



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NUMBER 120 OF 2014

SIMON KIMANI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in Criminal Case Number 2090 of 2010 in the Chief Magistrate's Court at Kakamega delivered by Hon.J.Ongondo (PM) on 15th August 2014)

JUDGMENT

Background

1. **SIMON KIMANI**, the appellant herein has filed this appeal against conviction and death sentence on a charge of robbery with violence contrary to Section 295 as read with section 296 (2) of the Penal Code and for conviction on a charge of being in possession of a firearm contrary to section 4(2) of the Firearms Act Cap 114 Laws of Kenya.

The prosecution's case

2. The prosecution called 8 witnesses in support of the charges. **PW1, Joseph Otiende Erosa**, the complainant herein stated that on 14.11.10 at about 8.00 pm, he was driving M/V KAK 540A and had on board the turnboy, Mr. Kinagongo, and a female passenger who had a baby. He stated that he was going over a bump near Yala River when the appellant, who was armed with a pistol and who was a pillion passenger on a motor cycle pulled his door open and ordered him to move from driver's seat. It was his evidence that appellant took control of the vehicle but failed to control it and it overturned on the driver's side. The witness stated that he managed to get out and with the assistance of the conductor and passengers in a matatu passing by apprehended the appellant, disarmed him and handed him over to the police.

3. PW2 Francis Mundi Kinagongo who was turnboy in M/V KAK 540A that was being driven by PW1 and PW3 Christine Minayo Obiro, the female passenger gave similar evidence to that of PW1 and explained how the appellant attempted to rob them and how he was apprehended. PW4 Henry Mavisi the owner of M/V KAK 540A stated that he arrived at the scene of crime after the appellant was apprehended.

4. PW5 IP Emmanuel Langat, a ballistic expert examined a homemade gun recovered from the appellant and found that it was a firearm but was incapable of being fired. PW6 PC David Otiemo Ouma, a scenes of crime officer took photographs of the subject motor vehicle and produced them as PEXH. 2. PW7 CPL Hezron Maenge visited the scene of crime on 14.1.10, rearrested the appellant and caused the subject motor vehicle to be towed to the police station. PW8 Simion Maiyo similarly stated that he visited the scene of crime on 14.1.10 and received a firearm from PW1 who alleged that the appellant had used during the attempted robbery.

5. When put on his defence, the appellant gave sworn testimony in which he denied the offence. He stated that he is and not Simon Kimani and produced copy of ID in the name of Samson Kimandi Wanjiku. He said he was arrested and attacked after the motor cycle he was riding on hit the subject motor vehicle and after the motor cyclist escaped.

6. In a judgment delivered on 15th August, 2014, appellant was convicted and sentenced to suffer death in the first count of attempted robbery with violence.

The Appeal

7. The conviction and sentence provoked this appeal. In his grounds of appeal filed on 27.8.14 and supplementary grounds filed on 11.4.18 appellant raised a total of 11 grounds of appeal which I have summarized into 1 ground as follows: -

1) The charge sheet is defective

2) That the prosecution case was not proved beyond reasonable doubt

3) That his defence was not considered

4) That the sentence was harsh and unconstitutional

8. When the appeal came up for hearing on 5.9.18, appellant relied wholly on the grounds of appeal and submissions filed on 3.9.18.

9. Mr. Juma, learned State Counsel opposed the appeal and stated that he was relying on the evidence on record.

Analysis and Determination

10. This being a court of first appeal, I am expected to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I neither saw nor heard any of the witnesses and have to give due allowance. I am guided by the Court of Appeal's decision in the case of **Issac Ng'ang'a Alias Peter Ng'ang'a Kahiga V Republic Criminal Appeal No. 272 of 2005** where the court stated as follows: -

“in the same way, a court hearing a first appeal (i.e. a first appellate court) also has duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same.

11. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions filed by the appellant.

12. In dealing with this appeal, I will address the 3 grounds summarized above as follows: -

Is the charge sheet defective?

13. The appellant submitted that the evidence on record does not disclose any intent to rob. The essential ingredients of an attempt to commit an offence have been laid down in the following words.

