery under **Section 297 (2)** it is also treated as aggravated offence and is thus set out as an offence with punishment for it clearly provided and is not any other felony punishable with death such as murder of which those convicted for attempting to commit would be sentenced for maximum seven years.

In our view, the decision of this Court differently constituted, and recently pronounced in the case of **Charles Mulandi Mbula vs Republic - Criminal Appeal No. 123 of 2010** captures the intention of the Legislature when **Section 297 (2)** was enacted. The court stated as follows:

**"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."**

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**(Emphasissupplied)**

**It is dear 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 offences. 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)**

We agree with this approach. In our view the provision of **Section 389** could not have treated attempted robbery with violence, being an attempt offence for which punishment was already specified as any other felony carrying death sentence, such as murder. Thus we reject the submissions on this issue.

The net result is that this appeal lacks merit and is dismissed both on conviction and on sentence.

**Dated and Delivered at Kisumu, this 6<sup>th</sup> day of June, 2014.**

**J.W. ONYANGO OTIENO**

**JUDGE OF APPEAL**

**F. AZANGALALA**

**JUDGE OF APPEAL**

**S. Ole KANTAI**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**