



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT MOMBASA
Criminal Appeal 241 of 2007

MWENDO MUTUKU APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa (Sergon, J) dated 26th November, 2007

in

H.C. Criminal Appeal No. 161 of 2004)

JUDGMENT OF THE COURT

This is a second and last appeal. **Mwendo Mutuku**, the appellant, was charged before the District Magistrate at Taveta with the offence of attempted robbery contrary to **section 297(1)** of the Penal Code. The particulars of the charge read as follows:

“On the night of 7th day of August 2003 at about 2.00 a.m. at Lotima Village in Taita Taveta District of the Coast Province jointly with others not before court attempted to rob Daniel Kimondio of shop goods and cash and at or immediately before or immediately after such attempted robbery threatened to use actual violence to the said person Daniel Kimondio.”

The appellant pleaded not guilty to the charge but as the learned Magistrate at Taveta had no jurisdiction to hear and determine the matter, the case was, on 23rd December 2003, transferred to Voi Law Courts for hearing and further action. The learned Principal Magistrate at Voi (R.A. Mutoka), after full hearing of the case, in a judgment dated and delivered on 24th June 2004, found the appellant guilty as charged, convicted him and sentenced him to serve nine years imprisonment with hard labour. He was not satisfied with that conviction and sentence and he appealed to the superior court which, after hearing and considering his appeal, dismissed it as against conviction but allowed the appeal as against the sentence; set aside the sentence of nine years imprisonment with hard labour and substituted it with a sentence of five years imprisonment with effect from the date of the original sentence imposed by the trial

court. The appellant still felt dissatisfied with that decision of the superior court and hence this appeal.

Daniel Kimondio (PW 1) (Kimondio) is a farmer and a shop keeper at Rotina in Taveta District. On 6th August 2003, he was at his house together with his wife. They went to bed. At 2.00 a.m., he heard a loud bang on his main door. He went to the living room. The attackers moved to the window and hit the window with a stone and it broke down. His wife, who had woken up was screaming. The people outside shot two gunshots into the house and shouted to Kimondio's wife to keep quiet or else they would kill her. They further told Kimondio to give them money. All this time they were shining their torches on Kimondio. Kimondio had a torch and he also did flash his torch at them. He stated in his evidence that as he flashed his torch, he saw one of the attackers whom he identified as the appellant. Kimondio took his bow and arrows, and shot three arrows at the thieves as they ran away. He shot one of them and he was certain the man he shot was the same person whose face he had seen when he flashed his torch and that was the appellant. The attackers ran away. Neighbours came to the rescue of Kimondio. Two of those neighbours were Julius Kimondui (PW 2) (Julius), and Francis Muema Makau (PW 3) (Makau). Buoyed by the presence of those neighbours, Kimondio went to the police who were at a road block at Gitobo and reported the incident to them. The police accompanied them to look for the robbers with the police taking a different route while members of the public i.e. Kimondio and his neighbours, took a different direction. As Kimondio and others laid an ambush, they heard a group of people approaching with one of those in that group saying that he had been hurt by "*that man*". Kimondio and others confronted them as they neared them. Kimondio shot two arrows at them but they responded by shooting in the air and Kimondio and his group took to their heels upto Taveta Police Station. They made a report at the police station and they were given police officers with whom they went to Kimondio's home.

According to Kimondio, the police visited his home and saw how the roof was shot at and also recovered a panga and a rungu at the scene next to his house. At the scene where they laid an ambush and encountered the robbers after the attempted robbery, the police recovered a panga and a spent cartridge. Kimondio's evidence was that he could identify his arrow head which he used in shooting at the escaping robbers as it was serrated and once it embedded itself into a human body, it would not come out unless the body was operated upon to remove it.

Julius' evidence was that on the night in issue, he heard screams coming from Kimondio's home and he rushed there. He saw several torch lights and heard voices calling out "*give us money*" from people standing outside Kimondio's house. As he ran around the fence towards the gate, he saw people run out of Kimondio's home. He met one of those people upon whom he flashed his torch and told to stop. That man had an arrow stuck on his shoulder. Julius went into Kimondio's house and found Kimondio and his wife who were still screaming. Kimondio told him that he (Kimondio) had shot one of the attackers with an arrow. Other neighbours came and they all went to report to the police at a road block at Gitobo. Julius identified the appellant as one of the people he met running away from Kimondio's house. He said the appellant is the person he confronted and who had an arrow sticking on his shoulder.

Makau was also in his house that night. At 2.00 p.m. he woke up to screams from Kimondio's house. He got out and heard sounds like gunshots. He took his bow and arrow and went to the direction where screams were coming from. He met the complainant and neighbours on the way. Kimondio told him that robbers had battered his door and broken his window and that he had shot one of them. He was with Julius and Kimondio when an ambush was laid for the thugs and he also heard one of the thugs saying, as they approached, that "*that man hurt me so much.*" However, though they confronted the robbers, the same robbers shot in the air and they (Kimondio, Makau, Julius and others) ran away upto Taveta Police Station where they made a proper report to the police.

Pc Addley Masese (PW 4) (Pc Masese) of Taveta Police Station received a report of attempted robbery at about 3.00 a.m. on 7th August 2003. He, together with Sgt. Mwangamo, Pc Mulatia and Pc Muita went to Kimondio's home which was the scene of the attempted robbery. They saw a broken window and they recovered a rungu and a panga from the scene. They then went to the place called Makongeni where Kimondio and his neighbours had laid an ambush and they saw blood stains and recovered a panga. They went back to Taveta Police Station and telephoned police in Tanzania and informed them to look for a person injured with an arrow. At 10.00 a.m. that day i.e. 7th August 2003,

police officers from Himo Police Station in Tanzania reported that a suspect who had gone to seek for medical attention at Faraja Health Centre was detained there and he had an arrow head embedded in him. Pc Masese together with Pc Optat and others went to Faraja Health Centre in Tanzania and found the appellant there. The appellant had an arrow head embedded in his shoulder. They arrested him and took him to Taveta Hospital. The injury looked fresh and it was still bleeding. Later, the appellant was transferred to Voi Hospital and eventually he was transferred to Coast General Hospital for operation to remove the arrow head from his body. Pc Masese interrogated the appellant and the appellant told him that he had been shot by his brother but Pc Masese did not believe that allegation.

On 7th August 2003, Dr. Eric Odhiambo Okongo at Taveta Hospital saw the appellant at Taveta Hospital. He stated in court that when he saw the appellant, the appellant had an arrow lodged in the spine. He assessed the appellant's degree of injury as harm and referred the appellant for surgical treatment at the Coast General Hospital. After the arrow was removed, the appellant was referred back to Taveta Hospital for removal of stitches. He identified the appellant as the patient he saw with an arrow head lodged in his spine. The appellant was then charged with the offence as stated hereinabove.

In his defence in court, the appellant stated that on 4th August 2003, he and one Augustino Muema, his partner, went to Tanzania. On 5th August 2003, they were at a memorial ceremony of Augustino's grandfather. That ceremony continued till 6th August 2003. On 7th August, 2003, they started cleaning goat skin. As they were doing so, one Joseph Mapendo joined them and called one Mandeo. They went aside. Suddenly a quarrel broke out between the two and Mandeo beat Mapendo who ran away. After about 10 minutes, Mapendo returned and suddenly the appellant felt a sharp pain and on touching the spot, it was bleeding. He fell and fainted. He regained consciousness at Taveta Hospital in the evening of that day and at that time when he woke up, police were guarding him. Later he was taken to Coast General Hospital where he was operated upon and was returned to Taveta after the operation. Although he has not stated in so many words, we understand the appellant to have raised a defence of *alibi* and to have stated that he was shot with an arrow by another man at a different place altogether.

The above are the salient facts upon which the trial court found the appellant guilty, convicted him and sentenced him to nine years imprisonment with hard labour and which the superior court analysed afresh, evaluated and upon which it independently confirmed the conviction but altered the sentence. The appellant now comes to us in person on a supplementary grounds of appeal filed on 25th June 2008 in which he attacks the findings of the two courts below on facts mainly and says that the conviction cannot stand as some of the people mentioned in the proceedings were not called as witnesses and also attacks the sentence that was awarded by the court saying it was unmeritorious. The learned Assistant Deputy Public Prosecutor supports the conviction and says the sentence was in fact too lenient when the offence committed is considered.

As we have stated, this is a second appeal. That being the case, by dint of **section 361(1) (a)** of the Criminal Procedure Code, we can only consider matters of law and not matters of fact. We cannot interfere with concurrent findings of the trial court and the first appellate court on matters of fact unless it is demonstrated that their concurrent findings on fact was so erroneous that no court of law, properly exercising its mind, could have made such a finding. **Section 361(1) (a)** also militates against our hearing a second appeal on sentence as severity of sentence is a matter of fact. **Section 361(1) (a)** states as follows:

“361(1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section –

(a) on a matter of fact, and severity of sentence is a matter of fact;”

(underlining supplied)

In the appeal before us, we are prepared to accept that the identification of the appellant at the scene

by Kimondio and Julius could not be proper as the circumstances were not conducive to proper identification as it was at night and the only sources of light were torches being flashed from the appellant and his colleagues and Kimondio at times when the appellant was outside the building with window grills between Kimondio and the appellant and so Kimondio, with his wife screaming, and the windows being hit with stones and him holding a torch together with bow and arrows, and seeking to aim his arrows at the appellant and his colleagues, could not have properly identified the appellant. Likewise, we accept that Julius had a very short time to see the appellant by the torch light as he (Julius) was running round the fence to reach the gate and naturally feared for his life as thieves were confronting him outside Kimondio's home. In any case, the visual identification by Kimondio and Julius was no more than dock identification as no identification parade was held for the two to properly identify the appellant. We note, however, that neither the trial court nor the superior court relied on that evidence of identification to convict the appellant. The main evidence that was accepted by both courts and that ended in the appellant's conviction was the evidence that Kimondio shot at least one of the attackers with an arrow which he identified as his own arrow. Kimondio told both Julius and Makau, a few minutes after the incident, that he had shot one of the robbers with an arrow. Julius saw one of the robbers with an arrow sticking on his shoulder just about the time of the attack. Later when Kimondio and his group laid an ambush, they heard one of the people approaching them that night saying that he had been injured by one of their victims. As if that is not enough, the same morning, the appellant is seen at Faraja Health Centre in Tanzania, which was not a long distance from the complainant's home, with an arrow embedded in his body. That arrow head, once removed at Coast General Hospital, was identified by Kimondio to be his arrow head. This evidence was accepted by both courts. It puts the appellant at the scene of the incident. We cannot, and we have no reason to interfere with it as it is a finding on a matter of fact based on sound reasoning. It clearly displaced the appellant's *alibi* defence. We have carefully perused and considered the appellant's written submissions. We are not persuaded that both courts' findings both on facts and on law were erroneous in any way. The alleged witnesses not called would not have added anything to the evidence already on record. As we have stated, severity of sentence is a matter of fact and in any case, we do not find a sentence of five years imprisonment for such a serious offence to be severe in the circumstances. In fact, the appellant is lucky that he was charged under **section 297(1)** and hence this Court cannot enhance the sentence for to do so would mean interfering with the charge which we have no jurisdiction to do. Otherwise, the proven facts of this case would have, in our view, sustained a charge under **section 297(2)** in which case the sentence of death would have been the appropriate sentence. However, as we have stated, the appellant was charged under **section 297(1)** and his sentence of five years imprisonment which is very much on the lower side will nonetheless stand.

In the result, this appeal stands dismissed.

Dated and delivered at Mombasa this 25th day of July, 2008.

P.K. TUNOI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR