IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWERA, KIAGE & GATEMBU JJ.A)

CRIMINAL APPEAL NO. 358 OF 2010

BETWEEN

FRANCIS MUTUKU NZANGI ……..……...…APPELLANT

AND

REPUBLIC ……...…..…….……..……RESPONDENT

(Judgment of the High Court of Kenya at Machakos (Lenaola & Warsame JJ.A) dated 21st October, 2009

in

HCCR.A NO. 79/2006

****

JUDGMENT OF THE COURT

The appellant, **FRANCIS MUTUKU NZANGI** was charged, tried, convicted and sentenced to death, before the Chief Magistrate's Court at Machakos on a single count of attempted robbery with violence contrary to **Section 297(2)** of the Penal Code. The particulars of the offence as set out in the charge sheet were;

> ***"On the 2nd day of June 2004 at around 7.00am along Ngei Road, Machakos Township Machakos District within Eastern Province, jointly with others not before court while armed with pangas [he] attempted to rob ABDUL GHANI AYUB of his money and at, or immediately before or immediately after the time of such robbery (sic) wounded the said ABDUL GHANI."***

The evidence by the prosecution was that on the material day and time, the complainant **ABDUL GHANI AYUB** (**PW1**) was praying in his retail shop christened Salim Emporium where he sold bicycles, their spare parts, mattresses, sewing machines and the like. He heard a knock at the front door. Going to answer it, he found the appellant and another person. They told him they wanted a bicycle gear set. **PW1** opened both front doors to his shop to give the duo ingress. They came to the counter while **PW1** picked a gear set from the cupboard and gave it to them. They affected to examine it and then asked for another for comparison.

As **PW1** reached for a second gear set, he noticed a third man enter the shop and close the door.

Sensing danger, **PW1** rushed to the door, grabbed the third man and pulled him to thwart his attempt to bolt the door from the inside. As **PW1** confronted the third man, the appellant and his companion set upon **PW1** with slaps, fists and kicks which sent him sprawling to the floor.

As he was thus attacked, **PW1** screamed "Thieves! Thieves!" attracting members of the public including PHILIP MAKAU MULWA (**PW2**) who came to his rescue. **PW1's** assailants took to their heels and in the process the appellant left behind a green travelling bag he had been carrying. Also abandoned was a checked green coat, a manila sack bag and a panga. All of these items were later taken to the police as confirmed by P.C. CATHERINE MUGAMBI (**PW5**) and were produced before the trial court.

PW2 testified that he was walking to work when, as he passed **PW1's** shop, he heard his screams for help. He rushed to the shop and found three men assaulting **PW1**. As he entered the shop, **PW2** was confronted by a panga- wielding appellant while his two accomplices took to their heels towards Grogon. **PW2** called to one Ngoroko from across the street and together with other members of the public, they were able to arrest the appellant when he tried to run away.

PW2's testimony was confirmed materially by that of PETER KYULE (**PW3**) while the injuries sustained by **PW1** were confirmed by DR. DAVID KABURU (**PW3**) of Machakos District Hospital, who classified them as "Harm".

Placed on his defence, the appellant neither gave nor called evidence. He did, however, make an unsworn statement in which he stated that he was innocently going about his bicycle repair business when he was set upon and severely beaten by **PW2, PW3** and four other people all claiming that he had "attempted to rob items from an Indian." From the alleged beating he lost consciousness. When he came to the next day, the appellant found himself at a police station on charges he knew nothing about.

Both the trial court and the High Court at Machakos (**Lenaola J**; sitting with **Warsame J**, as he then was) found that the prosecution case had been proved to the required degree. He was convicted by the first and his appeal was rejected by the second court, hence this appeal.

The appeal is captured in the grounds enumerated in the Supplementary Memorandum of Appeal filed by the appellant's advocates as follows;

> **"1. THAT the 1st appellate court erred in law in affirming the decision of the trial court despite the fact that the facts proved did not constitute the offence charged.**
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> **2. THAT the 1st appellate court erred in fact and law in affirming the decision of the trial court despite the fact that trial court misapprehended and misdirected itself on evidence.**
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> **3. THAT the 1st appellate court misapprehended and misdirected itself on evidence.**
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> **4. THAT the 1st appellate court erred in law in affirming the decision of the trial court notwithstanding that the said court shifted the onus of proof on the appellant.**
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> **5. THAT the 1st appellate court erred in law in affirming the decision of the trial court despite the fact that the charge was defective.**
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> **6. THAT the 1st appellate court erred in law in affirming the decision of the trial notwithstanding that the sentence passed upon the appellant by the said court was illegal."**

In his submissions before us, **Mr. Oyalo**, the appellant's learned counsel contended that the facts established did not constitute the offence charged and referred us to **Section 388** of the Penal Code which defines an attempt to commit an offence which, he argued, was not met as his client did not himself beat up the complainant but was only made a scapegoat, the beating having been done by the third man who entered the shop.

