IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: O'KUBASU, WAKI & VISRAM, JJ.A)

CRIMINAL APPEAL NO. 277 OF 2007

BETWEEN

EVANSON MUIRURI GICHANE……. APPELLANT

AND

REPUBLIC …….....…… RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Lesiit & Makhandia, JJ) dated 26th September, 2006

In

H.C. Cr. A. No. 122 of 2004)
****

JUDGMENT OF THE COURT

The appellant herein, EVANSON MUIRURI GICHANE, was tried and convicted on one count of attempted robbery with violence contrary to ***section 297 (2)*** of the Penal Code by the Learned Senior Resident Magistrate (Ms Siganga) at Kibera Law Courts and upon the said conviction the appellant was sentenced to death. He appealed to the High Court but by its judgment dated and delivered at Nairobi, on 26th September, 2006, the High Court (Lesiit & Makhandia , JJ) dismissed his appeal. Being dissatisfied by the dismissal of his appeal by the High Court the appellant now comes to this Court by way of second appeal.

The appeal came up for hearing before us on 2nd November, 2010 when Mr. R.O. Odhiambo appeared for the appellant while Mr. V. S. Monda (Senior State Counsel) appeared for the State.

The facts, as accepted by the two courts below, were simple and straight forward. On 5th September, 2003 at about 3.15 p.m. three people arrived at the gate of the home of Kennedy Kamwathi (PW5) along Riverside Drive claiming that they had been sent by Mr. Kamwathi to carry out fumigation exercise in his compound. Kamwathi's laundry man, Ernest, opened the gate for the three men, despite protests from Kamwathi's other employees – Phillip Etale (PW4), a shamba boy and Philip Ombuya (PW1) a cook. Once inside the compound the three men and Ernest grabbed Ombuya and Etale and threatened the two domestic workers with knives. Etale (PW4) screamed for help, which screams attracted the attention of other workers in the neighbouring compounds. Those workers included William Shivachi (PW2). The three men panicked and two of them jumped over the hedge but the third person who is the appellant was not so lucky to escape. He was cornered as he tried to escape, arrested and escorted back to the compound of Kamwathi. Police officers were called to the

scene and re-arrested the appellant whom they escorted to Kileleshwa Police Station and subsequently charged with attempted robbery contrary to ***section 297 (2)*** of the Penal Code.

When put to his defence the appellant made unsworn statement to the effect that on the material day he was innocently walking from his kiosk along Suna Road to a bus-stop along Riverside Drive, but before he could reach the bus-stop he was surrounded by a mob which descended on him with blows and kicks claiming that he was one of the thieves. He was then dragged to a nearby compound from where he was collected by police officers who took him to the police station. He was later charged with an offence he knew nothing about.

In convicting the appellant the learned trial Magistrate (Ms. Siganga) in her judgment delivered on 5th March, 2004 stated:-

> ***"I am satisfied therefore that accused's guilt has been proved beyond all doubt. His defence is not credible and is, in my opinion, controverted (sic) by the prosecution's evidence against him.***
>
> ***If there is any gap or inconsistency in the prosecution case, then it is so minor that it cannot cause a fatal defect in the prosecutions case.***
>
> ***I find that the evidence on record supports the charge accused faces. His guilt has been proved to the required standard. I convict accused accordingly as charged."***

The superior court considered the appellant's appeal to that court and in its judgment stated inter alia:-

> ***"The offence of attempted robbery with violence was proved beyond reasonable doubt. The inevitable conclusion then is that the appellant's appeal against conviction lacks merit. It is accordingly dismissed. As for sentence, the only sentence prescribed by law is death. Consequently, the appellant's appeal against sentence is also dismissed."***

Although Mr. Odhiambo filed a supplementary Memorandum of Appeal containing six grounds of appeal he abandoned the first and sixth grounds of appeal. He then argued the remaining grounds under three main headings:-

(i) the trial was a nullity as none of the witnesses was sworn

(ii) the charge sheet did not disclose robbers attempted to steal.

(iii) The death sentence was unlawful.

On the first ground, Mr. Odhiambo referred us to the trial court's record and submitted that in the original record the witnesses were not sworn. We can dispose of this ground before we deal with the rest of the submissions. We called for the original file of the trial court and it was clear to us that all the witnesses were duly sworn as that is what is indicated in the learned Magistrate's record. In the typed record it is clear that all the witnesses were sworn. We therefore find no merit in this ground which we accordingly dismiss.

As regards the second ground of appeal, Mr. Odhiambo argued that none of the witnesses mentioned the household goods which the robbers attempted to steal. Mr. Odhiambo wondered what the robbers wanted to steal. He further argued that it was imperative to mention in the charge sheet what the robbers intended to steal. Finally Mr. Odhiambo referred to **Article 50 (2) (b)** of the Constitution which provides:

> ***"(2) Every accused person has the right to a fair trial which includes the right –***
>
> ***(a) ----------***
> ***(b) to be informed of the charge with sufficient detail to answer it."***

The particulars of the charge presented to the trial court were as follows:-

> ***"EVANSON MUIRURI GICHANE: On the 5th day of September, 2003, along Riverside drive in Kileleshwa within the Nairobi Area, jointly with others not before Court, while armed with dangerous weapons namely knives attempted to rob PHILLIP OMBOYA NGAYO of household goods and at or immediately before or immediately after the time of such attempt threatened to use personal violence to the said PHILLIP OMBOYA NGAYO."***

Those are the particulars that have been declared inadequate by Mr. Odhiambo. We have considered Mr. Odhiambo's submission in that respect but we are unable to accept the contention that the particulars of the charge were inadequate or unclear. We have referred to the summary of the facts accepted by the two courts below. The appellant and two others entered Mr. Kamwathi's compound on the pretext

that they had been asked to carry out fumigation exercise in that home. Once in the compound these three men grabbed the two domestic workers and threatened them with knives. Now, that was not fumigation exercise but a serious assault on the two domestic servants and the intention of the three men (and the accomplice Ernest) must have been to steal from the main house. In general life robbers do not normally have with them a requisition or inventory form indicating what they intend to steal. Robbers normally come to steal whatever they find in the house or on the victim. It is therefore mischievous to argue that the trial must be unfair since what was to be stolen was not stated. The charge stated clearly what the appellant was to answer. The trial proceeded in accordance with the law and the appellant was given the opportunity to defend himself. He did so in his unsworn statement. We therefore find no merit in that ground of appeal.

Finally, Mr. Odhiambo submitted that the death sentence was unlawful . He referred to ***section 389*** of the Penal Code which provides:-

> ***"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."***

On his part Mr. Monda submitted that there is no contradiction between ***sections 297 (2)*** and ***389*** of the Penal Code.

Section 297 (2) of the Penal Code under which the appellant was charged 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."***

We have considered this ground of appeal and submissions by both Mr. Monda and Mr. Odhiambo and we are of the view that indeed, there may be a contradiction between ***sections 297 (2)*** and ***389*** of the Penal Code. The section under which the appellant was convicted provides for death sentence while ***section 389*** provides inter alia:-

> ***"--- 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."***

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 find merit in Mr. Odhiambo's submission. We are fortified in our conclusion by the decision of this Court in **GODFREY NGOTHO MUTISO VS. REPUBLIC** – Criminal Appeal No. 17 of 2008 (unreported) 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 for 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 provision."***

We think we have said enough to conclude that the appeal against conviction is unmeritorious while the appeal against the legality

of the sentence has merit. Accordingly this appeal is dismissed as regards the conviction of the appellant but we allow the appeal against the sentence to the extent that we substitute the death sentence with a prison term that will result in the appellant's release from prison since the appellant was convicted and sentenced on 5th March, 2004 and should have been sentenced to imprisonment for a term not exceeding seven years.

It is so ordered.

Dated and delivered at Nairobi this 10th day of December, 2010

E.O. O'KUBASU
……
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.