Kavai v Republic (Criminal Appeal E039 of 2023)
[2024] KEHC 11358 (KLR) (30 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11358 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL E039 OF 2023

AC MRIMA, J

SEPTEMBER 30, 2024

BETWEEN

GEOFFREY KAVAI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising out of the judgment, conviction and sentence by Hon. S. Makila (PM) in Kitale Chief Magistrate's Court Criminal Case No. 1563 of 2020 delivered on 4 th May 2023)

JUDGMENT

Background:

1. Geoffrey Kavai, the Appellant herein, was charged with the offence of Robbery with violence contrary to Section 296(2) of the Penal Code.

2. The particulars of the offence were that on the 29th day of March 2021 in Kananachi in Kiminini Sub-County robbed Dorcas Wanjala Nyongesa of her cash Kshs. 30,000/- and mobile phone Techno valued at Kshs. 4,000/- and immediately after the time of such robbery beat the said Dorcas Wanjala Nyongesa.

3. In support of the prosecution's case, a total of 5 witnesses testified. The Complainant, Dorcas Nanjala Nyongesa, testified as PW1. Phyllis Simiyu, and John Sifuna the complainant's neighbours testified as PW2 and PW3 respectively. Fredrick Kimosop, a Clinical Officer at Matunda Sub-County Hospital testified as PW4. No. 224323, Corporal Gilbert Wechuli, the Investigating Officer, testified as PW5.

4. Upon close of the prosecution's case, the Court found that a prima facie case had been established. The Appellant was placed on his defence.

5. The Appellant called a total of 5 witnesses. The Appellant testified as DW1, Molly Muhonja Kavai, a sister to the Appellant testified as DW2, Hellen Adhiambo Oyando, also a sister to the Appellant testified as DW3, No. 239901 IP Edward Ekisa, the Deputy OCS Kiminini Police Station testified as

DW4 and Naftali Nyakwara, a Clinical Officer at Matunda Sub-County Referral Hospital testified as DW5.

6. At the close of the hearing, the Appellant was found guilty of the offence of Robbery with violence. Accordingly, he was convicted and sentenced to 10 years imprisonment.

7. The Appellant appeared through Counsel during the trial and the complainant also had a Counsel who watched her brief.

The Appeal:

8. The Appellant was dissatisfied with the conviction and sentence. Through the Amended Petition of Appeal dated 16th November 2023, filed by Messrs. Bikundo & Company Advocates, the Appellant urged 27 grounds of appeal.

9. In sum, it was the Appellant's case that dusting was not done on the Club/'rungu' produced in evidence to ascertain that his finger prints were on it. He also pleaded that the trial Court failed to note that the P3 Form produced by the Complainant and her sister were the same and that it had contradicting dates according to the Medical Officer and the Police Officer.

10. It was his further case that the trial Magistrate erred in failing to note that there was contradicting evidence as to whether robbery occurred. The Appellant pleaded that the evidence before Court supported the charge of assault as opposed to robbery with violence.

11. It was the Appellant' case that the trial Court erred in failing to note that the prosecution did not produce the mobile phone receipt to prove ownership and that the aspect of stealing Kshs. 30,000/- and the phone valued at Kshs. 4,000/- were not proved beyond reasonable doubt.

12. The Appellant also pleaded that the trial Court erred in not conducting an inquiry into the lighting of the scene of crime as to yield positive identification free from error.

13. The Appellant filed written submissions dated 16th November 2023 where he urged his case as in the grounds of appeal. Several decisions were referred to.

14. In the end, the Appellant prayed that the appeal be allowed, the conviction quashed, sentence set-aside and he be set at liberty.

The Respondent's case:

15. The Respondent opposed the appeal through written submissions dated 14th November 2023.

16. It was its case that the prosecution was able to prove all the main ingredients of the offence of robbery with violence beyond reasonable doubt and as such the conviction and the sentence were proper.

Analysis:

17. From the foregoing discourse, the main issue that arises for determination is whether the ingredients for the offence of robbery with violence were proved.

18. This being a first appeal, it is the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent findings and conclusions (See Okono vs. Republic [1972] EA 74).

19. This Court is, however, required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court. It ought, therefore, to make due allowance in that respect. (See: Ajode v. Republic [2004] KLR 81.

20. A consideration of the main issue now follows.

21. The Penal Code defines robbery is section 295 as follows;

> Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

22. In the process of prescribing punishment for the offence of Robbery, the Penal Code in Section 296(2) provides for the offence of Robbery with Violence in the following manner;

> 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 robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

23. In Criminal Appeal No. 116 of 2005 (UR),Johana Ndungu v Republic the Court of Appeal listed the ingredients of the offence or robbery with violence as follows;

    i. If the offender is armed with any dangerous weapon or instrument; or

    ii. If he is in the company of one or more other person or persons, or;

    iii. If at or immediately after the time of the robbery, he wounds, beats, strikes or uses violence to any person.

