



**Salat v Republic (Criminal Appeal E008 of 2024)
[2024] KEHC 15060 (KLR) (26 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15060 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL E008 OF 2024
SM GITHINJI, J
NOVEMBER 26, 2024**

BETWEEN

MAHAMOUD RAMADHAN SALAT APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from Original conviction and Sentence in Criminal Case No. E010 of 2023 of the Magistrate's Court at Lamu before Hon T.A.Sitati – SPM on 29th August, 2023)

JUDGMENT

Representation:

Appellant in Person

Mr Mulamula for the State

1. Mahamoud Ramadhan Salat was charged in the lower court with the offence of Robbery with violence contrary to section 296(2) of the Penal Code.
2. The particulars of this offence are that on the 18th day of September, 2022 at Bobo area, Hindi Location in Lamu Central Sub-County at around 20:00 hours, the appellant herein being armed with a dangerous/offensive weapon namely a “panga” robbed Robert Mwangi Muthika; Kshs.1,500/= an Itel mobile phone – IMEI 356022927xxxxxx, one sack of lemon fruits, head cap, a pair of open shoes, a phoenix bicycle, all valued approximately Kshs.10,750/= and during the time of robbery wounded the said Robert Mwangi Muthike with the panga on his head in contravention of the said Act.
3. The prosecution case is that the victim and the appellant in this case comes from the same village, Roka. They used to drink beer together. However, there is a time the appellant assaulted the victim. He was charged and sentenced to serve 5 years’ imprisonment. Upon completion of the said sentence he was released.



4. Thereafter on 18/9/2022 at about 8.00Pm the victim was going home from Monica's stall riding his phoenix bicycle. He was carrying a sack of lemon fruits and had with him 1,500/=, an Itel mobile phone, head cap and a pair of brown open shoes. There was full moon and the night was bright. Along the road, the appellant emerged. He shouted ordering the victim to stop. The victim disobeyed him and pedaled faster to avoid him. The appellant pursued him and cut him with a panga on the back of his head. He also cut him on the face, injuring the nose, jaw where a tooth was dislodged and arm. The appellant said to him, "Today I will kill you for you to realize that I am a man." You made me be jailed for 5 years." After the attack the victim fell down unconscious. He regained consciousness at around 6.00am. He was in pain and bleeding from the cut wounds. He noted that his bicycle, sack of lemons, 1,500/=, Itel phone, head cap and a pair of brown open shoes were missing. He crawled to his house and banged on the door. His wife (Pw-2) opened. She was taken aghast by the sight of the grave injuries the husband had suffered. She called the victim's brother by the name Jackson Munyua to assist take him to the hospital. Using a motor cycle, he was taken to Hindi Police Station where the matter was reported and then to Hindi Magogoni Health Centre where first aid was administered. He was referred to King Fahd Hospital. He was treated at the hospital and his P-3 form filled. It reveals according to the evidence of Pw-3 that he suffered a deep cut wound on the right forehead which was 4cm x 3cm deep and had to be stitched in layers. He had a nose bridge cut of 3cm long by 2cm deep. Right temporal region had deep cut wound of 5cm long, deep to an extent of exposing the skull bone. The back of the head had 4cm long and 3cm deep cut wound. The left eye was also swollen. The degree of injury was indicated as harm.
5. Pw-4 investigated the case. He visited the victim at Hindi Magogoni Hospital where he took three photographs of the injured areas. The victim was discharged on 23/9/2022. He informed the officer that prior to the attack he had been drinking liquor with the suspect at a local chang'aa drinking den. He left the place with the suspect behind him. He said that in the attack the appellant was revenging for an earlier case reported by the victim against him which led to his conviction.
6. On 14/1/2023 the police received a complaint of house breaking and stealing by the appellant. The appellant was held by villagers who sought police assistance. Pw-4 in company of Pc Kelvin Ondiek visited the scene. They arrested the appellant and took him to the police station. He was interrogated concerning allegation in this matter and he denied it. After closure of investigations he was charged with the offence carried in the charge sheet.
7. The appellant in his defence denied the offence. He alleged that he is a farmer at Bobo where he resides. On 14/1/2023 the police visited Bobo and arrested him. They alleged he was a wanted man. He was taken to the police station on burglary allegations. The complainant in the case forgave him. Before release the charges herein were preferred.
8. The victim had an old grudge against him as he had led to conviction of the appellant in another claim of assault where he was jailed for 5 years. He was not happy when the appellant was released and wished to get him back in prison.
9. The trial court evaluated the evidence and found the offence proved against the appellant beyond reasonable doubt. The appellant was convicted of it and sentenced to death.
10. Dissatisfied with the said conviction, the appellant preferred an appeal to this Court on the grounds that; -
 1. He was not positively identified as the culprit.
 2. The offence was not proved by the prosecution beyond reasonable doubt.



