



**Republic v Kibwange (Criminal Appeal E003 of 2023)
[2024] KEHC 15624 (KLR) (6 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15624 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KILGORIS
CRIMINAL APPEAL E003 OF 2023
F GIKONYO, J
DECEMBER 6, 2024**

BETWEEN

REPUBLIC APPELLANT

AND

FRANCIS NDERINDERI KIBWANGE RESPONDENT

*(From the conviction and sentence of Hon. W. Kitur (S.R.M)
in Kilgoris CMCR No. E915 of 2021 on 17.02.2023)*

JUDGMENT

1. The trial court convicted the respondent and sentenced him to serve 3 years imprisonment for committing the offence of grievous harm.
2. Being dissatisfied with the said conviction and sentence the prosecution preferred an appeal vide memorandum of appeal dated 06/03/2023. The appellant filed grounds of appeal as follows;
 - i. The trial court erred in finding and holding that the appellant did not prove the offence of attempted robbery with violence against the respondent beyond reasonable doubt.
 - ii. The trial court erred in failing to find that the respondent was a principal offender to the offence of robbery with violence.
 - iii. As a consequence of the above, the sentence meted on the respondent, being a sentence based on a conviction on the alternative charge of grievous harm against the respondent, is not proportional to the actual offence committed by the respondent.
 - iv. In any event the sentence imposed on the respondent on the alternative charge of grievous harm was manifestly too low and ought to be enhanced.



Brief facts

3. The respondent was charged with attempted robbery with violence contrary to section 295 as read together with section 297(2) of the Penal Code.
4. The particulars were that on 10/10/2021 at Moita location in Transmara South sub-county within narok county jointly with another not before court armed with a panga attempted to rob Samson Agira of his motorcycle registration number KMEV 223E valued at Kshs. 80,000 and immediately before or after the time of the attempted robbery did grievous harm to the said Samson Agira.
5. The respondent was charged with an alternative charge of grievous harm contrary to section 234 of the penal code.
6. The particulars were that on 10/10/2021 at Moita location In Transmara South Sub County within narok county jointly with another before court being armed with a panga did grievous harm to Samson Agira.
7. The respondent was tried and convicted on the alternative charge. The respondent was sentenced to 3 years imprisonment.

Directions of the court.

8. The appeal was canvassed by way of written submissions.

The Appellant's submissions.

9. The appellant submitted that the trial court erred in interpreting the actions of the respondent's unidentified counterpart of pulling away PW1's motorcycle as distinct and disassociated from the respondent's act of cutting PW1 severally. The appellant contends that the totality of the circumstances point to the fact that the respondent viciously attacked PW1 in a coordinated effort to enable both the respondent and his unidentified counterpart to rob PW1 of the motorcycle. Therefore, the respondent also bore the requisite mens reus for the attempted taking away of the motorcycle and is to be treated as a principal offender in any offence upon which such wrongful dealing with the motorcycle would crystallize. The appellant relied on section 20 of the Penal Code.
10. The appellant submitted that the sentence meted upon the respondent amounts to an error in principle being a sentence imposed on a conviction made in error for the wrong offence/ under the wrong section of law. The appellant urged this court to enter a conviction on the main count of attempted robbery with violence contrary to section 297(2) of the penal code as opposed to the alternative count of grievous harm upon which the respondent was convicted.

The respondent's submissions.

11. The respondent urged this court to scrutinize all the evidence presented at the lower court which resulted in a three-year imprisonment sentence awarded to him.
12. The respondent submitted that he has various courses at the prison facility and has realized his past mistakes.
13. The respondent urged this court to disallow the appeal as it is quite unfair and unfounded and quash any more charges against him.



Analysis And Determination.

Court's duty

14. As first appellate court, will re-evaluate the evidence and make own conclusions, but, bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See *Okeno vs. Republic* [1972] E.A 32
15. The court has considered the grounds of appeal, the evidence adduced in the lower court, and the respective parties' submissions. The broad issues for determination are: -
 - i. Whether the prosecution proved the charge of attempted robbery with violence beyond a reasonable doubt. Here, whether the trial court erred in convicting for the alternative charge will be determined.
 - ii. Whether the sentence was manifestly low and ought to be enhanced.
16. Did the prosecution prove the offence of attempted robbery with violence against the respondent?

Attempted robbery with violence

17. In the case of *Opoya vs Uganda* [1967] E. A. 752:

“The word 'robbed' is a term of art and connotes not simply a theft but a theft preceded, accompanied or followed by the use of threat or use of actual violence to any person or property in order to obtain or retain stolen property.”
18. Section 295 defines robbery in the following terms:

“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.”
19. Section 297 of the Penal Code establishes the offence of attempted robbery and prescribes the penalty thereof as follows:
 - “(1) Any person who assaults any person with intent to steal anything, and, at or immediately before or immediately after the time of the 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 it 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 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.”



20. Expounding on that provision in the case of Ndirangu Nderitu Mureithi & Another vs Republic [2006] eKLR, the court of appeal stated thus:

“Mr. Githui is, with the greatest respect to him, wrong in thinking that the offence of attempted robbery is defined in section 297(1) and section 297(2) merely provides the penalty for the offence created by section 297(1). Those are separate and distinct offences, each carrying its own penalty. Section 297(2) defines what constitutes an attempted robbery with violence which is punishable by death while section 297(1) defines a non-capital attempted robbery.”

21. The clear elements of the offence of attempted robbery are thus: (i) the act of stealing, and (ii) use of or threat to use actual violence to any person or property immediately before or immediately after stealing intended to obtain or retain the stolen item or prevent or overcome resistance to the stealing. As for attempted robbery under
22. And, proof of any one ingredient in the offence under Section 297 (2) that: (a) the offender is armed with any dangerous and offensive weapon or instrument or (b) the offender is accompanied by one or more other person or persons or (c) at or immediately before or immediately after the time of robbery the offender wounds beats or uses other personal violence to any person, is sufficient to establish the offence of attempted robbery with violence which is punishable by death.
23. PW1 testified that he was riding a motorcycle. At Nkararo weigh bridge he stopped to give way to another motorcycle. The other motorcycle also stopped. The respondent who was a pillion passenger alighted and attacked PW1 with a panga. The respondent aimed at his neck but he blocked it with his left hand. The respondent pushed him and he fell while still on his motorcycle. PW1 wailed calling members of the public to help. He tried running away to safety but the respondent continued to cut him on his left thigh. Lights from Transmara Sugar Company were put on and it helped the complainant to identify the respondent. The other motorcyclist who carried the respondent to the scene tried to take PW1’s motorcycle whilst the respondent continued to cut PW1 on his left leg feet. The respondent also cut the complainant on the lower part of his right leg. Members of the public arrived as the respondent was still cutting the complainant on the right thigh. The other motor cyclist had asked the respondent to escape, but, the respondent continued to cut the complainant. When the people responded to help, they then boarded the other motorcycle and escaped. The investigating officer stated that, they drooped PW1’s motorcycle and escaped aboard the other motor cycle.
24. The complainant bled a lot and lost consciousness. He was taken to Transmara West Sub-county Hospital in Kilgoris. He was later transferred to narok hospital due to complications in his left hand. The complainant was riding a motorcycle registration number KMEV 223E.
25. On cross-examination, PW1 denied knowing or having an affair with the lady he had dropped at Nkararo.
26. PW2 testified that he was the owner of motorcycle registration no. KMEV 223E that the complainant was riding that night. He visited the complainant at the hospital after receiving information that he had been attacked and had multiple cuts.
27. PW3 testified that he received a call from the complainant that he had been attacked and was being attended at a private hospital at Nkararo. He found him bleeding a lot from the injuries on his hands and legs.
28. PW4 testified that he found the complainant badly injured near Transmara Sugar Company. He was able to see him with the help of the tractor lights.



29. PW5 testified that he was working at Transmara Sugar Company when he heard somebody calling for help on the other side of the fence. He went and found the complainant badly injured. He took him to the hospital using his own motorcycle. He saw the complainant with the help of tractor lights.
30. PW6 a clinical officer testified that the complainant had multiple cut wounds on his left hand and both thighs of his legs. he also suffered a fracture of the ulna of his upper left arm. She produced treatment notes, x-ray, and P3 form as P Exh 5, 4, and 3 respectively.
31. PW7 a scene of crime officer produced certified photographs of motorcycle registration No. KMEV 223E Honda red in colour and a certificate of the photographic print as P Exh 6(a) and 7 respectively.
32. PW8 the arresting officer testified that he arrested the respondent on 18/10/2021 at a bar in Nkararo on suspicion of injuring the complaint and trying to steal his motorcycle.
33. PW9 the investigating officer produced motorcycle registration No. KMEV 223E, logbook and cut gumboots as P Exh 8, 2, and 1 respectively.
34. In his defence, the respondent denied attacking the complainant and trying to steal from him.
35. The evidence before the court is that the respondent attacked the complainant (PW1) with a panga and cut him severally before escaping with his counterpart.
36. To constitute an attempted robbery, the respondent must be shown to have assaulted the complainant specifically with an intention to steal something from him and that at or immediately before or immediately after the said assault he used or threatened to use violence in order either to obtain the thing intended to be stolen or prevent or overcome resistance to its being stolen. The complainant narrated how the other person who was with the respondent pulled away PW1's motor vehicle registration number KMEV 223E as the complainant struggled with the respondent. Evidence has it that, when the complainant was attacked, he pushed his motor bike away and tried to run but fell down and the accused continued to cut him with a panga. The person who had carried the accused as his pillion passenger was busy pulling away PW1's motorcycle whilst the respondent. This was not an attempt to prevent further assault upon the complainant. In fact, he never attempted to prevent further attacks on the complainant. His action of pulling away the complainant's motor bike was to steal it, and the attacks by the respondent upon the complainant was to obtain the thing intended to be stolen or prevent or overcome resistance to its being stolen. The act of stealing was part of the entire transaction executed by the two. It was not an independent or isolated incident as was held by the trial court.
37. This position is reinforced by the fact that, the baseless attempt by the respondent to introduce in his defense a love affair between the complainant and the lady he had dropped before the attack as being the cause of the attack. He also introduced insinuations that the lady was Ochola's wife. These were mere afterthoughts meant to provide some motive for the attack thus, concealing the real intention was to steal the motor cycle.
38. The respondent was therefore, a principle offender under section 20 of the Penal Code for the offense of attempted robbery with violence.
39. It bears repeating that, the actions by the respondent in relentlessly assaulting the complainant was to obtain the thing intended to be stolen or prevent or overcome resistance to its being stolen.



40. The court, therefore, finds that the prosecution proved beyond reasonable doubt that the respondent was guilty of the main charge of attempted robbery with violence contrary to section 295 as read together with section 297(2) of the Penal Code whose particulars were that:

on 10/10/2021 at Moita location in Transmara South sub-county within narok county jointly with another not before court armed with a panga attempted to rob Samson Agira of his motorcycle registration number KMEV 223E valued at Kshs. 80,000 and immediately before or after the time of the attempted robbery did grievous harm to the said Samson Agira.

41. Consequently, the trial court committed an error in principle by not convicting the respondent for attempted robbery with violence. The decision by the trial court is therefore, set aside and in lieu thereof, the respondent is convicted for the offence of attempted robbery with violence contrary to section 297(2) of the Penal Code.

Sentence

42. The relevant penalty clause under which the respondent ought to have been sentenced is Section 297(2) of the Penal Code which section provides that:

(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more 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.”

43. Within the constitutional framing, the penalty of death provided in section 297(2) of the Penal Code is to be construed to be the maximum sentence and not mandatory sentence.

44. The trial magistrate noted that the respondent was a first-time offender and was remorseful. The trial court also noted that the respondent had been in remand for over one year and four months.

45. Relevant aggravating factors are;

- a. The serious multiple injuries sustained by the complainant. The complainant suffered a fracture of the ulna of left arm, multiple cuts and wounds on the left hand and both thighs. He was admitted for three days.
- b. The weapon used to inflict the injuries was a sharp object- a panga which was dangerous weapon that may cause extremely grave or even fatal injuries.
- c. The manner the offence was committed was brutal and intended to inflict grievous harm. It was also vicious attack upon the complainant; had the audacity of coming back to cut him more after he had been urged by his accomplice to escape.

46. On the basis of these factors, three years is inordinately lenient and inappropriate. In any event, it was inflicted on the offence which has been set aside. The sentence of three years is therefore set aside. The court has considered the time spent in custody and hereby sentence the respondent to serve 10 years’ imprisonment. The sentence will commence from the date of the initial sentence by the trial court. Section 333(2) of the Criminal Procedure Code is given effect.

47. In the upshot, the appeal on conviction and sentence is allowed.

48. Right of appeal explained-14 days.



49. It is so ordered.

**DATED, SIGNED, AND DELIVERED AT KILGORIS THROUGH MICROSOFT TEAMS
ONLINE APPLICATION THIS 6TH DAY OF DECEMBER, 2024.**

F. GIKONYO M

JUDGE

In the presence of: -

1. Okeyo for DPP- Appellant
2. Respondent
3. Nyangaresi C/A

