Rotich & another v Republic (Criminal Appeal E007 of 2023)
[2023] KEHC 3802 (KLR) (27 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3802 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERICHO

CRIMINAL APPEAL E007 OF 2023

JR KARANJA, J

APRIL 27, 2023

BETWEEN

WESLEY KIPRONO ROTICH ..... 1ST APPELLANT

ALFRED KIPNGETICH ROTICH ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellants, Wesley Kiprono Rotich and Alfred Kipngetich Rotich, appeared before the principal magistrate at Kericho charged with the offence of robbery with violence, contrary to section 296 (2) of the *Penal Code*, in that on the 25th December 2017 at around 1800 hours at Kapsuser primary school in Belgut within Kericho County, jointly robbed Robert Kibet Yegon of a mobile phone make infinix S/No.3599730721xxxxx valued at 15,229/= and immediately before or after the time of such robbery used actual violence to the said Robert Kibet Yegon.

2. After a full trial, the two appellants were convicted and sentenced to suffer death. Being disatissfied with the conviction and sentence, the appellants preferred the present appeal on the basis of the grounds contained in the ...petition of appeal dated 1st February, 2023.

3. At the hearing of the appeal, both appellants were represented by their learned counsel, Mr. Miruka, while the state/respondent by the learned Senior Assistant Director of Public Prosecution (SADPP) Mr. Musyoki.

   In support of the appeal, the learned counsel, argued the three grounds of appeal wholesome and essentially submitted that the trial court erred by convicting and sentencing the appellant on the basis of a charge which was not established and proved as there was no force or violence used nor was there any theft of a phone which was in any event not proved to be the property of the complainant.

4. Learned counsel submitted further that the said phone fell down from the pocket of the complainant when he was fighting and/or being assaulted by the appellants and was recovered at the scene on the same day by a lady called Irene who in turn gave it to the complainant's mother (PW 4) who then gave it to the complainant.

5. Learned counsel further submitted that the phone was never booked in the O/B by the investigating officer (PW 5) as the subject of any theft, neither did the complainant report that it was stolen from him by the appellants. In a nutshell, learned counsel submitted that the ingredients of the offence of robbery with violence were never established by the prosecution evidence to warrant conviction of the appellants. Learned counsel therefore urged this court to allow the appeal, quash the conviction and set aside the sentence.

6. In opposing to the appeal, the learned prosecution counsel contended that the necessary ingredients of section 296 (2) of the penal code were duly established as the offenders were more than one, were armed with an offensive weapon or instrument and used violence against the victim. That, these ingredients were established and proved through the evidence of the complainant (PW 1) as corroborated by all other witnesses including (PW 2) who arrived at the scene and went to the rescue of the complainant after she found him being assaulted by the two appellants.

7. Learned prosecution counsel, further submitted that the P3 form confirmed that the complainant was injured and contended that the complainant did not recover his phone.

   While contending that the two appellants were rightly convicted and sentenced by the trial court, the learned prosecution counsel urged this court to dismiss the appeal and uphold the conviction and sentence.

8. Having considered the appeal on the basis of the supporting grounds and the rival submissions, the first duty of this court was to revisit the evidence and arrive at its own conclusion bearing in mind that trial court had the advantage of seeing and hearing the witnesses.

   In that regard, the prosecution case was briefly that the complainant and the appellants were neighbours and therefore persons known to each other. On the material date at about 6.00pm the complainant Robert Kibet Yegon (PW 1) was on his way to Kapsuser when he was attracted by noses and heard that a naked person had been attacked by the two appellants. The first appellant (Wesley) had a stick at the time with which he threatened to attack and kill him (complainant). Shortly thereafter he was hit on the head with the stick and at that moment the second appellant (Alfred) took his phone which he said that he did not recover. He thereafter reported the matter at Sosiot police station.

9. Albina Mutai (PW 2) heard screams near her homestead and learnt that the two appellants were attacking the complainant. She ran to the scene and found the trio of the complainant and the two appellants having been separated. She then called the area chief who told her to report to the police. She implied that the two had engaged in a fight as they fought a second time in her presence at a different scene.

10. Evaline Cherono (PW 3) indicated that she rescued the complainant from being assaulted by the two appellants. She initially saw them quarreling before the complainant was hit on the head with a stick and fell down. Her screams attracted villagers who came to the rescue of the complainant. She stated in cross-examination that she never saw any phone but there was one at the scene.

11. Jane Chemutai (PW 4) the complainant's mother, indicated that she was told that the two appellants and the complainant were fighting when the complainant's phone was taken away but was later

brought to her by a lady called Irene. She then handed over the phone to the complainant who gave it to the police.

12. Cpl. Agnes Mueni (PW 5) the investigating officer, indicated that the complainant made an assault report at Sosiot police station to the effect that he was assaulted by the two appellants and in process lost his phone to the second appellant (Alfred).

    The investigating officer (PW 5) further indicated that the phone was found and returned to the complainant, who was issued with a P3 form and eventually the two appellants were charged with the present offence.

13. The defence case was a denial with the first appellant (Wesley) indicating that he never fought with the complainant nor did he take his phone. He only found the complainant and the second appellant (Alfred) fighting and separated them with the help of other villagers. The second appellant indicated that he was involved in a brawl with a person called Dennis who was drunk at the time when the complainant appeared at the scene with the intention of beating him (second appellant). The complainant then threw him down on the ground before he was rescued by neighbours.

14. Irene Cherono Koskei (DW 1) testified that she arrived at the scene and found that those involved in a fight had already left. She found a phone on the ground and knew it to belong to the complainant. She picked it and took it to the complainant's house where she handed it over to the complainant's wife. Having considered the evidence in it totality, the trial court concluded that the case against both appellants established they were both seen participating in the act of assaulting and robbing the complainant.

15. In this court's opinion, the basic issue which arose for determination was whether the ingredients of the offence of robbery with violence were established and proved against the appellants or whether indeed the offence of robbery with violence was indeed committed by the two appellants against the complainant. In that regard, the definition of robbery is contained in section 295 of the *Penal Code* to wit,

> " Any person who steals anything and at or immediately before or immediately after the time of stealing it, uses or intends 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"

16. This provision of the law creates the offence of robbery which becomes robbery with violence under section 296 (2) of the *Penal Code* if the offender is armed with any dangerous or offensive weapon on instrument involvement 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. The maximum sentence in such circumstances is the death sentence which was herein imposed upon the appellants following their conviction for robbery with violence.

17. However, in this court's opinion, the charge as framed was defective in as much as section 295 of the *Penal Code* which creates the offence of robbery with violence was omitted from the charge sheet such that the appellants ended up being charged and punished for a non – existent offence. Section 296 (2) of the penal code is merely a provision for the applicable sentence for an offender who is armed with a dangerous or offensive weapon and is in the company of one or more other person/person and who uses or threatens to use violence of any form against the victim. The failure by the prosecution to invoke section 295 of the *Penal Code* in the charge sheet was a fatal omission which forms a solid basis and reason for quashing the conviction of the two appellants by the trial court without much ado.

18. The foregoing notwithstanding, the evidence availed by the prosecution though the complainant (PW 1) with regard to the fact of theft of his mobile phone was inconsistent with that of the rest of the witnesses (PW2, PW3 and PW4) and thus not worthy of belief. It showed that the complainant maliciously framed the appellants with theft, hitherto violently of his phone after he suffered the most in a fight in which he participated along with the two appellants. If anything, the three of them ought to have been charged with affray as they engaged in a fight at a public place.

19. It would therefore follow that the injury inflicted upon the complainant was a result of a criminal act of affray rather than a criminal act of assault committed against him by the appellants or any one of them. In any event, there was no proper or credible evidence to show that the complainant suffered bodily harm as a result of an act of assault. The P3 form said to have been issued to the complainant was never formally tendered in evidence other than being marked for identification (PMFI 4).

20. For all the foregoing observations and reasons the first ground of the appeal is sustained and is sufficient on its own for a finding by this court that the appellants' conviction by the trial court was neither safe nor sound and is hereby quashed with the death sentence imposed upon the two appellants being set aside.

    Both appellants be released forthwith unless otherwise lawfully withheld.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 27TH DAY OF APRIL, 2023.

J. R KARANJAH

JUDGE