



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

CRIMINAL APPEAL NO. 178 OF 2015

GILBERT SIMWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief

Magistrate's Court at Kibera Cr. Case No. 2519 of 2014 delivered

by Hon. A. Onginjo, CM on 18th September, 2015).

JUDGEMENT

Background

The Appellant, **Gilbert Simwa**, was charged in the first count with the offence of attempted robbery with violence contrary to **Section 297 (2) of the Penal Code**. The particulars were that on the 8th of June, 2014 at about 6:10 p.m. at Chiromo Campus hostels room no. BQR 3K in Kileleshwa within Nairobi County, jointly with others not before court, while armed with a dangerous weapon namely a knife, attempted to rob Yussuf Mursal Mohammed of his mobile phone a Samsung Note II valued at Ksh 58,000/- and at the time of the attempted robbery assaulted and threatened to stab the said Yussuf Mursal Mohammed with a knife.

In Count 2, the Appellant was charged with malicious damage to property contrary to **Section 339 (1) of the Penal Code**. The particulars were that on the 8th day of June, 2014 at 6:10 p.m. at Chiromo Campus hostels room no. BQR 3K in Kileleshwa within Nairobi County, willfully and unlawfully damaged one Samsung Note II mobile phone valued at Ksh 58,000/- the property of Yussuf Mursal Mohammed.

The Appellant was found guilty in Count I, convicted accordingly and sentenced to suffer death. He was dissatisfied with the decision of the trial court as a result of which he preferred the instant appeal. His grounds of appeal are that the evidence adduced was shaky, contradictory and uncorroborated, that he was not positively identified, that he was not found in possession of any stolen goods, that his defense was ignored by the court, that the charge sheet was defective, that the case was closed before the 1st report was produced in court and that the ambiguity in the definition of the offence under **Section 297 (1) and (2) of the Penal Code** made the conviction and sentence flawed.

Submissions

The Appellant relied on written submissions filed on the 24th of July, 2017. He submitted that the charge was not supported by the evidence adduced. This was in regard to the fact that the charge stated that he was armed with a knife at the time of the robbery, an allegation that was discounted by PW3, Dr. Maundu who testified that ***“The object that inflicted injuries was blunt.”*** The witness also affirmed that the said injury was probably caused by a ring. According to the Appellant, in view of this testimony, the prosecution ought to have amended the charge sheet and consequently charged him under Section 297(1) of the Penal Code. He added that the failure to amend the charge sheet resulted in him being sentenced for an offence he did not commit which ultimately prejudiced him.

The Appellant also submitted that his right to a fair hearing as envisaged under Article 50 (2) (j) and (k) of the Constitution was contravened by the failure to furnish him with OB extract from Kileleshwa Police Station. He submitted that he requested for the OB extract but the same was not provided to him.

The Appellant further submitted that there were essential witnesses that would have dissipated any doubts in the case but were not called to testify. The most important one being Abdalla Omar Abdalla who was a friend of PW1 and was present at the time he allegedly went into their room. The said Abdalla neither recorded a statement with police. According to the Appellant he was crucial in confirming that he indeed committed the offence.

The Appellant also submitted that he was not properly identified. He claimed that he never saw PW1 until when PW1 was demanding for his phone from him. PW1 also claimed that the Appellant was accompanied by another person who fled when the Appellant was being attacked. This person was not identified at the scene and an identification parade was not carried out either to ascertain his involvement in the offence.

The Appellant added that the charge sheet was defective since there was no clear distinction between the offences defined under **Section 297 (1) and (2) of the Penal Code**. This was with respect to lack of clarity in the ingredients constituting either offence in the respective subsections.

Lastly, the Appellant submitted that the sentence was harsh and unlawful since Section 389 of the Penal Code provides that where an accused is charged with attempting to commit an offence and the sentence provided for that offence is either life imprisonment or death penalty, he should be sentenced to 7 years imprisonment.

In opposing the appeal, learned State Counsel, M/s Atina submitted that the prosecution proved that the Appellant attempted to rob PW1 who was with his friend Omar Abdalla and also stabbed PW1 above the eye. After a tussle, Abdalla who was the friend of PW1 screamed and this is when the assailant and his counterpart fled to the basement where the other students were watching TV. The students in the TV area then pounced on the Appellant whose accomplice had since fled the scene. The Appellant was taken to a security guard, PW2 and later handed over to Kileleshwa Police Station. Miss Atina submitted that the Doctor, PW3, erred in his report by noting that the injury was caused by a blunt object as PW1 was certain that the Appellant had accosted him with a knife.

Learned State Counsel also submitted that the prosecution had established aggravated offence of attempted robbery with violence defined in Section 297 (2) of the Penal Code. In this regard, she submitted that it was established that the Appellant was, at the time of the robbery, in company of another and was armed with a dangerous/offensive weapon, a knife, and that a proof of either ingredient was sufficient to found a conviction under sub section (2) of Section 297.

M/s Atina added that the defense of the Appellant was false and could not bail him out. She submitted that the Appellant claimed to have been sent by some students to go and collect their luggage but he could not name even one of the students that had sent him.

On the production of the OB report, she submitted that there was a request by the Appellant for the same and the court ordered a PC Mokaya to avail it. At the next hearing date, although the court did not confirm that the Appellant was provided with the OB extract, he did not complain about not having it.

Thus, it could only be concluded that he already had it and that is why he agreed to proceed with the case.

On sentence, M/s Atina submitted that sentencing under Section 389 of the Penal Code would only apply if no punishment was provided under Section 297(2) of the Penal Code.

On the failure to call one Abdalla as a witness, the Learned Counsel submitted that the court had warned itself on the danger of relying on the evidence of a single identifying witness which it had found sufficient to warrant a conviction. Counsel submitted that the appeal had no merit and urged that it be dismissed.

Evidence

The Prosecution called a total of 4 witnesses. **PW1, Yusuf Mursal Mohammed** was the complainant in the case. The summary of the case was that on the 8th of June, 2014 at around 6:10 p.m., he was watching a movie in his room, BQR- 3R in the University of Nairobi Chiromo campus hostel with his friend, Abdalla Omar Abdalla when they were accosted by two individuals; one being the Appellant. The Appellant then said, “*Nataka hiyo simu, iPad and two laptops that were on the table.*” When he and Abdalla refused, they had a brief tussle with the assailants and it resulted in the Appellant stabbing PW1 above the right eyebrow after missing his eye which was the target. This is when the phone of PW1 fell, a Samsung Galaxy Note II valued at Ksh 58,000/-. Abdalla ran out of the window and called for help. The Appellant fled from the room to the underground hall where students watch television. The Appellant was nabbed by the mob in the room which also beat him up. He had a bag which contained a knife, phone and shoes. The Appellant explained that he had been sent by other Somali students to rob PW1.

The Appellant was handed over to **PW2, Kingstone Geitangi Karemi** the Deputy Chief Security Officer at the University of Nairobi – Chiromo Campus. PW2 testified that he bumped into a mob of students escorting the Appellant to his office. He added that the Appellant told him that that he met some students in City Market who sent him to the hostel to steal phones and iPads. He escorted him to Kileleshwa Police Station where he recorded a statement. He was taken to hospital for treatment and thereafter charged accordingly.

Meanwhile, PW1 also went for treatment of the wound he sustained on the right eye brow at the Nairobi Women’s Hospital. He was later examined by **PW3, Dr. Joseph Maundu** a Police Surgeon on the 11th of June, 2014. He concluded that the injuries were inflicted by a blunt object possibly a ring.

PW4, PC Stephen Okech of Kileleshwa Police Station investigated the case. He summed up the evidence of the prosecution witnesses and preferred the charge against the Appellant. He entirely corroborated the evidence of PW1, 2 and 3. He added that the Appellant was treated at Mbagathi District Hospital.

In his unsworn defence, the Appellant said that he had been hired by two students from town to ferry some luggage for them to Chiromo Campus on 8th June, 2014. While inside the campus, he called his clients to come and collect the goods outside the hostels as he was not conversant with the compound. It is then that he was confronted by three men who stole his mobile phone and a wallet. They also ransacked his bag while claiming that he was a thief. When PW1 arrived at the scene, he pleaded with the men who were beating him to stop. By then one of his teeth had fallen off and had sustained a fractured arm. Amongst the people who rescued him was an old man who took him to his office and thereafter he was escorted to Kileleshwa Police Station where he was abandoned. The police took him to Mbagathi Hospital where he was admitted for treatment. He was thereafter charged accordingly.

Determination

It is now duty of this court to re-evaluate the evidence before it and arrive at its own independent conclusions. See **Pandya vs. Republic [1957] EA. 336.**

The Appellant submitted that the charge sheet was defective in that the evidence adduced did not support the charge. According to the Appellant, the particulars of the charge indicated that he was armed with a

knife, reasons wherefore the charge was drafted under subsection (2) of Section 297 of the Penal Code. He submitted that from the testimony of PW3, Dr. Maundu, he was not armed with a knife as the medical report indicated that the injury was caused by a blunt object which probably was a ring. Furthermore, although it was alleged that upon his arrest, a knife was found in a bag he had, the same was not exhibited in court. For that reason, he was of the view that the prosecution ought to have amended the charge sheet under Section 214 of the Criminal Procedure code. It also followed that the offence was not proved to the required standard, beyond a reasonable doubt.

I will intertwine the above submission with Appellant's submission that **Section 297 in subsection (1) and (2)** presents ambiguity with respect to the definition of the offence of attempted robbery with violence. Section 297 provides;

(1) Any person who assaults any person with intent to steal anything, and, at or immediately before or immediately after the time of 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.

(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 assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."

The Appellant was candid that the prosecution having failed to demonstrate that he was armed with a knife meant that he ought to have been charged under Subsection (1). Consequently, his conviction under Sub-section (2) which provides for a death penalty was illegal. In any case, it contravened Section 389 of the Penal Code. That is to say that, he ought to have been sentenced to a term not exceeding seven years imprisonment. The court was referred to the case of **Joseph Kaberia Kahinga and 11 others v Attorney General [2016] eKLR**, a constitutional Petition in the High Court.

I agree with the Appellant that Section 297 of the Penal Code as was held in the **Joseph Kaberia case (Supra)** ought to be amended so that it does not present the ambiguity currently faced by courts in attempting to distinguish the elements constituting either offence of attempted robbery with violence under subsection (1) and (2) respectively. Be that as it may, upon a close scrutiny and interpretation of the two sub-sections, the only demarcation between the two offences is the overt act of wounding subsequent to an assault in the element of use of force under Sub-section (2). It is also graduated by the fact of the accused being armed with a dangerous or offensive weapon, or being in the company of one or more person or persons.

It then behooves the court to re-evaluate the evidence with a view to establishing whether any of the elements provided under subsection (2) were established. According to PW1, he sustained a wound on the right eyebrow which evidence was corroborated by PW3, Dr. Maundu who examined him. But a pertinent question arises; who caused this wound? According to PW1, the Appellant was armed with a knife a fact that was discounted by Dr. Maundu who testified that the injury was caused by a blunt object. In cross-examination, he stated as follows:

"...it indicates that superficial cut was sustained. It was suspected that a ring was used to punch complainants eye... the complainant assumed it was a ring that cause injury. I can't commit myself and say it was a knife or a panga or ring as I was not there. My opinion was that blunt object was used to inflict wound."

In all fairness, flowing from PW3's evidence, it cannot be said with certainty that the wound was caused by a knife. And according to the doctor, the probable cause was a ring. The doctor went on to say that the injury was superficial, which meant that it was a glazing wound.

There is no doubt that both the Appellant and PW1 struggled as the Appellant attempted to steal PW1's mobile phone. It must be in the cause of this struggle that the Appellant sustained the wound. A safe

conclusion then is that there was no intention to inflict the wound but that the wound may have been occasioned by either of the parties as the Appellant attempted to steal PW1's mobile phone. Further, the prosecution failed to demonstrate that the Appellant was in the company of another. The said Abdalla who was allegedly in the room with Appellant is the only person who would have confirmed this fact. His failure to testify means that the prosecution case was weakened to the extent that it could not be established that the Appellant was accompanied by another person. In my view then, the ingredients of the offence under Section 297(2) were not established. For avoidance of doubt, the prosecution failed to demonstrate that the Appellant was armed with a knife at the time of the robbery or that he was in company of one or more persons. Additionally, as there was no clear evidence on how the wound was inflicted, it may be dangerous to conclude that the Appellant used actual violence on PW1.

The other issue raised is whether the death penalty was warranted. According to the Appellant, Section 297(2) which provides for a mandatory death sentence prejudices an accused person in light of the fact that Section 389 of the Penal Code provides that if an accused is convicted for an offence that is punishable by death or life imprisonment, he shall be liable to imprisonment for a term not exceeding seven years. Suffice it to state, Section 389 relates to attempts to commit offences. It provides as follows:-

“Any person who attempts to commit a felony or a misdemeanor is guilty of an offence and is liable, if no other punishment is provided, to one half of such punishment as may be provided for the offence attempted, but so that if that offence is one punishable by death or life imprisonment, he shall not be liable to imprisonment for a term exceeding seven years.”

The provision is in no uncertain terms that the computation to seven years imprisonment where death or life imprisonment is provided would apply only to instances if no other punishment is provided. In the present case though, having arrived at a conclusion that the prosecution only proved a case under Section 297(1) of the Penal Code, the penalty therein is specific; that is, up to seven years imprisonment. Thus, Section 389 would not apply. But this is not to say, as was held in the **Joseph Kaberia case (supra)**, that where death penalty is a mandatory sentence, the accused persons are prejudiced as they are not entitled to the lesser penalty under Section 389.

With the above in mind, I will now proceed to re-evaluate the evidence so as to establish whether the Appellant was properly identified. As the trial court asserted, it is important to consider the fact that there was only one eye witness who testified and his evidence should be considered with caution. PW1 claimed that the Appellant is the person who attacked him with a knife thereby causing the injury above his right eye brow. He followed the Appellant as he fled into the underground hall where the students were watching TV. PW1 added that at this point, the Appellant was wearing 'goggles'. He added that he barred the crowd from further beating the Appellant; a fact that was corroborated by the Appellant as well. The Appellant was then taken to the office of PW2 who escorted him to Kileleshwa Police Station from where he was taken to hospital the following day.

The Appellant was followed into the underground hall where he was subdued by the large crowd and that is when the complainant got a hold of him. He was the person that was taken by the crowd to the office of PW2 and the one who was booked at Kileleshwa Police Station. There was therefore no case of mistaken identity. This ground of appeal also fails.

The third issue would be the failure of the prosecution to call crucial witnesses. The Appellant contended that the Prosecution failed to call the friend of PW1 who was with him at the time of the attack; Abdulla Omari Abdulla. This witness would have been sufficient to corroborate the testimony put forward by PW1. The matters in contention relating to the identification of the Appellant would be put to rest as well as the use of actual violence. That notwithstanding, the evidence of Abdulla Omari did not negate the obvious fact that PW1 sustained a wound in the course of the attempted robbery with violence. It also did not negate the fact that he was properly identified. The failure to call this potential witness would only be fatal to the case in the event that the evidence of PW1 would bring forth certain factors that only the specific witness would corroborate. This is an issue that would be considered by the court at the appropriate point. The learned magistrate though ought to have cautioned himself on relying on the

evidence of a single witness. Be that as it may, the Appellant was satisfactorily placed at the scene of the incident. This ground of appeal also fails.

The fourth issue is that the court ignored the defense put forward by the Appellant. He gave unsworn testimony and claimed he was hired by two students to ferry their luggage to town. Thereafter, he was robbed of his phone and wallet while they ransacked his bag. As much as the onus was not placed on him to prove his innocence, he was required to give a plausible sequence of events. When he was apprehended by the students, there was no mention of the cart that he claimed to have hired to ferry the luggage of the students who had contracted him. The Appellant failed to give the names and contact information of the two men who not only met him in town but also called him to Chiromo Campus. He claimed to have known one of them very well but failed to give any information in that regard. He gave two names when orally submitting in his appeal; Ismail and Odongo. These names were only adduced when the Respondent herein contended that he failed to mention them in the trial. In the circumstances, I hold that his defence was ousted by the strong prosecution evidence. This ground of appeal therefore fails.

The fifth issue raised by the Appellant is the failure to avail to him the OB report at the satisfactory time for him to properly defend himself. On Page 22 of the proceedings, it is recorded in Lines 9 to 12,

“Accused

I don't have 1st report

Order

PC Mokaya to avail OB extract on this matter to accused on 2/04/2015”

The court did not note whether the Appellant was provided with the OB report on the 2nd of April, 2015. So it is not clear whether he received the report on this day. The Appellant however alleges that he was given this report at the end of the prosecution case. There is no evidence of this assertion either. But the record does show that he never raised an objection when the court resumed that he had he not received the OB report. Thus, the best conclusion that this court can arrive at is that he had the OB at the time he requested for it.

In the result, I find that the prosecution proved their case beyond a reasonable doubt that the Appellant committed the offence of attempted robbery with violence contrary to Section 297(1) of the Penal Code and I convict him accordingly.

On sentence, Section 297(1) provides that he is liable to imprisonment for seven years. But before passing a sentence, the court must consider both the mitigating factors and circumstances of the case. The record shows that he was a first offender and was an orphan and was taking care of his grandmother. He also pleaded that he suffered from poor health. Of course the trial court did address itself to the fact that it had considered the Appellant's mitigation but owing to the fact that under Section 297(2), a mandatory death sentence was provided, the mitigation would not have lessened the death penalty to any other sentence.

On the part of this court, I consider the fact that the Appellant accosted PW1 with a specific motive, to steal his mobile phone. Save that he was not able to grab it at first instance, the struggle between the two would not have followed. In addition, the injury PW1 sustained was unintended. Therefore, imposing the maximum sentence would be harsh and excessive. I consider the fact that the Appellant was a first offender and was in custody throughout the trial period. He took plea on 11th August, 2015. The sentence was passed on 18th September, 2015. As at date, cumulatively, he has been in remand for a period of three years, three months. Given the circumstances of the case, it is the view of this court that he has served sufficient sentence. In the end, I order that he be forthwith set free unless otherwise lawfully held. It is so ordered.

DATED AND DELIVERED THIS 24TH DAY OF NOVEMBER, 2017.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. Appellant present in person.
2. Miss Sigei for the Respondent.