Mr. Oyalo next combined grounds 2 and 3 and criticized the two courts below for proceeding on the misapprehension that the appellant and his mate had demanded the bicycle gear sets when in actual fact all they did was ask for them as potential customers. He also assailed the two courts for using the alleged demand for the bicycle parts to found and confirm the appellant's conviction yet the offence charged related to an attempt to rob the complainant of money. Mr. Oyalo also sought to draw a legal distinction by stating that the appellant was in the company of only one other person at the time and not two.

On Ground 4, Counsel made a broadside at the trial court for stating that the accused failed to rebut the ***prima facie*** case established against the prosecution which, in counsel's reckoning, amounted to shifting the burden to the appellant to prove his innocence.

It was also contended for the appellant that the charge as laid before the trial court was defective because it cited **Section 297(2)** of the Penal Code, which is the punishment provision, as opposed to **Section 297(1)** which creates the offence as required by **Section 137 (a)** of the Criminal Procedure Code. He also attacked the charge sheet for failing to include the words "dangerous weapon" and for attempting to rely on all three of the elements that constitute the offence of robbery with violence alleged to have been attempted. He contended that the prosecution should have relied on only one element.

Regarding the sentence of death imposed by the trial court and affirmed by the High Court, Mr. Oyalo was of the view that the proper sentence for attempted robbery with violence is a term of imprisonment not exceeding seven years. He based his argument on **Section 389** of the Penal Code and added that there is a conflict between that section and **Section 297 (2)** of the same Code which prescribes the sentence of death. That conflict, counsel submitted, should have been resolved in favour of the appellant giving him the lesser punishment. He cited in support this Court's decision in **MORRIS OTIENO ODUOR Vs. REPUBLIC CRIMINAL APPEAL NO. 149 OF 2007.**

Opposing this appeal, **Mrs. F. Njeru**, the learned Senior Prosecution Counsel stated that the offence charged was well and amply proved by the prosecution. She reiterated the concurrent findings of the two courts below that all three intruders, including the appellant, did in fact enter **PW1's** shop with robbery on their minds and they together assaulted **PW1** in furtherance of that intention. Counsel for the State lauded the prosecution evidence as having been cogent and devoid of any material contradictions to weaken it. On the complaint that the trial court shifted the burden of proof on to the appellant, Mrs. Njeru submitted that no such thing happened. She explained that the impugned passage in the judgment was no more than another way of saying that the appellant's unsworn statement was a mere sham and an afterthought that did not rebut or weaken the prima facie case already established by the prosecution. She concluded that all the elements of the offence were proved and urged us to dismiss the appeal as bereft of merit.

Having perused the judgment of the two courts below as well as the entire record of proceedings and listened to learned counsel on opposing sides, this is the view we take of the matter. On whether, on the facts, the requirements of an attempt to commit robbery with violence were established, we hold that they were. The beginning point for determining this issue is, as correctly pointed out by Mr. Oyalo, the statutory definition of attempt. The Penal Code at **Section 388** renders it thus;

> ***"388. (1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.***
>
> ***(2) It is immaterial, except so far as regards punishment,***

whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfillment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.

(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence."

Our understanding of this provisions is that if a person conceives an idea or plan to commit an offence and sets out to effectuate the intention by taking definite steps or puts in motion a chain of events or state of things calculated to attain that objective as manifested by some open and discernible act or acts but fails to achieve his objective, he will be guilty only of an attempt to commit the offence. The attempt is proved whether or not that person did all the acts necessary to perfect the offence and quite irrespective of what intervening act or change of heart may have aborted the fulfillment. It also matters not that circumstances did in fact exist, unbeknown to the person, that would have rendered his success impossible.

Viewed from that stand point, we entertain no doubts whatsoever that the appellant did attempt to commit robbery with violence. He and his two partners in crime made an early morning visit to the complainant. They did not come in peace. They were armed with an offensive weapon namely a panga. Their request or demand (it matters not which it was, in the circumstances) for bicycle gear sets was no more than a clever ruse, a ploy to distract **PW1** while the third of their number attempted to lock the door. The locking of the door was meant to keep any curious and unwelcome visitors who might interrupt and interfere with the robbery they intended to commit. They proceeded to assault **PW1** to either terrify him into parting with his merchandize or money, or to immobilize him so they could help themselves to his property. Only the appearance at the scene of **PW2, PW4** and other members of the public prevented and aborted the fulfillment of the robbery and the robbers, thwarted, had to flee empty handed. It is a classic case of attempt.