24. In Criminal Appeal No. 300 of 2007, Dima Denge Dima & Others vs Republic, the Court stated that the ingredients of the offence of robbery with violence are appreciated disjunctively. It is, therefore, proper to convict an offender in instances where only one of the ingredients is proved. The Court observed: -

> .....The elements of the offence under Section 296(2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence....

25. In the case of Oluoch -vs- Republic {1985} KLR 549, the Court observed that proof of any one of the above ingredients is enough to sustain a conviction under Section 296(2) of the Penal Code.

26. Deriving from the foregoing, the offence of robbery with violence is made up of two parts. The first part is the robbery and the other part is the aspect of violence.

27. Robbery is committed when a person steals anything capable of being stolen and immediately before or after the theft, the person uses actual violence or threatens to use actual violence on the holder of the thing or the property so as to either obtain or retain the stolen thing or so as to prevent or overcome any resistance thereto.

28. Two things must, therefore, be proved for the offence of robbery to be established. They are theft and the use of or threat to use actual violence.

29. Once the offence of robbery is proved on one hand, the offence of robbery with violence, on the other hand, is committed when robbery is proved and further if any one of the following three ingredients are also established that is the offender is armed with any dangerous or offensive weapon or instrument, or, the offender is in the company of one or more other person or persons, or the offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person.

30. This Court is alive to the confusion which has lingered over time in distinguishing the offence of robbery from that of robbery with violence.

31. To this Court, the confusion is real. The description of any of the two offences leads to the other. Indeed, that was one of the findings by an expanded Bench of the High Court in Joseph Kaberia Kahinga & 11 others v Attorney General [2016] eKLR which called for law reform to address the ambiguity.

32. Be that as it may, for purposes of establishing the offences pending any law reform which is far too long overdue, the difference between the two offences ought to relate to the circumstances under which they are committed and the gravity of the injuries sustained. This Court will, therefore, adopt an intermediate approach. The approach is that whereas both offences connote theft and violence, for the offence of robbery with violence to be established, there must be evidence of actual use of violence on the person of the victim and not a threat to such violence.

33. Therefore, if in the course of stealing, the offender only threatens to use violence on the victim, but no more than the threat, then the offence of robbery, and not robbery with violence, may be committed. Further, in such circumstances, the offence of robbery with violence cannot stand even if it is proved that the offender was armed with any dangerous or offensive weapon or instrument and/or the offender was in the company of one or more other person or persons as long as there was no evidence of actual use of violence.

34. Having said as much, this Court joins the calling for immediate law reform to address the legal ambiguity.

35. Returning to the case at hand, a look at the evidence is paramount. PW1 testified that when she returned home on 29th March 2021 at about 8pm, she was hit by a person known to her from the back as she looked for keys to her gate. She further testified that she struggled with the attacker, but the assailant stole from her Kshs. 30,000/- and a Techno mobile phone valued at Kshs. 4,000/-.

36. She also stated that Phyllis and John, [PW2 and PW3 respectively], found the Appellant still assaulting her and thereafter, the Appellant went home. It was her evidence that she immediately went to report the matter to the police and she was referred to Matunda Hospital for treatment.

37. PW1 stated that the Appellant was a son to her neighbour and had known him from the year 2008 when she moved in and as such she could not have mistaken him for anyone else since the security light was on when she was attacked. PW1 confirmed that the stolen items were not recovered.

38. In cross-examination, it was PW1's testimony that the Appellant attacked her with a stick and that he stole the phone and the money all of which that were in the bag.

39. PW2's evidence was that as she made her way home on the material date, she heard noises. She rushed to the scene and saw the Appellant striking PW1 with a stick/ 'fimbo'.

40. It was her evidence that she saw a neighbour trying to separate the Appellant from PW1 and eventually, the neighbour managed to pull the Appellant away from the Complainant.

41. PW2 stated in cross-examination that as the Appellant committed the offence, the Appellant's mother and sister were on the fence on their side of the compound.

42. It was PW2's evidence that she was not sure if the Appellant stole the bag, money and phone. Indeed, her testimony cantered on that the Appellant did not steal from PW1, but only assaulted her.

43. According to PW3, when he was heading home on 19th March 2021, at about 8pm, he heard screams from the complainant's home who was her neighbour. That, on rushing there, he found the Appellant hitting the Complainant with a stick. He intervened by holding and disarming the Appellant.

44. PW3 also stated that he threw the stick away and the Appellant walked to his home. To PW3, PW1 was bleeding on the right side of his head.

45. PW5, the police officer who investigated the case, had known the Appellant for 5 years and also witnessed the fracas between the Appellant and PW1. He testified that at the material time, the scene was well-lit from the security light.

46. He intervened and asked the Appellant why he was assaulting the Complainant. The Appellant responded that the complainant was fond of abusing his mother.

47. The evidence presented by the Appellant was also manifest on what transpired on the fateful night.

48. The evidence given by Defence witnesses explained the reason the Appellant unlawfully attacked the Complainant. According to the evidence of DW1, DW2 and DW3, the Appellant was fond of abusing their mother and their family generally, especially when drunk, due to a boundary dispute.

49. From a re-analysis of the evidence, it is apparent that all the witnesses who saw the incident unfold spoke to the occurrence of assault.

50. The evidence of both PW2 and PW3 weakens the complainant's claim of robbery with violence. PW2's evidence was to the effect that she saw assault but when PW3 intervened, it stopped. It was her testimony that she did not see the Appellant take the complainant's bag, phone or money.

51. PW3's evidence was further telling. He stated that he intervened and separated the complainant from the Appellant and upon doing so the Appellant walked away.

52. If indeed the Appellant walked away with the complainant's bag, which contained her money and phone, there is no way PW2 and PW3 could have failed to notice it. That evidence would have naturally come out in their testimonies.

53. The P3 Form filled by the Clinical Officer's (PW5), states that the complainant had swollen and tender left forehead, small bruise on left cheek, bruised and swollen left thigh tender to touch and a bruised swollen upper arm.

54. The clinical results were that the complainant's degree of injuries amounted to 'bodily harm'.

55. Juxtaposing the foregoing with the law as espoused above, it comes out that the trial Court overlooked the first limb of the offence of robbery, which necessitates proof of 'stealing' as captured in Section 295 of the Penal Code for the offence of robbery with violence to be completed as provided for in Section 296(2) of the Penal Code.

56. From the evidence led at the trial, a lot of doubt is created as to the incidence of stealing as to make the offence transcend to the arena of robbery and further to robbery with violence.

57. Save from the Complainant, all the witnesses did not attest to seeing the complainant's bag being taken away. More importantly, not a single item, purportedly stolen, was recovered from the Appellant. Even the mobile phone, which could easily have been traced to the Appellant through Global Positioning System (GPS) was not adduced at the trial.

58. Ultimately, it is this Court's finding that on a re-assessment of the evidence, the ingredient of stealing was arrived at by the trial Court without evidence. Therefore, the offence of robbery with violence could not have been committed in the circumstances of this case.

59. The appeal must succeed.

60. Having found so, and given the nature of the evidence on record. this Court turns to the concept of 'cognate offences. Section 179 of Criminal Procedure Code provides as follows: -

> 179. When offence proved is included in offence charged:
>
> 1. When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.
>
> 2. When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

61. The Black's Law Dictionary, 11th Edition defines Cognate Offence at page 1300 as follows: -

> A lesser offense that is related to the greater offence because it shares several of the elements of the greater offence and is of the same class or category.

62. By dint of Section 179 of the Criminal Procedure Code, Courts have the leeway to prescribe less punitive convictions for offences whose evidence do not meet the minimum threshold required of the greater charge originally pressed on an accused.

63. In Criminal Appeal No. 5 of 2013 Robert Mutungi Mumbi vs. R [2015] eKLR the Court of Appeal made comprehensive remarks on cognate offences in the following fashion: -

> .... As is apparently clear, section 179 of the Criminal Procedure Code empowers a court, in some particular special circumstances, to convict an accused person of an offence, even though he was not charged with that offence. The court contemplated by section 179 can be either the trial court or the appellate court. The real question here is not whether the appellant was charged with indecent assault of NK for which the High Court convicted him. That was not necessary under section 179. The question is whether the special circumstances contemplated by section 179 were in existence to enable the court convict the appellant of an offence with which he was not charged.
>
> An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related or alike; of the same genus or species. To sustain such a conviction, the court must be satisfied on two things. First, that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted. (See Robert

Ndecho& AnotherV. REX (1950-51) EA 171 and WachiraS/O NjengaV. Regina(1954) EA 398).

Spry, J. explained the essence of the first consideration as follows in Ali Mohammed Hassani MpandaV. REPUBLIC [1963] EA 294, while construing the provision of the Tanzania Criminal Procedure Code equivalent to section 179 of the Kenya Criminal Procedure Code:

> Subsection (1) envisages a process of subtraction: the court considers all the essential ingredients of the offence charged, finds one or more not to have been proved, finds that the remaining ingredients include all the essential ingredients of a minor, cognate, offence (proved) and may then, in its discretion, convict of that offence.

That conclusion is reached at the stage of judgment when it is not practical to require the accused person to plead afresh to the minor offence. It is a decision premised on the discretion of the court based on the evidence adduced at the end of the trial.

