IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 59 OF 2006

WILFRED AMENYA MOMANYI …….…… APPELLANT

AND

REPUBLIC ……..…….. RESPONDENT

(*Appeal from a judgment of the High Court of Kenya at Nakuru (Musinga & Kimaru, JJ) dated 13th February, 2006*

In

H. C. Cr. A. No. 129 of 2004)

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JUDGMENT OF THE COURT

The appellant was tried and convicted on a charge of attempted robbery with violence contrary to ***section 297 (2)*** of the Penal Code. The particulars of that charge were that on 23rd January, 2004 at Jogoo Trading Centre (Mau Summit) in Nakuru District of Rift Valley Province, the appellant jointly with others not before the court, while armed with a dangerous or offensive weapon, namely, a panga, attempted to rob Margaret Wairimu Mwangi of her money and at, or immediately before or immediately after the time of such attempted robbery, he wounded Margaret Wairimu Mwangi. Upon his conviction, the appellant was sentenced to death. He appealed to the High Court against both the conviction and sentence but by its "Judgment of the Court" dated and delivered on 13th February, 2006, the High Court (Musinga & Kimaru, JJ) dismissed the appeal against the conviction and confirmed the sentence of death. The appellant now appeals to this Court by way of a second appeal and that being so, the Court's jurisdiction is confined to only matters of law – see ***section 361*** of the Criminal Procedure Code.

The first point of law raised by Mr. Ombati on behalf of the appellant was with regard to the charge which stated that the appellant, jointly with others not before the court, attempted to rob the complainant. Mr. Ombati submitted that the evidence of Margaret Wairimu Mwangi (PW1) and that of Lucy Wanjiku Kamau (PW2) who were together during the incident, showed that only one person attacked Margaret. It appears Mr. Ombati was submitting that the discrepancy between the evidence and the charge made the charge defective. It is true that the person who attacked the two ladies was alone but we do not agree that the discrepancy between the charge and the evidence made the charge defective. Apart from the fact that the attacker was armed with a dangerous weapon, namely a panga, he also cut Margaret with the panga and the ingredients of an offence under ***section 297 (2***) of the Penal Code were proved. That the

particulars stated the offence was committed jointly with another while the attacker was proved to have been alone did not invalidate the charge and the discrepancy caused no prejudice to the appellant; it is one curable under ***section 382*** of the Criminal Procedure Code.

Mr. Ombati next attempted to raise an issue based on section ***72 (3)*** of the Constitution, but there was no such ground of appeal and the Court stopped him from arguing a point not raised in the grounds and which might well have required notice thereof to be given to the Republic.

As to the evidence which was accepted by the two courts below we think that those courts were right in accepting the evidence. It is true the attack on Margaret and her friend took place at about 7.00 p.m. while the two were on a road but both Margaret and Lucy swore they saw and recognized the appellant as he was a local boy. He had a panga and cut Margaret with it. Margaret swore she had known the appellant for over one year. When Lucy asked him why he was attacking Margaret the appellant in turn asked them where they were coming from at that time and demanded that Margaret should give him all the money she had. Margaret and Lucy later had him arrested and when he took them together with P.C Augustine Cheruiyot (PW4) to his house, he produced the panga which he had used to cut Margaret. The evidence was accepted by the two courts and we can see no reason for interfering with concurrent findings of facts. He was, in our view, properly convicted and we dismiss his appeal against the conviction.

On sentence, when we saw the appellant in Court, he immediately struck us as being young. He now says in ground five of his grounds of appeal that he was only 16 years at the time of the offence. We ordered that he be subjected to a medical examination and the report we now have shows that he is aged between 20 and 22 years which would mean that at the time of the offence he was under the age of eighteen years. He could not, therefore, have been sentenced to death. We accordingly set aside the sentence of death and substitute it with an order under ***section 25 (2)*** of the Penal Code that he shall be detained at the pleasure of the President.

Dated and Delivered at Nakuru this 22nd day of February, 2008

R.S.C. OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR.