



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: BOSIRE, WAKI & VISRAM, JJ.A)

CRIMINAL APPEAL NO. 149 OF 2007

BETWEEN

MORIS OTIENO ODUOR .....APPELLANT

AND

REPUBLIC .....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (Makhandia, J.) dated 31<sup>st</sup> July, 2006

in

H.C.CR.A. NO. 719 OF 2003)

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JUDGMENT OF THE COURT

Although the appellant herein had, in person and through his counsel on record, drawn up a “*Petition of Appeal*”, “*Supplementary grounds of appeal*”, “*Further Supplementary Memorandum of Appeal*” and “*2<sup>nd</sup> Further Supplementary Memorandum of Appeal*” containing in all some 27 grounds of appeal to challenge his conviction and sentence, he abandoned all the grounds of appeal against his conviction and only urged one ground relating to the legality of his sentence. We shall return to that ground presently.

The appellant was charged and tried before Makadara Senior Principal Magistrate (C.O. Kanyangi) on one count of attempted robbery with violence contrary to **section 297 (2)** of the Penal Code; one count of being in possession of a firearm without a certificate contrary to **section 4 (3) (b)** of the Firearms Act, and one count of being in possession of ammunition without a firearm certificate Contrary to **section 4 (1) (3) (b)**, of the Firearms Act. It was alleged in the attempted robbery charge that on the 18<sup>th</sup> day of July, 2002, along Landies Road in Nairobi, jointly with others not before court while armed with a dangerous weapon namely Browning Pistol S/No. 75072411 attempted to rob **Francis Muiruri Ng’ang’a** of his motor vehicle registration No. KAP 013M, Nissan matatu, and his properties and at or immediately before or immediately after the time of the attempted robbery threatened to use actual violence to the said Francis Muiruri Ng’ang’a. The two other counts related to the firearms and ammunition used in the attempted robbery on the same date.

On the evidence of three prosecution witnesses, it was proved beyond reasonable doubt that Francis Muiruri Ng’ang’a (PW1) (“*the complainant*”) was on the material day at about 7.30 p.m. driving motor vehicle registration no. KAP 013M, which was a Nissan Matatu plying the Embakasi/Town route. As he stopped to drop some passengers at the country bus station at Muthurwa Landies, he was suddenly accosted by one of the passengers who showed him a gun. Another one came to his seat and ordered him to move over and he did so, while yet another one stood at the door preventing passengers who wanted to alight from doing so. The man who ordered the complainant to move took over the vehicle and drove off. At the Kamukunji round about, the complainant heard a bang at the back of the matatu and an order that the vehicle be driven to Kamukunji. On turning he saw two people struggling at the back. He grabbed

the steering wheel of the vehicle and in the process of struggling with the intruder, the vehicle hit the pavement and a handcart, and came to a standstill. Some of the robbers escaped but the man he had seen struggling with another at the back of the matatu was not so lucky. It happened that among the passengers at the back was **IP Benson Shikuku** (PW2) a police officer from Jogoo Road Police Station who was off duty and had boarded the matatu earlier to go home in Kileleshwa. He had his own gun and confronted the gun-wielding gangster upon realising that the matatu was being hijacked. In the struggle the officer shot out one bullet and with the assistance of other passengers managed to overpower the assailant who dropped his pistol on the floor of the vehicle. That assailant was the appellant who was arrested and handed over to the Officer Commanding Police Division (OCPD) Gigiri who was driving by at the time and who took him to Kamukunji Police Station. The appellant's gun which dropped on the vehicle floor and the ammunition were examined by a ballistics expert and confirmed to be so as defined under the Firearms Act, before he was charged with the three offences as stated earlier.

The appellant's defence was that he had boarded the vehicle at Muthurwa to go home when he heard a shot ring out shortly thereafter and wanted to escape. He was then arrested and taken to Kamukunji Police Station where he was charged with the offences which he denied. That defence was, of course, rejected and the appellant was convicted on all three counts and sentenced to death on the first count and to serve 10 years and 5 years imprisonment, respectively, on counts 2 and 3. All sentences were to run concurrently. The first appeal to the High Court on both the conviction and sentence was dismissed, and as stated earlier, he no longer challenges his conviction.

The appeal on the sole ground of legality of sentence was not about the manner in which the death sentence was combined with prison sentences, although that too was inappropriate. This Court has stated times without number that where there is a conviction for a capital offence combined with other non-capital offences and a death sentence is imposed on one count, the proper thing to do is to leave the other sentences in abeyance pending appeal or execution of the death sentence. See for example **Abdul Debano Boye & Another v R. Cr. Appeal No. 19/2001 (ur)**.

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 the court to rectify the sentence accordingly.

But there is precedent on the issue and we find no reason to differ from previous decisions. We allude to the decision of this Court, differently constituted, in **Boniface Juma Khisa v Republic, Criminal appeal No. 268/2009 (ur)** where the Court followed an earlier decision and stated as follows: -

**“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 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.” (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.”**

The Court further stated that the apparent conflict in the law may only be resolved by Parliament and held that the appellant was entitled to the less punitive of the two sentences. 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 count. We substitute therefor a sentence of imprisonment for a term of 5 years on the first count and do not disturb the sentence of 10 years and 5 years imprisonment on the second and third counts, respectively. All terms of imprisonment shall run concurrently from the date of conviction of the appellant by the trial court.

To that limited extent only, this appeal succeeds. Orders accordingly.

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.

***Dated and delivered at NAIROBI this 7<sup>TH</sup> day of OCTOBER, 2011.***

**S.E.O. BOSIRE**

.....  
**JUDGE OF APPEAL**

**P.N. WAKI**

.....  
**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

.....  
**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**