IN THE COURT OF APPEAL
AT ELDORET
CORAM: OMOLO, WAKI & VISRAM, JJ.A
CRIMINAL APPEAL NO. 268 OF 2009
BETWEEN
BONIFACE JUMA KHISA…………………………………………APPELLANT

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

(Appeal from a judgment of the High Court of Kenya at Bungoma (Muchemi & Chitembwe, JJ) dated 16th July, 2009
in
H.C.CR.A. NO. 100 OF 2008)
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JUDGMENT OF THE COURT

The appellant in this matter abandoned his appeal on conviction, and we think he was well advised to do so. Instead, he relied on one ground of appeal in a supplementary memorandum of appeal filed by his counsel Mr. C.K. Okara, challenging the legality of the sentence of death meted out on him.

The appellant was charged and tried before Bungoma Chief Magistrate, R. Nyakundi, Esq. for the offence of attempted robbery with violence contrary to **Section 297(2)** of the Penal Code. The particulars were that on the 13th day of June, 2008 at Muyayi Village in Bungoma District, jointly with others not before the court, while armed with dangerous weapons namely pangas and rungus attempted to rob ***Edward Khaemba*** of his unregistered motor cycle make TVs star valued at Kshs.100,000/= and at or immediately before or immediately after the time of such attempt used actual violence to the said Edward Khaemba. After hearing four prosecution witnesses and the appellant in his defence the trial magistrate was satisfied that the prosecution had proved its case beyond reasonable doubt and convicted the appellant accordingly. He subsequently sentenced the appellant to *"death by hanging as per and under the law"*. His first appeal to the superior court *(Muchemi and Chitembwe, JJ)* was dismissed, hence this second and final appeal.

The concurrent findings of fact made by the two courts below were that on the 13th June, 2008 at about 10 p.m., the complainant who was a police officer based in Eldoret, was riding his motor cycle in Muyayi village searching for his livestock. With him was pillion passenger, ***James Khaemba (PW.3),*** who was his employee. At some point they slowed down to cross a railway line but suddenly a gang of five people flashing torches emerged from the bushes and pounced on them. The complainant was hit on the back with a rungu and he and the passenger fell down. They rose up, screaming and throwing stones at the attackers. Fortunately there was another motor cycle behind them which arrived and joined the struggle with the attackers. The attackers started fleeing and screaming to confuse members of the public who had heard screams of *"thief ----- thief"*. One member of the public was ***Douglas Wafula Waswa (PW2)*** who was in his house nearby and left to answer the distress call in the direction of the railway line. It was a moonlit night. Then he met someone running towards a maize plantation and pursued him. He caught up with him, arrested him and was joined by other members of public who started beating him up. The person was the appellant before us. He was identified by the complainant and PW3 as one of the attackers and was handed over to ***PC James Kingori (PW4)*** of Bungoma Police station who rearrested

him and subsequently charged him with the offence. The injuries caused to the complainant during the attack were confirmed by ***Quinto Maloba (PW5)*** who completed the P3 Form and treated him. The motor vehicle which was intended to be stolen was also produced in evidence. In his defence, the appellant said on the material date and time, he was on his way to his wife's parent's home pursuing his wife who had gone there. He then met some people who started assaulting him, and thereafter took him to the police. He denied the attempt to commit the offence charged.

On those facts the appellant was properly convicted and we would have no basis for disturbing the concurrent findings of the two courts below as they are well grounded on the evidence.

As stated earlier the only challenge is on the legality of sentence imposed on the appellant, which under ***section 361(1)(b)*** of the Criminal Procedure Code, is an issue of law. The submission on the legality of it is that ***Section 297(2)*** of the Penal Code which prescribes the sentence of death, is in conflict with ***Section 389*** of the same Code which requires that in offences of attempt to commit a felony, the sentence should not exceed seven years' imprisonment**.** ***Section 389*** states as follows:-

"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 supplied).**

And ***Section 297(2)*** provides:-
"(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.*" (**emphasis supplied).**

It is manifest at once that there is an apparent conflict in those provisions in relation to the sentence to be imposed. The section under which the appellant was convicted provides for death sentence, while ***Section 389*** provides for a term not exceeding seven years. *Mr. Okara* drew our attention to a recent decision of this Court where a similar issue arose and the court expressed itself as follows:-

"The appellant was convicted of an offence (attempted robbery with violence) punishable by death. In terms of section 389 of the Penal Code the appellant shall not be liable to imprisonment for a term exceeding seven years. But he was sentenced to death. The apparent conflict in the law may only be resolved by Parliament. But the appellant is entitled to the less punitive of the two sentences…………. We are fortified in our conclusion by the decision of the court in GODFREY NGOTHO MUTISO V. REPUBLIC, C. Appeal No. 17/2008 (UR) in which this Court stated, inter alia:-

"We may stop there as we have said enough to persuade ourselves that this appeal is meritorious and the Attorney General was right to concede it. On our own assessment of the issue at hand and the material placed before us, we are persuaded, and now so hold, that section 204 of the Penal Code which provides for a mandatory death sentence is antithetical to the Constitutional provisions on protection against inhuman or degrading punishment or treatment and fair trial. We note that while the Constitution itself recognizes the death penalty as being lawful, it does not say anywhere that when a conviction of murder is recorded, only the death sentence shall be imposed. We declare that Section 204 shall, to the extent that it provides that the death penalty is the only sentence in respect of the crime of murder is inconsistent with the letter and spirit of the Constitution, which as we have said, makes no such mandatory provisions."

Learned counsel *Mr. Oluoch* who appeared for the State readily conceded the appeal on legality of the sentence and we think he was right to do so.In the result we dismiss the appeal on conviction and allow the appeal on sentence. We set aside the sentence of death imposed on the appellant and substitute therefor a sentence of 5 years imprisonment. The term of imprisonment shall run from the date of the appellant's conviction by the trial court on 15th October, 2008.

Those shall be our orders in the appeal.

DATED and DELIVERED at ELDORET this 17th day of FEBRUARY, 2011.

R.S.C. OMOLO

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JUDGE OF APPEAL
P.N. WAKI
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JUDGE OF APPEAL

ALNASHIR VISRAM
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JUDGE OF APPEAL
I certify that this is a true copy of the original.

DEPUTY REGISTRAR