3. His defence was not properly weighed.
11. The appeal was canvassed by way of written submissions and both sides filed their respective submissions.
12. I have as the first appellate court re-evaluated the charge, evidence adduced, judgment of the lower court, grounds of the appeal and submissions by both sides.
13. There is only one eye witness to the incident constituting the offence, who is the victim in this case (Pw-1). He said the incident happened at night, 8.00Pm and there was full moon. There was bright light. During cross-examination he said that he was not drunk that evening. He was from selling lemons which he had harvested earlier from his farm and was sober. However, his wife the Pw-2 in this case on cross-examination stated, “yes, my husband did not sleep in the house that night. I was worried. He left the house to go to a nearby drinking den.”
14. The evidence of Pw-4, the investigating officer also reveals that;

“He said (Pw-1) that he was riding his bicycle home from a local chang’aa den when he was accosted by a person well known to him.....”
15. On cross-examination the witness confirmed that the victim was from a liquor drinking that evening.
16. The foregoing evidence strongly suggests that the victim (Pw-1) was not truthful on the issue and could have been drunk on the material night. The evidence of Pw-2 and Pw-4 could not have been obtained from elsewhere rather than from the victim himself.
17. The victim alleges the appellant was out to revenge as he had previously reported him in a case of assault where he was jailed for 5 years. He is alleged to had said, “Today I will kill you, for you to realize that I am a man. You made me be jailed for 5 years.” The said words reveals that the appellant’s intention (mens rea) was to kill the victim rather than to rob from him. There is no evidence that the appellant robbed from the victim the alleged items. The incident happened along a common path used by other member of the public. After the attack the victim fell unconscious from 8.00Pm up to 6.00am. He never witnessed the appellant take a thing from him. None of the alleged stolen items were recovered from the appellant or elsewhere. There exists possibility where the valuables could have been stolen by someone else rather than the appellant, after the alleged attack.

Section 295 of the Penal code reads; -

“Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, was 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 it’s being stolen or retained, is guilty of the felony termed robbery.”

296(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 after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

18. The foregoing sections make it clear that mens rea for the offence of robbery with violence, is the “intention to steal” and the rest depend on how it’s perpetrated. The evidence is clear that the appellant intention was not to steal, but rather to revenge; and there is no evidence that he stole anything. The offence therefore disclosed, cannot be of robbery with violence. The offence disclosed is of attempted



murder under section 220 of the Penal Code. The words allegedly uttered by the appellant reveals he was out to kill the victim. The nature of the attack and injuries sustained suggest of one who was out to kill. Section 220 reads; -

Any person who; -

- a. Attempts unlawfully to cause the death of another; or
- b. with intent unlawfully to cause the death of another does any act, or omits to do any act which it is his duty to do so, such act or omission being of such nature as to be likely to endanger human life, is guilty of a felony and is liable to imprisonment for life.

19. The prosecution evidence reveals clearly and is confirmed by the defence that the appellant and the victim knew each other very well. They even had an earlier case of assault where appellant was jailed for 5 years. The utterances by the appellant on 18/9/2022 shows he was the convict in the earlier incident and was out to revenge. This rests the issue of recognition. Whether he was properly seen using the moonlight or not, does not weaken the evidence as his statement can only be related to him. The victim though had taken beer, in my view was not very drunk as he was able to ride or push a bicycle loaded with a sack of lemons. He was in a state where he was able to hear and register what the assailant said to him. To his wife and the police, he disclosed only the appellant as the assailant. This shows he was firm or rather sure of the person who attacked him. Weighing the foregoing I find there exists reliable evidence that the appellant is the real culprit.
20. Going by the provided sentence for the offence of Robbery with violence and that of attempted murder, the latter is a lesser offence to the former. Under section 179 (1) (2) of the Criminal Procedure Code a defendant can be convicted of a lesser offence than the one charged with if related, and proved beyond reasonable doubt.
21. I therefore find the lesser offence of attempted murder proved, rather than the one of robbery with violence. As such the conviction for the offence of robbery with violence is quashed and replaced with one for attempted murder. The death sentence is as well quashed.
22. I have considered that the appellant is not a first offender. I have also considered what he said in mitigation. He will serve a sentence of 10 years' imprisonment from 14/1/2023 for the offence.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 26TH DAY OF NOVEMBER, 2024

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S.M. GITHINJI

JUDGE

In the Presence of; -

1. Ms Mkongo for the State
2. Appellant present in person

