



IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 39 OF 2007

BETWEEN

MULINGE MASWILI..... APPELLANT

AND

REPUBLIC..... RESPONDENT

Appeal from a judgment of the High Court of Kenya at Machakos (Ojwang & Sitati JJ.)

dated 11th May 2007

in

H.C.C.R.A. NO.7 OF 2006)

JUDGMENT OF THE COURT

Following the dismissal of his first appeal against conviction and sentence for the offence of attempted robbery with violence contrary to **section 297(2)** of the Penal Code, **Mulinge Maswili**, the appellant, filed this appeal which probably is his last one.

In submissions before us, Mrs. Nyamongo, learned counsel for the appellant, lamented that the appellant was not accorded a fair trial as he requested for but was not furnished with copies of witness statements made to the police; certain essential witnesses were not called by the prosecution; the appellant's defence was improperly rejected as no reasons were given to justify the rejection and that the sentence meted out to the appellant was contrary to the law in view of the provisions of **section 389** of the Penal Code. It was also the appellant's case that evidence regarding his identification as the person who committed the alleged offence was weak.

Mr. Monda, Principal State Counsel, in opposing the appeal submitted *inter alia*, that **section 389** of the Penal Code did not in any way conflict with **section 297(2)** of the Penal Code with regard to sentence, as the former section, in his view, had an exception which covers **section 297(2)**, above. It was his view further that both courts below properly evaluated the evidence on the issue of the identification of the appellant and came to the conclusion that he committed the offence charged. It was broad daylight, and the appellant was arrested at the scene before he could escape and on that account he could not properly argue that he was an innocent passer-by. And regarding witness statements and the alleged failure to call certain witness, Mr. Monda submitted that the witnesses who were not called were not essential and their respective pieces of evidence would have been superfluous. Regarding witness statements, which were requested for and allegedly not supplied, Mr Monda submitted that the issue was being raised for the first

time and in his view therefore, it was merely an afterthought. Likewise Mr. Monda thought that the issue of language which the appellant raised too was merely an afterthought.

The offence against the appellant is created by **section 296(2)** of the Penal Code as read with **section 297(2)** of the same code. **Section 297(2)** of the Penal Code provides thus:

“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.”

It is quite clear from the wording of the above section that it is a provision which provides for a specific penalty. That being so section 389 of the Penal Code is excluded. The completed offence is covered under **section 296(2)** of the Penal Code, and that too has its own separate and distinct penalty for it. **Section 389** of the Penal Code provides as follows:

“A 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**, 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).

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.”**

Mrs Nyamongo in her submissions to us on behalf of the appellant must have overlooked the above phrase when she stated that **section 297 (2)** and **389**, respectively of the Penal Code, conflict. The prosecution case as presented before the trial court was that **Shadrack Isika Makau (Shadrack)**, a driver employed by one Musya Syuki, to drive motor vehicle Reg. No. KAP 439Z, was driving the said vehicle along Yongella Mbitini road, when two people emerged from bushes by the roadside and mounted a road block using a log of wood. One of the two men was armed with a home made gun, and the two ordered Shadrack to produce Kshs.20,000/=. He did not have the money and pleaded with the attackers to accept a lesser sum of Kshs.10,000/=. Shadrack, who was accompanied by **Evan Ngusyi Syuki (Evan)** and a loader, decided to confront their attackers. He caught hold of the man who was armed with a gun following which a struggle ensued. As they struggled he screamed for help. Members of the public responded to his screams and assisted him to subdue the armed man. When the second man saw people gathering he escaped. The man who was subdued and arrested was the appellant.

The homemade gun was later sent to a firearm examiner, who, following his examination of it came to the conclusion that it was capable of firing, and was therefore a firearm within the meaning of the Firearms Act.

At the appellant’s trial it was his case, that he was just a passerby and that he was mistaken for the person

who tried to rob Shadrack and his two companions. Consequently, one of the issues at the trial was whether the appellant was correctly identified as having been one of the two people who wanted to rob Shadrack and his two companions. The trial and first appellate courts had no doubt that the appellant was positively identified by both Shadrack and Evan as one of their two attackers.

At the appellant's trial Shadrack was the first prosecution witness. At the end of his evidence in chief the appellant asked to be given the witness statements to the police, presumably to use it in testing the credibility of the witnesses. Following that request the trial magistrate adjourned the hearing and ordered the court prosecutor to provide the appellant with the statements he requested for. There is however no indication on record that the appellant was ever supplied with the statement or statements. At the resumed hearing, the court received the evidence of Evan after which the case was again adjourned. At the next hearing, the firearm examiner testified first after which Shadrack was recalled without any mention of the witness statements the appellant had requested for. The appellant cross-examined him at length. He did not raise any issue concerning the statements he had asked for earlier. In answer to questions put to him by the appellant Shadrack is recorded to have responded, in pertinent part, thus:

"I do recall we arrested you 2.30 -3 p.m. that is when we did arrest you. That I did tell the police you were two of you. The other fellow did disappear. I did tell police it was a man and he escaped. The evidence I did offer that day is the same as the evidence I recorded with the police. There were several people on the road."

As stated earlier the appellant did not revisit the issue of witness statements to the police. We have also checked the proceedings of the High Court and are not able to find any complaint by the appellant that he was denied those statements. Mrs. Nyamongo submitted before us that the appellant was denied facilities for the preparation and presentation of his case and for that reason we should find that his constitutional right to a fair trial was breached.

It is always prudent for the trial court to record any request made by an accused person and if an order has been made for the meeting of that request a note should be made that such request was satisfied. Otherwise a failure to do so may, in an appropriate case, lead to the quashing of a conviction which otherwise would be sound. In the matter before us, even in absence of such a note, we think that considering the manner in which the appellant conducted himself when Shadrack was recalled, he was either given the statements or he did not need them any more. Besides, this is a case in which the appellant was arrested at the scene, was found with a home-made firearm, and there was no basis for any suggestion that the case was framed up against him in view of the fact that Shadrack, Evan and the loader of the lorry did not know the appellant before. There was nothing to stop the appellant renewing his request for the witness statements if indeed he was not furnished with them before he cross-examined Shadrack. The earlier request for the same was made by him without any prompting and there is nothing to show that he was prevented from renewing his request. In our view the appellant has not demonstrated to us that his conduct of the defence was impaired by the alleged failure to furnish him with the statements assuming they were not so provided.

The appellant as stated earlier also complained that certain essential witnesses were not called: The Ugandan case of **Bukenya v. Republic** [1972] EA. 549 is authority for the legal proposition that the prosecution is obliged to call all witness necessary to prove its case, but it is not obliged to call a superfluity of witnesses. If however, it fails to call a certain witness or witnesses and the evidence in support of its case is found to be barely sufficient to prove the case, then a trial court will be at liberty to raise an inference that had the witness been called, his evidence would have tended to be adverse to the prosecution case. Mrs. Nyamongo for the appellant must have had this case in mind when she submitted that certain witnesses were not called. She had in mind members of the public who assisted in arresting the appellant and the police officer or officers who went to the scene. Those witnesses even if they would have been called would not have added much to the prosecution case. The prosecution case was based on the appellant's arrest by those who were victims of the attempted robbery. He was arrested on the spot. The complaint relating to failure to call some witnesses is a red-herring.

There is also the complaint the appellant raised on language. His advocate submitted that interpretation

was only offered on the first day. In her view the court failed to offer interpretation to the appellant subsequently as a result of which the appellant did not fully follow the proceedings. It is clear from the record that the appellant cross-examined all witnesses, and asked relevant questions. If indeed he was not able to follow the proceedings at his trial there is no way he would have been able to ask such questions. The appellant chose the language he wanted proceedings conducted when he first appeared in court. The court made available an interpreter for him. Although there is no note on the language each witness used in succeeding days it is clear that all witnesses testified and the appellant followed their evidence. Nothing turns on the appellant's complaint on language. As regards the appellant's defence it was displaced by the evidence adduced by the prosecution. The trial magistrate believed prosecution witnesses and rejected the appellant's defence. The appellant had stated in his defence that he was merely a passerby and was mistaken for a robber. The trial magistrate did not believe him and the High Court on first appeal did not also believe him. In the circumstances, this Court has no basis for interfering with the concurrent findings of fact. We agree with Mr. Monda, Principal State Counsel, that the trial court evaluated the evidence on first instance and for that reason it was best placed to assess the demeanor of witnesses. It saw and heard the witnesses testify. The High Court on first appeal re-evaluated the evidence and came to its own independent conclusion based on it as it was obliged to do. There is clearly, no merit in the appellant's complaint that his defence was improperly rejected.

The last aspect we need to consider is that Mrs. Nyamongo lamented that both courts below did not warn themselves on the need for caution in dealing with the appellant's case. In her view because the appellant faced a capital charge, the two courts below should have acted with extra caution and considered the evidence more meticulously. In our view, that is what the two courts below did. The nature of the evidence was that the appellant was, so to speak, caught in the act and had no room for escape. His conviction was based on acceptable and sound evidence.

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

Dated and delivered at Nairobi this 28th day of March 2012.

S. E. O. BOSIRE

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JUDGE OF APPEAL

J. G. NYAMU

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR