REPUBLIC OF KENYA

COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 224 OF 2010

BETWEEN

JAMES MAINA MAGARE……..……..…...…..1ST APPELLANT

JOHN KIBANYA MAINA……..…….…….…...……2ND APPELLANT

AND

REPUBLIC …….....…….…….....…..RESPONDENT

(An appeal from a judgment of the High Court of Kenya at Mombasa (Azangalala & Odero, JJ.) dated 20th July, 2010

In

H.C.CR.A. NO. 170 & 188 OF 2006)

****

JUDGMENT OF THE COURT

1. On the 22nd February, 2006 **James Maina Magare** and **John Kibanya Maina** hereinafter referred to as 1st and 2nd appellant respectively, were each convicted by the Senior Resident Magistrate Taveta of three offences. The first count, in respect of which the two appellants were charged jointly, was attempted robbery with violence contrary to **section 297(2)** of the Penal Code. Each of the appellants was sentenced to the mandatory death penalty. Each of the appellants were also convicted of two separate counts of being in possession of firearm without a firearm certificate contrary to **section 4(1)** as read with **section 4(3)** of the **Firearms Act, Cap 114** Laws of Kenya, and being in possession of ammunition without a firearm certificate, contrary to **section 4(1)** as read with **section 4(3)** of the **Firearms Act, Cap 114,** Laws of Kenya. Each of the appellants was sentenced to serve 10 years imprisonment on each of the two separate counts. In view of the death sentence imposed on the first count, the sentences in regard to the other two separate counts were ordered to run concurrently, but to remain in abeyance.

2. Being dissatisfied with the judgment of the subordinate court, the appellants appealed to the High Court against their conviction and sentence. In their judgment the High Court (***Azangalala & Odero, JJ***), upheld the appellants' conviction and sentence in regard to the first count, but quashed their convictions and set aside their sentences in regard to the other two separate counts.

3. The appellants were still dissatisfied with the judgment of the High Court and therefore lodged this second appeal. The 1st appellant's memorandum of appeal prepared by ***Azania Legal Consultants Advocates*** raised three grounds as follows:

(i) That there were substantial injustice during the first appeal when the appellant was not

accorded any legal representation, after it was indicated that their lawyer was ill, contrary to section 50, 2(g) of the Constitution.

(ii) That the learned superior court Judges erred in law by passing the death sentence. The mandatory death sentence as provided by section 297(2) of the Penal Code was unlawful since it contradicts section 389 of the Penal Code.

(iii) The learned superior court Judges erred in law by depending on dock identification evidence, which is worthless in it entirety as was stated in Kiarie v Republic [1976-1985] EALR 213.

4. The 2nd appellant's memorandum of appeal prepared in person and filed on 28th October 2011 also raised three grounds as follows:

i. That both the Hon. trial court and the first appellate courts erred in law by convicting and sentencing me to death on charges of attempted robbery yet provision of section 389 of the PC provides for imprisonment term not exceeding seven years, kindly see the decision of Court of Appeal in the case of EVANSON MUIRURI GICHANE VS. REP. 2010 KLR AND MORRIS OTIENO ODUOR VS. REPUBLIC 2011 KLR.

ii. That the trial court and the first court judges erred in law by failing to see that the recovery of the exhibited pistols was of doubtful integrity for PW1 was shown two pistols on the alleged day of arrest kindly vide page 5 line 24 yet PW6 told the court that they followed a lead which made them recover one pistol on the following day.

iii. That both the Hon. Trial magistrate and the first appellant court judges erred in law in failing to consider my defence statement which remained firm and unchallenged by the shoddy fabricated prosecution case.

5. On 17th January 2012, just a few days to the hearing of the appeal, **Mr. S. M. Kimani,** who was apparently instructed to appear for the 2nd appellant, filed a supplementary memorandum of appeal raising ten grounds. Following an objection from the Senior Principal Prosecuting Counsel **Mr. Kemo**, and in consultation with his client, **Mr. Kimani** withdrew grounds one and two of the supplementary memorandum of appeal. It is noteworthy that **Mr. Kimani** did not argue any of the grounds but associated himself with the submissions made by **Mr. T. Bryant** who appeared for the 1st appellant.