The second consideration arises, of necessity, precisely because the accused person is not charged with, and has not pleaded to, the minor cognate offence. The purpose of delving into this consideration is to satisfy the court that the accused person was not prejudiced, and that by being charged with the major offence, he had sufficient notice of all the elements that constitute the minor offence. (See Republic V. Cheya& Another[1973] EA 500).

In this case we are satisfied that committing an indecent act with a child is a minor and cognate offence of defilement with which the appellant was charged. The elements of the offence of committing an indecent act with a child are ingrained or subsumed in the elements of the offence of defilement. The former attracts a comparatively lesser sentence than the latter. Accordingly, we find that the appellant was properly convicted of indecent act with a child under section 179 of the Criminal Procedure Code even though he was not charged with that offence and had not pleaded to it. The requirements of section 179 were satisfied.

64. Coming back to the instant case, the Court's attention is drawn to Section 251 of the Penal Code which provides as follows: -

> 251. Assault causing actual bodily harm
>
> Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.

65. In Criminal Appeal E013 of 2021, Vicky Chelangat v Republic [2022] eKLR, the Court of Appeal discussed the dynamics that culminate in the offence of assault as follows: -

> (33) The essential elements of the offence of assault causing actual bodily harm are;
>
> i. Assaulted the complainant or victim, which
>
> ii. Occasioned actual bodily harm. (See the case of Ndaa vs Republic[4])
>
> (34) An assault is any act by which a person intentionally or recklessly causes another to suffer or apprehend immediate unlawful violence. The term is often used to include a battery- an intentional or reckless application of unlawful force to another person (DPP v Little [1992] QB 645).

(35) Of actual bodily harm, or hurt or injury, in Rex vs Donovan[5], Swift J, stated: -

> For this purpose, we think that "bodily harm" has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the complainant. Such hurt or injury need not be permanent, but must, no doubt, be more than merely transient and trifling.

(36) See also R vs Chan-Fook[6], paragraph D Lord Hobhouse LJ said: -

We consider that the same is true of the phrase "actual bodily harm". These are three words of the English language that receive no elaboration and in the ordinary course should not receive any. The word "harm" is a synonym for injury. The word "actual" indicates that the injury (although there is no need for it to be permanent) should not be so trivial as to be wholly insignificant.

(37) Also relevant is a passage in Archbold's Criminal Pleading, Evidence and Practice, 32nd Edition, Page 959 where it is stated as follows: -

> Actual bodily harm includes any hurt or injury calculated to interfere with the health or comfort of the prosecutor" (i.e. complainant)

(38) Section 2 of the Penal Code defines: -

> " harm" means any bodily hurt, disease or disorder whether permanent or temporary;

66. Deriving from the above and going by the evidence of PW1, PW2, PW3 and PW5, there is no doubt that the actions of the Appellant whose identity was not in contest occasioned 'harm' to the complainant.

67. In the premises, this Court finds and hold that the Appellant committed the offence of Assault causing actual bodily harm contrary to Section 251 of the Penal Code.

68. The Appellant is hereby found guilty and convicted accordingly.

69. On sentencing, this Court recalls the principles of sentencing as observed by the Court of Appeal in Shadrack Kipchoge Kogo -vs- Republic in reference to the Supreme Court of India in Soman -vs- Kerala {2013} 11 SCC 382 Para 13.

70. The Court is also alive to the circumstances leading to the commission of the crime, the principles of proportionality, deterrence and rehabilitation, as well as the mitigating factors.

71. As such, whereas the appeal succeeds, the Appellant is found guilty of the offence of Assault causing actual bodily harm contrary to Section 251 of the Penal Code.

Disposition:

72. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 thereby mostly being away from the station. Apologies galore.

73. Consequently, the following final Orders hereby issue: -

a. The Appeal against the conviction and sentence for the offence of Robbery with Violence is successful. The conviction is quashed and the sentence set-aside accordingly.

b. Pursuant to Section 179 of the Criminal Procedure Code, the Appellant is found guilty and is hereby convicted for the cognate offence of Assault causing actual bodily harm contrary to Section 251 of the Penal Code.

c. The Appellant was sentenced on 4th May 2023 and he has been in prison since then. That is a period of about 17 months. That period is sufficient sentence for the offence of Assault causing actual bodily harm. The Appellant is hereby sentenced to the period served.

d. The Appellant shall be set at liberty forthwith unless otherwise lawfully held.

74. It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 30TH DAY OF SEPTEMBER, 2024.

A. C. MRIMA

JUDGE

Judgment delivered virtually and in the presence of: -

Mr. Bikundo, Learned Counsel for the Appellant.

Miss Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Chemosop/Duke – Court Assistants.