



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 87 OF 2018

MZEE FADHILI MZEE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence by D. Mochache, Senior Principal Magistrate, in Shanzu Senior Principal Magistrate's Court Criminal Case No. 276 of 2018)

JUDGMENT

1. The appellant was convicted for the offence of attempted robbery with violence contrary to Section 295 as read with Section 297(2) of the Penal Code. The particulars of the charge were that on the 19th day of February, 2018 at Mombasa Beach at Kisuani Sub-County within Mombasa County armed with a dangerous weapon knife (sic), attempted to rob (sic) Omar Miraj a mobile phone Alcatel valued at Kshs. 15,000/= and after the time of such attempted robbery with violence, used actual violence to the said Omar Miraj. The appellant was sentenced to 50% of the sentence (sic) which was considered to equate to 20 years imprisonment.

2. On 19th July, 2018 the appellant filed a petition and grounds of appeal. On 2nd December, 2019 he filed amended grounds of appeal, with leave of the court. They are as follows-

(i) That the Learned Trial Magistrate erred in law and fact in convicting and sentencing him to 20 years imprisonment without a proper finding that the elements of attempted robbery (sic) were not proved by the prosecution and he could have been convicted with assault causing actual bodily harm contrary to Section 251 of the Penal Code;

(ii) That the Learned Trial Magistrate erred in law and fact in convicting and sentencing him to serve 20 years imprisonment without a proper finding that the same was harsh and excessive in the circumstances; and

(iii) That the Learned Trial Magistrate erred in law and fact in convicting and sentencing him to serve 20 years imprisonment without a proper finding that there was a conflict between Sections 297(2) and 389 of the Penal Code and he ought to have benefited from the lesser sentence (sic).

3. In his written submissions, the appellant contended that the offence of attempted robbery with violence envisages a situation where an offender is armed with a dangerous or offensive weapon or instrument or is in the company of one or more other persons, or immediately before or after the time of the attempted robbery, the offender wounds, strikes, beats or uses other personal violence on the victim. He stated that those are the elements set out under Section 297(2) of the Penal Code. He relied on the case of **Momeni Ngumbao Mangi v Republic**, Mombasa Court of Appeal, Criminal Appeal No. 141 of 2015, to support his argument.

4. The appellant referred to the facts narrated to the court and submitted that they did not disclose the claim that he attempted to rob the victim, Omar Miraj, of his mobile phone Alcatel as indicated in the particulars in the charge. He thus stated that he should not have been convicted for the offence of attempted robbery with violence. He argued that since the facts did not reveal that he and others persons attempted to rob the victim of his phone; his conviction was not safe. He stated that even if he was in the company of others, an attack on the victim did not necessarily mean that they attempted to rob him of his phone. He relied on the case of **Okethi Okale and others v Republic** [1965] EA 555, which is to the effect that a conviction must only be based on the weight of the actual evidence.

5. It was his view that the offence with which he could have been convicted of, was of assault causing actual bodily harm contrary to Section 251 of the Penal Code. He relied on the decision in **Erick Amwata Onono v Republic** [2016] eKLR, where a conviction for the offence of attempted robbery with violence was substituted with one for assault causing actual bodily harm.

6. The appellant also submitted that there was a conflict between the provisions of Sections 297(2) and 389 of the Penal Code, in that whereas the former provisions state that the sentence for the offence of attempted robbery with violence is death, the latter provisions provide for a maximum sentence of 7 years imprisonment where an accused person is charged with the offence of attempting to commit a felony.

7. The appellant cited the case of **Boniface Juma Khisa v Republic** [2011] eKLR, to illustrate that he should have been sentenced to the less severe sentence. The appellant submitted that the sentence which was imposed on him of 20 years imprisonment was harsh and excessive. He prayed to benefit from the less severe of the two sentences. He urged this court to allow his appeal.

8. In written submissions filed on 12th March, 2020, Ms Mwangeka, Prosecution Counsel, conceded to this appeal for the same reasons that were relied on by the appellant. In addition, she submitted that a plea agreement was entered into between the appellant and the Office of the Director of Public Prosecutions. It indicated that the appellant was pleading guilty of the offence of causing grievous harm and not attempted robbery with violence. She further submitted that the circumstances surrounding the case could not sustain a conviction for the offence of attempted robbery with violence.

9. With regard to the issue of the legality of the sentence imposed on the appellant, Ms Mwangeka cited the case of **David Mwangi Mugo v Republic** [2011] eKLR, to demonstrate that there was a conflict between the provisions of Sections 297(2) and 389 of the Penal Code and the appellant should not have been sentenced to more than 7 years imprisonment.

ANALYSIS AND DETERMINATION

The issue for determination is whether the appellant was properly convicted for the offence of attempted robbery with violence.

10. Although the Prosecution Counsel conceded to the appeal, this court has the duty to analyze and re-evaluate the evidence adduced before the lower court and come to its own independent decision. In **Odhiambo vs. Republic** [2008 KLR 565], the court said as follows:-

“The court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on evidence.”

11. The appellant was charged with the offence of attempted robbery with violence contrary to Section 297(2) of the Penal Code. On 29th May, 2018 he entered in a plea bargain agreement with the Office of the Director of Public Prosecutions. He agreed to plead to the charge of causing grievous harm. The appellant and the representative of the Director of Public Prosecutions signed the plea agreement which they presented to the court. Having done so, the prosecution was under an obligation to amend the charge against the appellant from that of attempted robbery with violence contrary to Section 297(2) of the Penal Code to the charge of causing grievous harm.

12. Section 137 F(1)(c) and (2) of the Criminal Procedure Code provides as follows with regard to the duty of the court when recording a plea agreement –

“(1) Before the court records a plea agreement, the accused person shall be placed under oath and the court shall address the accused person personally in court, and shall inform the accused person of, and determine that the accused person understands

–

(c) The nature of the charge he is pleading to

(2) The prosecutor shall lay before the court the factual basis of a plea agreement and the court shall determine and be satisfied that there exists a factual basis of the plea agreement. (emphasis added).

13. When the appellant was first arraigned in court on 21st February, 2018 the charge against him was for assault causing actual bodily harm contrary to Section 251 of the Penal Code. The appellant did not take plea then as he said that he had been beaten and injured. He prayed to be taken to hospital. The court deferred the plea to 26th February, 2018 and made an order for the appellant to be taken to hospital.

14. On the 26th February, 2018 the prosecution presented to the court a charge sheet with 2 counts. The 1st count was for the offence of attempted robbery with violence contrary to Section 297(1) (sic) of the Penal Code. The 2nd count was for the offence of causing grievous harm contrary to Section 234 of the Penal Code. The lower court proceedings of 26th February, 2018 indicate that count 1 and an alternative charge were read over and explained to the appellant and he pleaded not true. The lower court file has no charge sheet containing a main charge and an alternative charge. The proceedings of the said date are therefore misleading as they do not capture the true state of affairs as reflected on the charge sheet which was filed in court on the said date.

15. On 29th May, 2018 a charge sheet containing the offence of attempted robbery with violence contrary to Section 295 as read with Section 297(2) of the Penal Code was filed in court. If any other charge sheet was filed thereafter, it is not in the lower court file. The record of the lower court indicates that the appellant was on 21st June, 2018 informed of his rights under the plea bargain agreement. The charge was also read to him and he responded by saying that it was true. The court then entered a plea of guilty (confirmed from the original file). The facts were read out to the appellant. He admitted that the facts were correct. The Trial Court however failed to enter a conviction against the appellant after the facts were read out to him. The said court thus failed to adhere to the process of plea taking as was outlined in the case of **Adan v Republic** [1973] EA 445.

16. The appellant was given an opportunity to mitigate. The victim and the appellant's wife were then given an opportunity to address the court. The prosecutor informed the court that the appellant had previously been imprisoned for 5 years. The court however treated him as a

1st offender as the prosecution failed to avail the appellant's record to prove the previous conviction. The Trial Court sentenced him to 50% of the sentence which he should have served and equated it to 20 years imprisonment.

17. The following analysis obtained from the lower court proceedings and the applicable law clearly show that the appellant was not accorded a fair hearing. He cannot be said to have been well informed of the charge he was pleading to due to the variance in the charge as per the charge sheet which was read to him in court and the information contained in the plea bargain agreement in which he had pleaded guilty to the charge of causing grievous harm.

18. The lower court proceedings were flawed and I therefore hold that the conviction against the appellant was null and void. I hereby quash the said conviction and set aside the sentence of 20 years imprisonment.

19. I have considered whether I should order a retrial or not. The Court of Appeal in **Opicho v Republic [2009] KLR 369 cited the decision in Fatehali Manji v Republic [1966] EA 343**, where the Court of Appeal held as follows:-

“In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a trial should be ordered. Each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest of justice require it.”

20. The lower court proceedings indicate that the victim Omar Miraj sustained injuries in the hands of persons who attacked him on 19th February, 2018. Only 2 and half years have elapsed since the commission of the offence. The shortcomings in the case which was before the lower court were occasioned by both the prosecution and the Trial Court.

21. In the interest of justice, I hereby order that the appellant shall undergo a retrial. He shall be arraigned before the Senior Principal Magistrate's Court at Shanzu on 26th June, 2020 for plea taking before any other Magistrate save for Hon. D. Mochache, who heard the case which forms the subject of this appeal.

22. The lower court file shall be transmitted to the said law courts forthwith for plea taking on 26th June, 2020. The appellant has 14 days right of appeal.

DELIVERED, DATED and SIGNED at MOMBASA on this 19th day of June, 2020.

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant present in person

....., Prosecution Counsel, for the DPP

Mr. Mohamed Mohamud- Court Assistant