6. **Mr. T. Bryant**opted to argue only ground number two of the 1st appellant's memorandum of appeal. He pointed out that the High Court erred in convicting the appellant for the offence of robbery with violence contrary to **section 296(2)** of the Penal Code, when the appellant was charged with the offence of attempted robbery contrary to **section 297(2)** of the Penal Code. **Mr. Bryant** submitted that the appellant could not be convicted of a charge which he was not aware of during his trial.

7. Counsel for the 1st appellant further submitted that there was a contradiction between **section 297(2)** of the Penal Code, which provides for death sentence for attempted robbery, and **section 389** of the Penal Code which provides for a sentence not exceeding seven years where one is convicted of attempting to commit an offence punishable by death or life imprisonment. He argued that the appellant ought to have been sentenced to a term not exceeding seven years. In support of his submissions, **Mr. Bryant** relied on the following decisions of this Court:

§ ***Criminal Appeal No. 368 of 2007, David Mwangi Mugo vs Republic***

§ ***Criminal Appeal No. 268 of 2009, Boniface Juma Kisa vs. Republic and***

§ ***Criminal Appeal No. 149 of 2007 Morris Otieno Oduol vs. Republic***

Mr. Bryant urged the court to take into account that the appellants were arrested on 13th August, 2005 and

have therefore been in custody for a period of about six years and four months. **Mr. Kemo**, Senior Principal State Counsel conceded the appeal on the strength of the authorities relied upon by **Mr. Bryant**.

8. As a second appellate court, our jurisdiction in this appeal is confined to dealing only with issues of law. We note that the appellants have impliedly abandoned all their other grounds of appeal except the grounds argued by **Mr. Bryant**. The first question which arises is which offence the appellants were convicted of in the first count. It is clear from the charge sheet which forms part of the record of the subordinate court, that the appellants were charged in count one with the offence of attempted robbery with violence contrary to **section 297(2)** of the Penal Code. So it is clear that the appellants were not charged with the offence of robbery with violence contrary to **section 296(2)** of the Penal Code.

9. The following extract from the judgment of the trial magistrate gives a summary of the evidence and the trial magistrate's finding in regard to count one:

"Therefore both the accused were principal offenders as far as the first count of attempted robbery with violence is concerned. The accused never took the mobile phones belonging to PW1 Mohamed Ahmed but they intended to take the mobile phones and had begun to put their intention into execution by ordering PW1, PW2 and PW7 who were in the mobile phone shop to lie on the floor while PW1 was ordered to put the mobile phones in the shop in a blue paper bag the first accused had. The acts of the accused were overt acts hence the accused are deemed by the law to have attempted to commit the offence of robbery with violence bearing in mind not only were they armed with dangerous and offensive weapons namely Beretta pistols but were also acting together and threatening personal violence on PW1 Mohamed Ahmed, PW2 Amne Mohamed and PW7 Auma Orwa……. From the foregoing the court finds the accused guilty on the first count of attempted robbery with violence contrary to section 297 of the Penal Code Cap 63 Laws of Kenya. They are convicted accordingly"

10. The relevant part of the judgment of the first appellate court relating to the first count was as follows:

"The two appellants clearly entered the complainant's shop armed with pistols and ready to commit the offence of robbery. Their actions amounted to an attempted robbery which was thwarted by the complainant's courage in repelling them. As such we are satisfied that this charge of attempted robbery has been sufficiently proved. The trial court did consider the defence raised by the appellants but dismissed the same as being without merit. We find that the conviction of the two appellants on this first count was indeed sound and we have no hesitation in upholding the same… "

11. It is evident from the above that the Judges of the High Court considered and evaluated the evidence relating to count one, properly identifying the charge as that of attempted robbery with violence and upholding the subordinate court's conviction of the appellants on that count. However, in its conclusion the Judges of the High Court stated as follows:

"Finally and in summary we confirm and uphold the appellants' convictions and sentences on count No. 1 of robbery with violence contrary to S.296(2) of the Penal Code."

12. It is clear that the above conclusion was an error, as the appellants were never charged nor convicted in the subordinate court with the offence of robbery with violence contrary to **section 296(2)** of the Penal Code. We have no doubt that the High Court judges intended to confirm and uphold the appellants' conviction in regard to count number one, which as they had already noted earlier, was that of attempted robbery with violence. In our view, the appellants have not suffered any prejudice by the apparent error in the judgment of the High Court. It is an error which is curable under **section 382** of the Criminal Procedure Code.

13. The gravamen of **Mr. Bryant's** argument is that the sentence imposed upon the appellant was unlawful in view of **section 389** of the Penal Code, which provides a general penalty for an attempt to commit a felony or misdemeanour. The section provides as follows:

"389. 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."

14. In the case of **David Mwangi Mugo** (supra) and **Boniface Juma Khisa** (supra) which were cited by **Mr. Bryant**, this Court was of the view that there was an apparent conflict between the provisions of **section 389** of the Penal Code which provides for a sentence of seven years where the attempted offence is punishable by death, and **section 297(2)** which provides for a death sentence for the offence of attempted robbery with violence. We have carefully reconsidered these provisions, but have come to a different conclusion. For purposes of emphasis, we set out herein again, the provisions of **section 389** of the Penal Code:

"389. 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 added)*

15. In our view three things stand out from a reading of this section. Firstly, this section sets out a general offence of an attempt to commit a felony or a misdemeanour. This is an implied recognition that there are instances where specific offences have been provided for in the Penal Code, but no specific provision made for an attempt to commit such an offence. Secondly, the section recognizes that there are situations where no punishment has been provided for an attempt to commit specific offences, and the section therefore provides a formula for sentencing where no other punishment is provided for such attempt. Thirdly, a specific sentence of a term of imprisonment not exceeding seven years, has been provided, where the offence attempted is one punishable by death or life imprisonment. The latter part of **section 389** of the Penal Code which provides for the specific sentence, must be read in conjunction with the words "**if no other punishment is provided"** and "**but so that**" in the preceding part of that section. In other words, the specific punishment in cases where the offence attempted is one punishable by death or life imprisonment, is only applicable where the legislature has not provided any other sentence for such an attempt.

16. Thus, for the offence of an attempt to commit robbery with violence under **section 297(2)** of the Penal Code, in respect of which a sentence of death has been provided under that section, **section 389** of the Penal Code cannot apply. The fact that **section 297(1)** of the Penal Code which provides for the offence of attempted simple robbery, provides for a sentence of seven years, confirms the legislature's intention to provide a more severe punishment for the more serious offence of attempted robbery with violence under **section 297(2)** of the Penal Code. In our view, the legislature's intention to exclude the offence under **section 297(2)** of the Penal Code from the application of **section 389** of the Penal Code is clear. As was stated by this Court in **Evans Kiratu Mwangi vs. Republic, Cr. Appeal No. 154 of 2009**, **Section 297(2)** of the Penal Code provides for a sentence of death, and that sentence is therefore lawful.

17. In **Godfrey Ngotho Mutiso vs. Republic**, this Court dealt with the issue of legality of the mandatory death sentence. We think that, that case is distinguishable in that the Court was dealing with a different issue which is the mandatory aspect of the death penalty. Indeed, the Court noted as follows:

"The appellant may well be deserving of the death penalty or life imprisonment in view of the gravity of the offence committed and the circumstances of the deceased's death, or a lesser penalty, but then again making such findings would be arbitrary. We must reemphasize that in appropriate cases, the court will continue to impose the death penalty".

18. Both appellants were given an opportunity in the subordinate court to mitigate before the sentence was imposed. We come to the conclusion that notwithstanding the fact that the Senior Principal Prosecuting counsel conceded this appeal, this appeal has no merit as the sentence imposed on the appellants under **section 297(2)** of the Penal Code was lawful. We therefore dismiss the appeal in its entirety. This judgment has been delivered pursuant to **Rule 32(2)** of the Court of Appeal Rules, Visram

JA. having declined to sign the judgment.

Dated and delivered at Mombasa this 16th day of March 2012.

E. M. GITHINJI
……
JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

H. M. OKWENGU

……
JUDGE OF APPEAL

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

DEPUTY REGISTRAR