“In every crime, there is first intention to commit it, secondly, preparation to commit it, thirdly to commit it. If the third, that is, attempt is successful, then the crime is complete. If the attempt fails, the crime is not complete but the law punishes the act. An ‘attempt’ is made punishable because every attempt, although it fails of success, must create an alarm, which, of itself, is an injury, and the moral guilt of the offender is the same as if he had succeeded”

14. Thus, for there to be an attempt to commit an offence by a person, that person must: -

a. Intend to commit the offence;

b. Begin to put his intention to commit the offence into execution by means which are adapted to its fulfilment. This means that the accused begins to carry out his intention to commit the offence in a way suitable to bring about what he intends to achieve;

c. Do some overt act which manifests his intention; that is, the accused performs an act which is capable of being observed by another (although it may not have been) and which in itself makes clear his intention to commit the offence,

15. The evidence tendered by PW1, 2 and 3 is to the effect that the appellant who was armed with a firearm took control of M/V KAK 540A, attempted to drive it away but lost control and it overturned. They also told court that the appellant was in company of a motor cyclist who escaped after the vehicle overturned. PW8 Simion Maiyo recovered the said firearm at the scene of crime and PW5, the ballistic expert after examining it found that it was a homemade firearm incapable of being fired.

16. From the foregoing, I find that there is overwhelming evidence against the appellant had an intention to rob the complainant of the subject vehicle. Appellant begun to put his intention to commit the offence into execution by forcefully taking control of the vehicle and attempting to drive it away. from PW1 only failed after it overturned. Contrary to the appellant's submission, the evidence on record undoubtedly discloses the offence of attempted robbery with violence and I therefore find no defect in the charge sheet as drawn.

Was the prosecution case was not proved beyond reasonable doubt

17. As clearly stated hereinabove, the evidence by PW1, 2 and 3 that the appellant attempted to rob PW1 of the subject motor vehicle is well corroborated. The appellant was arrested immediately at the scene of crime. The prosecution case was in my considered view proved beyond any shadow of doubt.

Was the appellant's defence was not considered

18. I have considered the appellant's defence and I find that it was rightfully rejected by the trial court for the reason that it did not create any doubt on the well corroborated prosecution case. As concerns the appellant's name, I am convinced that the name **SIMON KIMANI** which the appellant denies is his has not caused him any prejudice because he was not identified by name by being arrested in the act of attempting

to rob PW1.

Is the sentence was harsh and unconstitutional

19. While considering the issue of legality of the death sentence for attempted robbery with violence, the Court of Appeal in **David Mwangi Mugo vs. Republic [2011] eKLR** held thus:

“The submission on the legality of it is that section 297(2) of the Penal Code which prescribes the sentence of death, is in conflict with section 389 of the same Code which requires that in offences of attempt to commit a felony, the sentence should not exceed seven years’ imprisonment. Section 389 states as follows:

“Any person who attempts to commit a felony or a misdemeanour 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.”

And section 297(2) provides:

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

20. A three Judge bench of the High Court has also dealt with this issue in *Nairobi Petition No.618 of 2010, Joseph Kaberia Kahinga and 11 others V Attorney General [2016]eKLR* restated that there is an apparent conflict that exists between **Section 297(2)** and **Section 389** of the **Penal Code** in regard to the punishment to be ordained when a person is found guilty of committing an inchoate offence of attempted robbery with violence.

21. The court made various observations and in one of its holdings stated: -

“We hereby declare that section 295, 296(1), 296(2), 297(1) and 297(2) of the Penal Code do not meet the constitutional threshold of setting out in sufficient precision, distinctively clarifying and differentiating the degrees of aggravation of the offence of robbery and attempted robbery with such particularity as to enable those accused to adequately answer to the charges and prepare their defences”.

22. Similarly, in this appeal, I uphold the issue of law raised by the appellant and quash the sentence of death imposed on him on the first count of attempted robbery with violence. The firearm that the appellant is charged with possessing in the second count is the same one that was used to commit the first count. I therefore quash conviction in the 2nd count on the ground that it ought to have been an alternative count and not a separate count.

23. From the above analysis, I have come to the conclusion that the conviction of the appellant on the 1st count was deserved and is upheld. The appeal however succeeds on sentence. I substitute therefor the sentence of death with a sentence of imprisonment for a term of 5 years on the first count.

Orders accordingly.

DATED AND SIGNED AT KAKAMEGA THIS 7th DAY OF September 2018

T. W. CHERERE

JUDGE

In the presence of-

Court Assistants - George & Erick

Appellant - Present in Person

For the State - Mr. Juma