Even though the case of **MWANDIKWA S/o MUTISYA Vs. R** [1959] E.A. 18 cited by Mr. Oyalo is not binding upon us being a decision of the old Supreme Court of Kenya, we find Sir Ronald Sinclair, C.J.'s analysis on the law of attempts correct and persuasive. It definitely does not aid the appellant's case herein. In fact, the learned Chief Justice's sentiments provide a full answer to the appellant's complaint that there was variance between the charge sheet that stated he attempted to rob money from **PW1,** while the evidence showed interaction only with the bicycle gear sets. Said the CJ; (at p 19);

"The articles which the appellant is charged with attempting to steal were set out in the charge sheet as a raincoat, a pair of pocket binoculars, a pair of sun-glasses and a seat cushion which were the contents of the car. The offence occurred at night in a car park and it may well be the case that the appellant did not know exactly what was in the car, or if he did it might not have been his intention to steal all the articles that were in the car, but these are not matters which afford any defence. It is clear from the pickpocket cases that even if the car was completely empty, nevertheless if the appellant did not know that and had opened the car with intent to steal some of the contents which he expected it would contain, he would be guilty of attempted theft as would a pickpocket who put his hand, for the purpose of theft, into a pocket which turned out to be empty."

We think that it matters not whether the appellants and his cohorts intended to rob **PW1** of the money or any or all of the merchandize in his shop. What is indubitable is that they went into his shop to commit a robbery and would have committed it but for **PW1's** noisy screams and the interruption they invited. Theirs were not actions that were remote and unconnected antecedents to the offence of robbery. Rather, they were direct and proximate being part of the actual transaction fully commenced but in the event interrupted in the nick of time. Sir Sinclair properly appreciated and applied the cases of **R Vs. CHEESEMAN [1862]** LE & CA. 140 as well as **R Vs. LAITWOOD 4 CR. APP. R. 248** on the law of attempt and we adopt his views herein.

Did the learned trial magistrate, in stating that the appellant failed to rebut the *prima facie* case established by the prosecution thereby shift the burden onto him to prove his innocence? We think not. We are inclined to agree with Mrs. Njeru for the State, that the learned magistrate was doing no more than stating that the unsworn statement by the appellant had not dented or weakened the prosecution case. It needs to be borne in mind that once a prima facie is established, the task of the trial court in considering whatever defence may be offered is to determine whether that defence does anything to prevent, weaken or dislodge the court's entitlement to convict on the basis of the evidence of the prosecution. This must flow from the formulation of a prima facie case as one on which the court would be entitled, without more, to convict or, as famously put in the oft-cited case of **RAMANLAL BHATT Vs. R** [1957]EA 332 at p 335;

> **"It may not be easy to define what is meant by a 'prima facie case', but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence."**
> (Our emphasis)

Turning to the fifth ground of appeal, we see no substance in it. There is absolutely no error and no defect in citing the punishment or penal section when drafting a charge. **Section 137(a) (ii)** of the Criminal Procedure Code provides that if the offence charged is one created by enactment it shall contain a reference to the Section of the enactment creating the offence. The operative word is "creating." When counsel for the appellant states that the offence should have been charged under **Section 297(1)**, he is clearly in error since that provision creates and provides the penalty for a totally different offence of attempted simple robbery. Everything changes the moment any of the extra elements found in sub-section (2) come into play namely;

i. ***the offender is armed with any dangerous or offensive weapon; or***

ii. ***the offender is in company with one or more other person or persons; or***

iii. ***at or proximate to the assault some form of personal violence is used on any person.***

The offence ceases to be attempted robbery and becomes attempted robbery with violence. The provisions of **Section 297** of the Penal Code mirror those of **Section 296** of the same which deal with robbery and robbery with violence proper respectively.

