



IN THE COURT OF APPEAL OF KENYA AT NYERI

CRIMINAL APPEAL 101 OF 2003

MUSA KAARU M'INYINGI APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nyeri (Juma & Kasanga Mulwa, JJ.) dated 11th July, 2002

in

H.C.C.R.A. NO. 224 OF 1997

JUDGMENT OF THE COURT

The appellant, **Musa Kaaru M'Inyingi**, was arraigned before the *Principal Magistrate's Court* at Maua on a charge of attempted robbery with violence contrary to **section 297(2)** of the Penal Code. The particulars of the offence were that on the *19th day of September, 1996* at Athiru Runjine Location in Nyambene District of the Eastern Province while armed with dangerous weapon, namely, a panga attempted to rob **Nahashon Baariu** of his property and at or immediately before or immediately after the time of such attempt caused the death of the said **Nahashon Baariu**.

The hearing of the trial commenced on *22nd September, 1997* when witnesses for the prosecution were called to give evidence. It was the prosecution case that at about 3:30 p.m., **Samson Mutwiri** (PW1) and **Jeremano M'Thiringi** (PW2) were going to a canteen when they saw the appellant and the deceased, Nahashon Baariu, struggling over a radio cassette which belonged to the deceased. The appellant who had a panga cut the deceased on the left hand.

The deceased screamed and many people came to the scene. Those who went to the scene included **Musa Mwenda** (PW4) and **Jeremiah Meme** (PW5) who were brothers to the deceased. Members of the public who came to the scene picked up stones and chased the appellant who escaped towards Kiraro Hill. **Nahashon Baariu** who was cut on the hand died on *30th September, 1996*. When put to his defence, the appellant denied having been involved in the commission of this crime. The learned Senior Resident Magistrate at Maua (Mr. M.N. Gicheru) considered the evidence before him and came to the conclusion that the appellant's guilt had been proved and proceeded to convict him as charged. In convicting the appellant, the learned trial magistrate stated inter alia:-

"I have carefully considered all the evidence adduced in this case by both sides bearing in mind the

heavy burden on the prosecution to prove the guilt of the accused beyond reasonable doubt. The burden is especially heavy in a case like this one where the accused is charged with a capital offence. I find the accused guilty as charged for the following reasons. Firstly, the offence was committed in broad daylight and the accused was seen by not less than three witnesses who knew him before. I find that the accused was known to Samson Mutwiri (PW1) and Jeremano Thiringi (PW2) who saw him assaulting the deceased as they struggled over a radio. He was also known to Johana M'Munoru (PW3) and Musa Mwenda (PW4) who saw him running away from the scene where the deceased lay towards Kiraro hill. Because it was during the day, these witnesses saw the accused person clearly and I have no doubt that he was positively identified as the person who assaulted the deceased as he was robbing him
.....

Secondly, the deceased who was alive for more than ten days after the assault, told Jeremiah Meme (PW5) that it was the accused who wished to rob him of his radio cassette and assaulted him in the process. I have no doubt that the deceased told Meme (PW5) that it was the accused who assaulted him in the course of an attempted robbery.”

Having so stated, the learned trial magistrate convicted the appellant as charged and sentenced him to death as provided by the law. The appellant then filed an appeal in the superior court where he challenged both his conviction and sentence. The superior court (*Juma and Mulwa, JJ*) considered the appellant's grounds of appeal but came to the conclusion that the appellant had been convicted on overwhelming evidence. In their judgment, the learned Judges of the superior court stated inter alia:-

“The attempted robbery took place in broad daylight. The appellant was seen by the members of the public as he attempted to steal the radio from the deceased. He did not succeed in the stealing as the members of the public interrupted him by throwing stones at him. PW3 Johana M'Munoru came to the scene and found the appellant being chased. He was also in the group of people that later arrested the appellant.

The evidence against the appellant was just overwhelming. The deceased even told the witness that it was the appellant who had cut him. The deceased knew the appellant quite well.

We are satisfied that the appellant was properly convicted.

As regards sentence, there is only one sentence for attempted robbery with violence and that is death. The appellant was sentenced to death according to law. We uphold the sentence and dismiss the appeal.”

Being dissatisfied by that order of dismissal of his appeal by the superior court, the appellant now comes to this Court by way of second appeal. That being so only matters of law may be raised for determination – **see section 361** of the **Criminal Procedure**.

When the appeal came up for hearing before us, Mr. Kamwenji, the learned counsel for the appellant, submitted that the particulars of attempted robbery had not been disclosed or proved.

Mr. Orinda, the learned Principal State Counsel, opposed the appeal on the ground that the appellant had been convicted on clear evidence of recognition.

Since Mr. Kamwenji appeared to argue that the particulars of the offence had not been disclosed we must start with the relevant provision of the section of the law under which the appellant was charged and eventually convicted. **Section 297** of the Penal Code at the time the appellant was charged provided:-

“297. (1) Any person who assaults any person with intent to steal anything, and, at or immediately before or immediately after the time of the assault, uses or threatens to use actual violence to any person or property in order to obtain the thing intended to be stolen, or to prevent or overcome resistance to its being stolen, is guilty of a felony and is liable to imprisonment for seven years together with corporal punishment not exceeding fourteen strokes.

(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 set out the particulars of the charge at the commencement of this judgment. They clearly stated that on the material day (***19th September, 1996***) while armed with a dangerous weapon namely a panga, the appellant attempted to rob the complainant, ***Nahashon Baariu*** of his property and that at or immediately after the time of such attempt caused the death of the said ***Nahashon Baariu***. Witnesses were called to testify on what they saw. There was evidence that the appellant was seen struggling with the deceased over a radio. When the deceased resisted the attempts of the appellant, the latter inflicted serious injuries which resulted into the death of the deceased.

We have considered the rival submissions made before us and we are of the view that the particulars of the charge were clearly stated in the charge sheet and that evidence was led which proved the charge. The incident took place in broad daylight and the appellant was known to the witnesses. This was as correctly pointed out by Mr. Orinda, a case of recognition. The appellant set out to rob the deceased but his efforts to achieve his mission were thwarted by the deceased and the others who came to the scene.

In view of the foregoing, we find no merit in this appeal and we order that the same be and is hereby dismissed in its entirety.

Dated and delivered at Nyeri this 19th day of May, 2006.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR