IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL NO. 649 OF 2010

BETWEEN

DICKENS ODARI BIGE .....1st APPELLANT

DAVID RUTO SIRWEN.....2nd APPELLANT

AND

REPUBLIC ….....RESPONDENT ***(Appeal from a Judgment of the High Court of Kenya at Kakamega (Ombija , Kariuki, JJ) dated 4st July , 2008***

in

KAKAMEGA HCCRA NO. 143 & 144 OF 2005)

****

JUDGMENT OF THE COURT

The appellants **Dickens Odari Bige** and **David Ruto Sirwen** were charged together with another who was acquitted at the trial before the Chief Magistrates Court at Kakamega, with the offence of attempted robbery contrary to Section 297 (2) of the Penal Code in that on the night of 31st January 2004 and 1st February, 2004 at Boyani village, Gamalenga sub location, Tambua location in Vihiga District of the then Western Province while armed with dangerous weapons namely somali swords jointly attempted to rob John Kipyegon Kiplagat of his money by threatening to stab him and ordering him to surrender money to them. A trial took place before the learned Senior Resident Magistrate (E. O. Obaga) who, in a judgment delivered on 13th October 2005 convicted the appellants and sentenced them to death. A first appeal to the High Court of Kenya Kakamega, (N. R. Ombija, J and G. B. M. Kariuki, J (as he then was) failed leading to this appeal.

Being a second appeal Section 361 (1) (a) Criminal Procedure Code gives us jurisdiction to deal only with issues of law but not matter of facts which the two courts below have tried and determined unless those courts have failed to consider relevant factors or applied wrong principles or the findings were bad in law for being perverse which is to say that no reasonable tribunal could on the evidence have arrived at such findings – See the judgements in such cases as **Karingo v R [1982] KLR 213** where the court expressed the statement:

“ A second appeal must be confined to points of law and this court will not interfere

with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did."

See also **M'uriungi v R [1982 – 1988] 1 KAR 360 and Thiongo v R [2004] IEA 333** among other many judgements of this court.

What, then, are the issues of law raised by the appellants falling for our consideration?

In the Memorandum of Appeal drawn by learned counsel for the appellants Mr. Charles Onyango seven grounds of appeal are taken. In the first ground the learned judges of the High Court are faulted for finding and holding that failure to sign the charge sheet was a mere defect when such failure spoke to the existence of the charge sheet. The second ground is related to the first – it is stated that the learned judges misdirected themselves in holding that an unsigned charge sheet could be the basis of criminal proceedings or that such charge sheet could be validated by Section 90 (2) of the Criminal Procedure Code. In the third ground the appellants fault the learned judges for holding that the complainant recognized the appellants when there was no basis for such finding. The complaint in the fourth ground is that recognition could not have been found because the complainant did not give any features of the attackers to the police. In the fifth ground the source of light is questioned and the learned judges are faulted for failing to warn themselves that mistakes could be made in cases of alleged recognition. In the sixth ground it is alleged that the learned judges faulted in their duty of re-evaluating the evidence to arrive at their own conclusion and in the final ground of appeal the learned judges are faulted for failing to give appellants the benefit of the lesser sentence provided by Section 389 of the Penal Code.

The case for the prosecution was through the evidence of five witnesses and was that on 1st February, 2004 at 2:00 a.m. **John Kipyegon Kiplangat (PW1)** (**Kiplangat)** was asleep in his house when he was awoken by a loud bang at the door. He switched on the lights and got out of bed to investigate and at the broken door found three people, two of who he recognized as the two appellants who were his neighbours. He did not recognize the third person as this person donned a mask. All three intruders were armed with knives and they ordered him to switch off the lights lest they would stab him. He complied. The first appellant threw him to the ground and ordered him to produce money otherwise he would be killed. He pleaded to be let go to fetch money but when he gained his freedom he escaped through a back-door and screamed for help which made the intruders to flee. He reported the matter in the morning to Gambogi Police Station and the appellants were arrested on 5th February, 2004.

Walter Amuyunzu (PW2) (Amuyunzu) and **Andrew Ayuko Kisia (PW3) (Kisia)** both visited Kiplangats' house the same night on hearing screams and witnessed the broken door. Kiplangat informed them that he had recognized the appellants. They were both in the party of those who apprehended the appellants, people they knew before because they were all neighbours. **Thomas Ombalo Kisia (PW4) (Ombalo)**, an assistant Chief of the area, received report from Kiplangat, confirmed that the house had been broken into, was given names of the two appellants and led in the arrest of the appellants.

No. 53423 P. C. William Chelimo (PW5) of Gambogi Police Station received Kiplangats' report on 1st February, 2004 and formally arrested the appellants.

The trial magistrate was satisfied that a case had been made by the prosecution calling upon the appellants to answer. In sworn testimony the first appellant testified that he was given a letter by the assistant chief to deliver at Gambogi Police Station but upon arrival there he was arrested and locked up. He denied being involved in any way in commission of the offence stating that he was at home on the night of the offence. He did not know the persons he was charged alongside.

The second appellant testified that he was arrested after being tricked by the assistant chief that he was to be involved in road construction. He denied the charge.

The learned trial magistrate in the judgement referred hereinabove held that the complainant properly identified the two appellants as the persons who broke and entered his house. The trial

magistrate further dismissed the alibi defence of the appellants holding that the alibi had been displaced by prosecution evidence.

When the appeal came for hearing before us on 12th May, 2014 Mr. Charles Onyango, the learned counsel for the appellants combined grounds 1 and 2 as one cluster, then grounds 3, 4, and 5 as another cluster and then urged ground 6 and 7 each separately. On the first cluster which grounds attacked the charge sheet, learned counsel submitted that the charge sheet was not signed against the provisions of law and was therefore an invaild charge sheet which could not be the basis for a criminal charge as the defect was incurable. On the second cluster of grounds which related to the courts findings on identification, learned counsel contended that the two lower courts proceeded on wrong legal premises as there was no proper investigation to ensure that there was no possibility of error in the evidence of recognition.The case of **Paul Etole & Anor v R Criminal Appeal No. 24 of 2000 (ur)** was cited for the proposition that the court should remind itself that mistakes in recognition even of close relatives and friends are sometimes made. **Wamalwa & Anor v R [1999] 2 EA 358** was also cited to fortify the submission that identification by a single witness in stressful circumstances was risky.

In support of ground 6 of the appeal which related to the allegation that the first appellate court failed in its duty of re-evaluating the evidence to reach its own independent conclusion counsel submitted that the High Court failed in that duty and this led to prejudice against the appellants.

The final ground related to the sentence imposed upon the appellants. Learned counsel for the appellants was of the view that there were two different sentences for the offence the appellants were charged with and submitted that the appellants should have enjoyed the benefit of the lesser of the two sentences.

Mr. Abele, the learned Assistant Director of Public Prosecutions supported conviction but did not support sentence.

In respect of the unsigned charge sheet counsel submitted that such failure was not fatal to the proceedings particularly where the charge sheet had been admitted, proceedings having taken place and there was no miscarriage of justice.

On identification, counsel submitted that there was sufficient electric light and adequate time allowing for identification of the appellants by the complainant through recognition as the attack was conducted by close neighbours. Mr. Abele was of the view that because the appellants were charged with the offence of attempted robbery they were entitled to the lesser sentence of seven years as provided under Section 389 of the Penal Code.

We have carefully considered the record of appeal, the memorandum of appeal, submissions from either side and the law relevant to this appeal.

On the first and second grounds of appeal it was found as a fact by the first appellate court that the charge sheet presented by the prosecution was not signed. That court found such failure to sign a charge sheet to have no effect and dismissed the complaint.

Section 89 Criminal Procedure Code on "Complaint and Charge" provides in the relevant part that:

> **"(1) __**
>
> **(2) __**
>
> **(3) A complaint may be made orally or in writing, but, if made orally, shall be reduced to writing by the magistrate, and, in either case, shall be signed by the complainant and the magistrate.**
>
> **(4) The magistrate, upon receiving a complaint, or where an accused person who**

has been arrested without a warrant is brought before him, shall, subject to the provisions of subsection (5), draw up or cause to be drawn up and shall sign a formal charge containing a statement of the offence with which the accused is charged, unless the charge is signed and presented by a police officer.

(5) Where the magistrate is of the opinion that a complaint or formal charge made or presented under this section does not disclose an offence, the magistrate shall make an order refusing to admit the complaint or formal charge and shall record his reasons for the order."

And Section 90 (2) of the said Code provides that:

"The validity of proceedings taken in pursuance of a complaint or charge shall not be affected either by a defect in the complaint or charge or by the fact a summons or warrant was issued without a complaint or charge."

It would appear, then, that there is a legal requirement that a charge sheet be signed to acquire validity to found a complaint against a suspect. But Section 90 (2) of the Code validates defects in the charge validity of whose proceedings shall not be affected either by a defect or complaint in the charge. In any event, and as ably submitted by Mr. Abele, any error, omission or irregularity in the charge sheet which did not occasion a failure of justice was cured by Section 382 of the said Code.

On identification counsel for the appellants complains that the complainant did not give any special features to police by which he recognized the appellants and also that the length of time lights were on to enable recognition was not stated. Kiplangat, the complainant, in evidence on recognition stated:

".... I put on the lights using a bed-switch. I woke up and headed to the main door. I met three people who had already entered the house through the front door which they had broken. They ordered me to switch off the lights. I did not switch off the lights immediately. They continued demanding that I switch off the lights. I finally obliged and switched off the lights. One of them grabbed me and he wrestled me to the ground. I lay on my back. He pointed a knife at me as he shone a torch at me. He demanded money from me. He told me that if I was not going to give him money he would kill me. I pleaded with him to spare my life as I promised to give him money. I besearched (sic) HIM TO SPARE MY LIFE AS HE WAS MY HOMEMATE....."

Also that:

"...I told my neighbours that my attackers were Hodari and David. I did not recognize the third person. I led my neighbours to the house of Hodari and David but they were not at their respective houses.... The 1st and 2nd accused are neighbours back at home...."

In cross – examination by the first appellant Kiplangat stated that not only did he know this appellant but that they were neighbours whose homes were 30 metres apart. Cross – examination by the second appellant on this aspect of the matter elicited the response that the 2nd appellant and Kiplangat were neighbours who shared a fence.

The trial magistrate in the judgement referred to considered evidence of identification by a single witness and the source of light and concluded that:

"....I am aware of the danger of convicting of (sic) the evidence of a single identifying witness, however, in the present case, I find that the circumstances surrounding the identification or rather recognition of the 1st and 2nd accused were condusive ..."

The first appellate court re-evaluated evidence on identification and was also satisfied that the

complainant had recognized the appellants who were his close neighbours. We note that the complainant immediately after gaining his freedom and after shouting for help informed the neighbours who answered to the distress call that he had been attacked by the appellants whose names he also gave to police upon reporting the matter that same morning. The trial court and the first appellate court after warning themselves of the dangers of convicting on the evidence of a single identifying witness particularly where circumstances may be difficult were satisfied that the appellants were properly identified through recognition by the complainant. Electric lights were on and the attack was by close neighbours. We are satisfied, like the trial and the first appellate courts, that conditions were favourable for proper identification and the complainant recognized the appellants as two of the three people who attacked him that night.

The last issue is on sentence where both learned counsel for the appellant and the counsel for the Republic submit that the appellants were entitled to a lesser sentence because they were charged with the offence of attempted robbery but not robbery with violence. Both counsel cited Section 389 of the Penal Code which provides:

> **"Any person who attempts to commit a felony or a misdemeanour 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." (*underlining supplied*)**

Counsel therefore submitted that the appellants should have been sentenced to imprisonment for a period not exceeding seven years.

The appellants were charged with the offence of Attempted Robbery contrary to Section 297 (2) of the Penal Code which provides:

> **"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."**

Our attention has been drawn to a decision of this court differently constituted in the case of **<u>Evanson Muiruri Gichane v R</u> Criminal Appeal No. 277 of 2007 (ur)** where effect was given to the position that the relevant sentence for an offence such as the one the appellants were charged was a maximum seven years.

We have for emphasis underlined the relevant part of Section 389 of the said Code where it says:

"... if no other punishment is provided..." to provide for a sentence of one half of the punishment for the offence attempted provided that if the offence is punishable by death or life imprisonment the liability is imprisonment for a term not exceeding seven years.

As we have shown Section 297 (2) of the said Code provides for a sentence of death and a sentence under the said Section cannot be affected by the provisions of Section 389 of he Code because section 297 (2) of the Code is a wholesome provision on its own providing for sentence for a person or persons convicted of an offence under the said Section.

With respect, therefore, it would appear that the decision in **<u>Evanson Muiruri Gichane</u>(*supra)*** was made per incuriam. This court stated in a recent decision of **<u>Charles Mulandi Mbula v R</u> Criminal Appeal No. 123 of 2010 (ur)** on the issue of such a sentence:

> **"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 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 <u>not be liable to imprisonment for a term exceeding seven years</u>"**
>
> **(Emphasis supplied)**

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 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 "<u>if no other punishment is provided.</u>""***

(Emphasis in original)

We would adopt this approach. It could not have been the intention of Parliament that a sentence for an offence under Section 297 (2) of the Penal Code be affected by the provisions of Section 389 of the said Code. If such intention existed the words ***"....if no other punishment is provided.."*** would not have appeared in the said Section. The submissions by both learned counsel in respect of the sentence are rejected. In a nutshell this appeal has no merit and it is accordingly dismissed.

Dated and Delivered at Kisumu this 6th day of June, 2014.

J. W. ONYANGO OTIENO

….....

JUDGE OF APPEAL

F. AZANGALALA

….....

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