On the issue of which part of the enactment should be used when laying the charge, we recently stated as follows in **DIMA NDENGE DIMA & OTHERS Vs. REPUBLIC, CRIM. APPEAL NO. 300 OF 2007,** and which bears repeating;

> ***"The law of drafting of charges as we understand it is that it is the punishment or penal section that creates the offence and as such it is the one that is cited in a charge sheet. In the book Essentials of Criminal Procedure in Kenya, (Law Africa, 2010) P.O. Kiage (now J.A, on this bench) did point out and we agree as follows;***
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> > ***'If the offence charged is one created by a statutory enactment, it must contain a reference to the Section of the enactment creating the offence. The correct procedure is to specify in the statement of offence, not the section that defines the offence, but the one that prescribes the punishment thereof.'***
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> **(At p 76. See also Douglas B (1964) *Criminal Procedure in Uganda and Kenya* (Law Africa) (No 13) pp37 and the Case of Cosma Vs. Republic [1955] 22 EA. 450."**

Turning now to the question of the sentence of death imposed and affirmed by the two courts below, our jurisdiction to even consider it stems from the fact that it is the legality, as opposed to the severity of the sentence that is challenged. The former is a matter of law we can consider while the latter is a question of fact that we would not have considered by virtue of **Section 361** of the Criminal Procedure Code. Mr.

Oyalo sought to persuade us that the sentence of death prescribed for the offence under **Section 297(2)** contradicts **Section 389** of the Penal Code that, according to counsel, provides a maximum sentence of seven years imprisonment for the offence. We are not persuaded.

As this issue keeps coming up before this and other courts with some unseasonable regularity, let us first set out what Section 389, on the general punishment for attempts, provides;

> ***"389. 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, and may suffer corporal punishment if such is provided for as a mandatory or discretionary punishment for the offence attempted."***
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> (Our emphasis)

From a plain reading of that section, the following is clear;

i. it does not apply to attempts the punishment whereof is provided (meaning it is a default punishment section).
ii. attempts, subject to (i), will attract half of the punishment for the offcence that is attempted.
iii. if the offence attempted, not falling under (i), attracts the death penalty or life imprisonment, the attempt is punishable by a maximum of seven years imprisonment.

Given the rather straight forward provision aforesaid which excludes application of the section to such attempts as have their punishment specifically provided elsewhere, we find it quite remarkable that a confusion and contradiction has been seen and expressed regarding the punishment for attempted robbery with violence. **Section 297(2)** provides in express terms that the penalty is death. It does not admit to the importation of the general or default penalty in **Section 389** of the Penal Code. Such importation is clearly an error that flies in the face of both sections and engenders a dispute that is not. We are of the respectful view that we cannot follow this Court (differently-constituted) when in **BONFACE JUMA KHISA Vs. REPUBLIC CRIMINAL APPEAL NO. 268/2009 (UR)** it spoke of "an apparent conflict in the two provisions" that is "manifest at once." We think the conflict is not a real one. Having carefully considered that judgment, we think our learned colleagues misapprehended **Section 389** of the Penal Code when they laid special and, with respect, undue emphasis on the latter part of the provision that provides the seven year sentence and none at all on the earlier part which delineates the applicability of the default sentence. They thereby missed the context which is "**if no other punishment is provided**."

That judgment, by no means the first, (see, for instance, **EVANSON MUIRUTI GICHANE Vs. REPUBLIC CRIM. APPEAL NO. 277 OF 2007)** was to be followed by others including **MORIS OTIENO ODUOR Vs. REPUBLIC (CRIM. APP. NO. 149 OF 2007)** cited by Mr. Oyalo. The context of that decision is instructive, however, in that the State conceded the point, and the presiding judge refused to sign, as captured in the following observations therein;

> ***"The focus of the appeal is rather that the sentence of death imposed under Section 297(2) of the Penal Code is in conflict with the sentence prescribed for attempted felonies under Section 389 of the same code. Mr. Oyalo, learned counsel for the appellant submitted that the conflict ought to be resolved in favour of the appellant; thus imposing a sentence which does not exceed seven years. Learned Senior Principal State Counsel Mr. Omirera conceded the issue and urged us to rectify the sentence accordingly …***
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> ***Similarly in this appeal, we uphold the issue of law raised by the appellant and quash the sentence of death imposed on him on the first counts. We substitute therefor a sentence of imprisonment for a term of 5 years….***

This judgment was delivered under rule 32(2) of the Court of Appeal Rules as the presiding Judge was of a different view and did not sign it."

That was on 7th October 2011.

In the later case of **JAMES MAINA MAGARE & ANOR Vs. REPUBLIC (CRIMINAL APPEAL NO. 224 OF 2010 [2012] eKLR,** another bench of this Court departed, as we do, from the earlier seven year-imprisonment line of authorities, holding instead, that the punishment for attempted robbery with violence is the sentence of death. We are persuaded that this is the correct position in law and that it should be untramelled by conflict, confusion or contention. The sentence is legal.

Having disposed of the matters raised in this appeal as we have done, the appeal is devoid of merit and we therefore dismiss it in its entirety.

Dated and delivered at Nairobi this 22nd day of November, 2013.

J. W. MWERA

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR