Murunga alias Sepeto v Republic (Criminal Appeal E092 of 2021)
[2023] KEHC 19533 (KLR) (6 July 2023) (Judgment)

Neutral citation: [2023] KEHC 19533 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL E092 OF 2021

AC MRIMA, J

JULY 6, 2023

BETWEEN

ALEX SIMIYU MURUNGA ALIAS SEPETO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising out of the conviction and sentence of Hon. C.M. Kesse (Principal Magistrate) in Kitale Chief Magistrate's Court Criminal Case No. 1460 of 2020 delivered on 28th October, 2021)

JUDGMENT

Introduction:

1. The Appellant, Alex Simiyu Murunga alias Sepeto, was charged with the offence of Robbery with violence contrary to Section 296(2) of the *Penal Code*. The particulars of the offence were that on 7th September 2020 at Sokomoko village in Kiminini sub-County within Trans Nzoia County, the Appellant robbed Isila Wanjala Wanyonyi her mobile phone make iTel valued at Kshs. 1,500/= and Kshs. 2,800/= cash and immediately after such robbery used actual violence to the said Isila Wanjala Wanyonyi.

2. When arraigned before Court, the Appellant pleaded not guilty to the offence. After a full trial, the Appellant was found guilty and convicted as charged. He was sentenced to 10 years' imprisonment.

The Appeal:

3. The Appellant was aggrieved by the conviction and sentence. He filed a Petition of Appeal on 8th November, 2021. He raised six grounds impugning the trial Court's analysis, findings and conclusion.

4. He lamented that the trial Court erred in convicting him on the evidence of a single witness that was at risk of poor recognition of the perpetrator. He opined that his defence was rejected without sufficient reason. In his conclusion, he found that the prosecution failed to prove beyond reasonable doubt that the Appellant had committed the offence.

5. He thus urged this Court to allow the appeal by quashing the conviction, setting aside the sentence and that he be forthwith set at liberty.

6. During the hearing of the appeal, the Appellant relied on his undated written submissions filed on 28th October, 2022. He submitted that from the evidence of the Complainant, was not apparent as to where she was hurt and the weapon used. Furthermore, the clothes that she had worn during the offence were not produced in evidence. He complained that the Charge sheet failed to accurately disclose the value of the properties stolen.

7. He further pointed out that the trial Court erroneously convicted him under Section 296(1) and not as charged under Section 296(2) of the *Penal Code*. He was unsatisfied with the fact that the offence took place at Bungoma County yet he was charged in Trans Nzoia County. Finally, he raised suspicion as to the fact that the Complainant was on the next day, called by PW3 on the same line that was in her stolen phone. As such, he lamented that he had been framed.

8. The Appellant urged this Court to allow the appeal as prayed.

9. The prosecution on its part failed to file its written submissions.

Analysis:

10. This being a first appeal, it's 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 conclusions and findings (See *Okono v Republic* [1972] EA 74). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard in that respect as so held in *Ajode v. Republic* [2004] KLR 81.

11. Having carefully perused the record, this Court is now called upon to determine whether the offence of robbery with violence was committed, and if so, whether by the Appellant.

12. Before dealing with the said aspects of the offence, I will render a brief recount of the evidence adduced at the trial.

13. The prosecution called three witnesses in a bid to establish the charges drawn against the Appellant. According to the fact sheet, the Complainant left her house on 7th September, 2020 at 5:00 p.m. to purchase dinner. On her way, the Complainant met the Appellant in the company of other identified persons. Suddenly, the Appellant accosted her, puller her, kicked and slapped her. In the process, the Appellant stole her phone and Kshs. 2,000.00 cash.

14. Following the ordeal on that very day, the Complainant went to Matunda Sub-County Hospital. She was seen by PW1 Naftali Nyakundi, a Clinical Officer at 6:00 p.m. He observed that she was in excruciating pain. Her face and nose were swollen. She was nose bleeding. There was tenderness on the right side of her chest. His conclusion was that she had suffered soft tissue injuries classified as "harm". He then treated the Complainant with several drugs. He produced the P3 Form that he filled as well as the treatment notes as exhibits respectively.

15. Notably, the P3 Form disclosed that her clothes were blood stained and torn and that she was hit by a blunt object.

16. The Complainant reported the matter at the police. Although she left her number at the Police Station, the Investigation Officer called her mother on 8th September, 2020. The complainant stated in cross-examination that the Appellant was not a good person and a threat to security in their community. She continued that members of the public could not arrest him as he threatened them when they found him. He was, however, arrested by the police. In her re-examination, the Complainant recalled that the Appellant always walked around with a knife.

17. PW3, No. 113670 PC Nyongore Collins, was the investigation officer. He testified that while on duty on 8th September, 2020, PW3 stumbled upon the incident report recorded in the Occurrence Book on 7th September, 2020. He found the Complainant's number and called her while she was in Hospital. The Complainant later met the investigating officer at the Police Station and since she was still in pain, she had to record her statement the following day. She reiterated that her witnesses were afraid of testifying as they had been threatened by the Appellant. She confirmed that she sustained injuries on her right eye, mouth and stomach.

18. PW3 later found the Appellant at his homestead. He interrogated him and led him to the police station where he was arrested and later charged with the present offence. PW3 stated that according to the relevant entry in the Occurrence Book, the Appellant robbed the Complainant's phone valued at Kshs. 2,000/=.

19. After close of the prosecution's case, the trial Court found that the Appellant had a case to answer and was placed on his defence.

20. In his alibi sworn testimony, the Appellant stated that he was at his home when the offence took place.

21. He was, however, arrested on 9th September, 20202. He was charged with the offence which he knew nothing about. He, therefore, denied committing the offence.

22. From the above factual matrix, this Court will now juxtapose it with the legal principles guiding the offence of robbery with violence.

23. The offence of robbery with violence is a creation of Sections 295 and 296(2) of the Penal Code. The provisions provide as follows: -

    295. Definition of robbery:

    > 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.

    296. Punishment of robbery:

    1. .....

    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.

24. From the foregoing provisions, 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.

25. 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.

26. 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.

27. 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: -

    (a) The offender is armed with any dangerous or offensive weapon or instrument, or,

    (b) The offender is in the company of one or more other person or persons, or

    (c) 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.

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

29. 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.

30. 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 the following *intermediate approach that, whereas both offences connote theft and violence, for the offence of robbery with violence to be established the aspect of threat to use violence does not arise, but instead there must be evidence of actual use of violence on the person of the victim.

31. 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 may be committed. However, in such circumstances, the offence of robbery with violence should not 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.

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

33. On the basis of the above, this Court will now apply the law to the facts of the case. First is the issue of identification of the offender.

34. There was only one identifying witness who was the complainant. In that scenario, care and extreme caution ought to be exercised to root out the possibility of mistaken identity even in respect of persons known to a witness.

35. Courts have settled the applicable parameters. In R v Turnbull & Others (1973) 3 ALL ER 549, which decision has been generally accepted and greatly used in our judicial system, the Court considered the

factors that ought to be considered when the only evidence turns on identification by a single witness. The Court stated as follows: -

> ... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

36. The Court of Appeal in Wamunga v Republic (1989) KLR 426 had the following to say on the matter: -

> ... It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.

37. In a differently constituted bench, the Court of Appeal in Douglas Muthanwa Ntoribi v Republic (2014) eKLR in upholding the evidence of recognition at night held as follows: -

> ... On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified: -
>
> > "I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant."
>
> The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error..."

38. Again, the Court of Appeal in Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another v Republic (2011) eKLR had this to say on the evidence of recognition at night: -

> ... We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as 'neighbours from the village', that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non- recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants."

39. Applying the above to this case, the complainant herein knew the offender well. They both hailed from the same village. She even knew him by name and his home. Further, the offence was committed during the day and in broad day light.

40. The complainant also reported the matter to the police on the same day. She gave the name of the offender whom she knew very well.(See the Court of Appeal inSimiyu & another v R, {2005} 1 KLR 192 at 195). She also gave the name of the offender at the hospital when she went for treatment around 3 hours after the attack.

41. It was also the complainant who informed the police that the offender was at his home thereby leading to the arrest. On the absence of any other person who witnessed the ordeal given that it took place during the day, the complainant explained that the Appellant was a terror in the village and was highly feared such that no one was willing to testify against him. In fact, PW3 noted that the Appellant was a well-built person and that he did not even arrest him at his home, but asked him to accompany the officers to the police station where he was then arrested and placed in custody.

42. To this Court, the explanation is sound and reasonable.

43. Having considered the totality of the evidence on identification, this Court finds that the then prevailing circumstances favoured a positive recognition of the offender as the Appellant. Therefore, the Court finds the complainant truthful and it is satisfied that the identification of the Appellant as the aggressor by way of recognition was not in error.

44. Next is the consideration as to whether the ingredients of the offence of robbery with violence were established. There is medical evidence on how the complainant was severally injured. There is also evidence that to the Appellant forcefully and by use of actual violence took away the complainant's phone and money.

45. According to the medical evidence, the complainant's clothes were soiled in blood and the skirt was torn. She was in excruciating pain as a result of kicks and blows from the attacker. The face was swollen and also had bruises on her face. The right eye was injured. She was also nose bleeding. The chest was tender.

46. The evidence, therefore, establish all the ingredients of the offence of robbery with violence. This Court now finds and hold that the offence of robbery with violence was proved.

47. There are some issues which were raised by the Appellant which also ought to be addressed and be ascertained to find out whether they have any adverse impact on the conviction. One of the issues was the manner in which the offence was drafted.

48. The Appellant posited that the charge sheet was incurably defective since it referred to Section 296(2) of the Penal Code and not to Section 295 of the Penal Code which creates the offence of robbery. In other words, the Appellant contended that the appropriate charge was instead to be robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code and not as drafted.

49. To resolve this issue, reference will be made to the substantive law on defective charge sheets. That is Section 134 of the Criminal Procedure Code, Cap. 75 of the Laws of Kenya.

50. The said section provides as follows: -

> Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with

such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

51. Addressing the issue of defective charge sheets, the Court of Appeal in Benard Ombuna v Republic (2019) eKLR stated as follows: -

> In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence.

52. Further, the Criminal Procedure Code in Section 382 gives guidance on how a defect may be dealt with.

53. Section 382 of the Criminal Procedure Code provides as under: -

> Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.
>
> Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings. (Emphasis added).

54. This Court has carefully considered the charge sheet as drafted. The offence was robbery with violence contrary to Section 296(2) of the Penal Code. The charge also had the particulars of the offence.

55. The particulars explained the manner in which the alleged offence was committed. The date and place where the offence was committed were also disclosed in the particulars. The victim's name was also given.

56. Taking guidance from the Benard Ombuna's case (supra) and Section 382 of the Criminal Procedure Code, this Court finds that the charge was clear and easily understandable and as such it did not occasion any miscarriage of justice.

57. The Court also notes that although the Appellant was supplied with the charge sheet at the earliest, he did not raise the objection anytime during the trial. The upshot is that the objection fails and is hereby dismissed.

58. The other issue was the place of charging the Appellant. He contended that whereas the offence was allegedly committed in Bungoma County, he was charged in Trans Nzoia County.

59. This Court does not find the objection a serious one. The particulars stated that the offence was committed in Sokomoko village in Kiminini Sub-County within Trans Nzoia County. There is no faulty since the Kiminini Sub-County is one of the sub-counties in Trans Nzoia County as opposed to Kimilili Sub-County which is in Bungoma County.

60. There was also the issue of alleged contradictions in the evidence especially that of the complainant. The Appellant contended that whereas the complainant stated that her phone was stolen at the time she was attacked, she was nevertheless called by the police using the same line and not her mother's

number which she had left at the police station. To the Appellant, the contradiction was not resolved and he was only, but framed.

61. On this issue, the complainant stated that since her phone was stolen, then she left her mother's phone number at the police station which the police used to reach her. PW3 stated that when he saw the incident minuted to him for action in the Occurrence Book, he called out the complainant through the number that was therein.

62. This Court is at a loss as to the alleged contradiction. Simply put, there was none. PW3 readily assumed that the phone number therein belonged to the complainant. That is what was stated therein and PW3 could not be reasonably expected to know that the number instead belonged to the complainant's mother. The alleged contradiction is illusory and is hereby dismissed.

63. Lastly, the alleged contradiction on the value of the phone and the cash stolen is easily reconcilable in evidence by dint of Section 382 of the Criminal Procedure Code. Such did not cause any miscarriage of justice or at all.

64. Having, therefore, considered all the issues raised by the Appellant challenging the conviction, this Court finds and hold that none was sustainable.

65. As a result, the appeal on the conviction is hereby dismissed.

66. On sentence, the Appellant was sent behind bars for ten years.

67. The High Court in Wanjema v. Republic (1971) EA 493 laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it considered an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

68. The trial Court `received the Appellant's mitigations. Although a Pre-Sentence Report was not called for, still the sentence rendered for the offence of robbery with violence was reasonable. The attack on the complainant was truly uncalled for. Even if the Appellant had to steal from the complainant, there was no justification in using such magnitude of violence to a person who did not even offer any resistance and who was already fearful of the attacker. The offence amounted to a gender-based violence.

69. Courts are called upon to act appropriately and firmly deal with such gender-based violence especially if it is visited on the vulnerable who are mostly women, children, persons with disabilities among like others.

70. This Court, hence, finds no basis in interfering with the sentence. The appeal on sentence also fails.

Disposition:

71. As this Court comes to the end of this judgment, it hereby renders an apology to the parties for the late delivery of this decision. The delay was occasioned by heavy workload at the Court Station coupled with that at the High Court at Kapenguria which this Court oversees. The delay is highly regretted.

72. Flowing from the foregoing, the appeal is unsuccessful and is hereby dismissed in its entirety.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 6TH DAY OF JULY, 2023.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Alex Simiyu Murunga alias **Sepeto,** the Appellant in person.

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

Regina/Chemutai – Court Assistants.