



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT NAIROBI**  
**(CORAM: TUNOI, AGANYANYA & VISRAM, JJA.)**  
**CRIMINAL APPEAL NO. 368 OF 2007**

**BETWEEN**

**DAVID MWANGI MUGO.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Appeal from a Judgment of the High Court of Kenya at Nairobi (Lesiit & Makhandia, JJ.) dated 16<sup>th</sup> May, 2006*

*in*

***H. C. CR. A. No. 1263 of 2002)***

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**JUDGMENT OF THE COURT**

The appellant in this matter abandoned all grounds of appeal filed in his original and undated memorandum of appeal and the supplementary memorandum of appeal filed on 25<sup>th</sup> May, 2010, and relied only on two grounds of appeal outlined in the further supplementary memorandum of appeal filed by his advocate on 17<sup>th</sup> February, 2011. These two grounds essentially challenge the legality of sentence and the complaint that the appellant's defence was not considered by the two courts below.

The appellant was charged and tried before the Chief Magistrate's Court at Nairobi (Mutoka, PM) for the offence of attempted robbery with violence contrary to **section 297 (2)** of the Penal Code, and of being in possession of various firearm and ammunition without a firearm certificate contrary to **section 4 (2) (a)** of Firearms Act. The particulars were that on the 13<sup>th</sup> day of January, 2001 at Shell Petrol Station along Forest Road in Nairobi, while armed with offensive weapons namely pistols attempted to rob Patel Raju some money and a motor vehicle reg. No. KZS 152 Mitsubishi pick-up and at or immediately before or immediately after the time of such attempted robbery shot dead Bhimji Lalji with a pistol. After hearing 13 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. She subsequently sentenced the appellant to death on the count of attempted robbery with violence, and to three years imprisonment on the other count of unlawful possession of firearms. His first appeal to the superior court (Lesiit and Makhandia, JJ) was dismissed, hence this second and final appeal.

The concurrent findings of fact made by the two courts below were that on the 13<sup>th</sup> June, 2001 at about 7.30 am Patel Raju (the complainant) (PW 1), driving a Mitsubishi pick-up, stopped at the Shell petrol station along Forest Road in Nairobi, to pick up his two workers, Peter Wanjiri (PW 2) (Peter) and Francis Kaguoya (PW 3) (Francis). Although stationary, the engine of his car was still running. On his left passenger seat was Bhimji Lalji, the deceased. Just as his two workers were boarding the pick-up, two men approached the driver's side of the pick-up. He did not see them coming, but heard a gun shot, and he accelerated and dashed away fast. A few metres ahead, Bhimji Lalji, his passenger, fell on him, bleeding profusely from his head. He realized that Bhimji Lalji had been shot. He stopped the car, and luckily a police car (an escort car for the Vice-President) stopped behind them, and the officers on hearing what had happened, turned around and went in pursuit of the attackers. Meanwhile, the complainant proceeded to the Aga Khan Hospital, where Bhimji Lalji was later pronounced dead. Back on Forest Road, the police officers, based on the description of the attackers that they had obtained from Peter and Francis, were able to apprehend the two attackers, and recovered a U.S. Colt revolver, and four rounds of ammunition from one of the attackers, and a berretta revolver and six rounds of ammunition from the other. The appellant and his co-attacker, one Samson Macharia Muchiri were charged with the offences stated earlier.

A ballistic expert gave evidence that the bullet that killed Bhimji Lalji was fired from the berretta revolver recovered from the appellant. Based on that testimony, and of the evidence of visual identification of the two workers (Peter and Francis) the trial court found the appellant and his co-accused guilty of the charge of attempted robbery, and sentenced both to death. They both appealed against conviction and sentence to the superior court. While that appeal was pending, one of the appellants, Samson Macharia Muchiri, passed away. The superior court heard and finally rejected the appeal of David Mwangi Mugo, who is now the appellant before us in this second and final appeal.

As stated earlier, there are only two grounds of appeal – the legality of the sentence imposed on the appellant, and the complaint that his defence was not considered by the two courts below.

Dealing first with the second ground regarding the appellant's defence, we have perused the record, and find that both the courts below did in fact consider the appellant's defence and rejected the same. The trial court's judgment states, in part, as follows:

**“I note, from their respective unsworn defence accounts that the two accused persons intended the court to believe that they were victims of enthusiastic police officers as they each went about their businesses, yet the prosecution evidence set out above overwhelmingly negates this. I thus dismiss the same.”**

The superior court rendered itself as follows:

***“The appellant argued that his defence was not given due consideration. We have considered his defence afresh. The Appellant's defence was that he was shot by police as he went about his business of newspaper vending. That evidence does not shake the overwhelming evidence adduced by the prosecution to the effect that he had in his possession at the time of arrest a pistol which a few minutes earlier had been used to shoot and kill the deceased named in count 1, nor does it shake the evidence of PW 4 and PW 5 that together they chased the Appellant, exchanged gun fire with him before finally apprehending him. We are satisfied that the evidence against the Appellant was overwhelming and that his defence was a mere denial without merit.”***

Accordingly, this ground of appeal has no merit and fails.

We now come to the more serious ground of appeal challenging the legality of sentence 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. Onalo, learned counsel for the appellant, 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 vs 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 Ms. Murungi who appeared for the State readily conceded the appeal on legality of the sentence and we think she 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 seven years imprisonment. The term of imprisonment shall run from the date of the appellant’s conviction by the trial court on 28<sup>th</sup> November, 2002. We also order that the sentence of three years imprisonment on count 2 shall run concurrently with the other sentence.

Those shall be our orders in the appeal.

**Dated and delivered at Nairobi this 8<sup>th</sup> day of April, 2011.**

**P. K. TUNOI**

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**JUDGE OF APPEAL**

**D. K. S. AGANYANYA**

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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**