Gachuhi v Republic (Criminal Appeal 59 of 2017)
[2025] KECA 109 (KLR) (24 January 2025) (Judgment)

Neutral citation: [2025] KECA 109 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 59 OF 2017

MA WARSAME, A ALI-ARONI & WK KORIR, JJA

JANUARY 24, 2025

BETWEEN

STEPHEN NGANGA GACHUHI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Naivasha (Meoli, J.) dated 22nd June 2017 in HCCRA No. 44 of 2014)

JUDGMENT

1. The events of 6th October 2008 in Maai Mahiu market within the then Naivasha District of the defunct Rift Valley Province are at the centre of this appeal. The appellant herein, Stephen Nganga Gachuhi, was on that day placed at the scene of the crime which led to him being charged in the first count with the offence of attempted robbery with violence contrary to section 297 (2) of the Penal Code. The particulars of the offence were that on 6th October 2008, the appellant, jointly with Peter Chege Joel, while armed with an imitation gun, attempted to rob John Karanja Muhoro of a television make JVC, a DVD make Sanyo, radio cassette, Nokia 1600 mobile phone and cash of Kshs. 5,000. The appellant and his co-accused faced a second count of being in possession of an imitation gun contrary to section 89 (1) of the Penal Code. The particulars of this second count arose from those of the first count.

2. The appellant denied the charges and at the conclusion of the trial, the appellant was found guilty on both counts while his co- accused was let off the hook. The appellant was sentenced to suffer death in respect to the 1st count and sentenced to 5 years imprisonment on the 2nd count, which sentence was nevertheless held in abeyance. His appeal to the High Court was dismissed with respect to conviction but the appeal against the sentence in respect to the 2nd count was allowed and substituted with an order that the sentencing in respect to that count would be held in abeyance.

3. The appellant through the supplementary grounds of appeal dated 9th July 2024, is now before us on a second appeal and faults the High Court on the grounds that:

   i. The learned trial Judge erred in law when she failed to consider the effects of the failure by the trial court to warn the Appellant on the nature of the capital charges facing him and the penalty attached thereto.

   ii. The learned trial Judge erred in law when she failed to consider the effects of non-representation of the Appellant at the plea taking stage and throughout the proceedings.

   iii. The learned trial Judge erred in law by upholding conviction based on a defective charge sheet.

   iv. The learned trial Judge erred in law by upholding a death sentence, being the harsher of two sentences available for the offence of attempted robbery and therefore, a violation of provisions of Article 50 (2) (p) of *the Constitution*.

   v. The learned trial judge erred in law by upholding a death sentence provided under Section 297 (2) of the Penal Code as opposed to a prescribed sentence not exceeding 7 years imprisonment as provided under Section 389 of the same Penal Code.

   vi. The learned trial Judge erred in law by upholding a conviction whereas the evidence did not support the charge of attempted robbery with violence.

   vii. The learned trial Judge erred in law by upholding a conviction on the second count without a ballistic report to establish that the item allegedly found in possession of the appellant was an imitation firearm.

   viii. The learned trial Judge erred in law by upholding a sentence that was excessive in the circumstances.

   ix. The learned trial Judge erred in law by rejecting the appellant's mitigation.

4. The brief facts of the case were that at around 12.30am on 16th October 2008, John Karanja Muhoro (PW1) was sleeping with his wife Emily Wangu Karanja (PW2) in a room behind his cereals shop when they were awoken by a visitor introduced himself as "Pate" and that he was seeking to sell some wheat. PW1 declined the offer but the visitor then sought for safe-keeping of the wheat overnight. PW1 acceded to the request and on opening his door, he was accosted by two men, with one wielding what looked like a gun. He was assaulted, and he screamed. His wife also raised alarm. The two men entered the house and closed the door. Attracted by the alarm, APC Mwaniki (PW3), APC Njoroge (PW4), and APC Wainaina (PW5) went to the complainant's shop. The appellant escaped from the shop knocking down PW3 in the process. PW5 pursued and got hold of him. He recovered the toy gun that the appellant had dropped. When the appellant was escorted back to the scene, PW1 and PW2 identified him as one of their attackers. He was later escorted to the police station and charged. In his sworn testimony, the appellant denied the charges, stating that he was arrested by police officers on his way home from a bar. He stated that he was taken on the beat by the officers, who later took him to the scene and accused him of committing crimes alien to him.

5. At the virtual hearing of this appeal on 10th July 2024, the appellant was represented by learned counsel, Ms. Sabaya, while learned counsel, Mr. Omutelema appeared for the respondent.

6. Ms. Sabaya relied on the submissions dated 9th July 2024 in support of the appeal. On the first and second grounds of appeal, counsel submitted that considering that the appellant was unrepresented at the trial, his right to legal representation as guaranteed by Article 49 (2) (g) and (h) of *the Constitution*

was infringed. To buttress this submission, counsel relied on the High Court decision in Charles Otieno Odongo vs. Republic [2020] eKLR.

7. As regards the third ground of appeal, counsel submitted that the charge with respect to the 1st count was defective as the appellant was charged for contravening section 297(2) of the Penal Code instead of section 297 (1) of the Penal Code which outlines the elements of the offence. He urged that the proceedings, having been founded on a defective charge were irregular and should be quashed. Attacking the charge in the 2nd count, counsel argued that it was not possible for two people to hold one gun at the same time.

8. Turning to the fourth and fifth grounds of appeal, counsel submitted that the appellant having been charged with attempted robbery in the 1st count, the sentence the offence could have attracted by dint of section 389 of the Penal Code was a maximum of seven years. Reliance was placed on the decision of this Court in Evanson Muiruri Gichane vs. Republic [2010] eKLR and that of the High Court in Peter Muindi & Another vs. Director of Public Prosecutions [2019] eKLR.

9. As for the sixth ground of appeal, counsel submitted that the evidence adduced at the trial did not prove that there was an intention to steal, hence one of the elements of the charge of attempted robbery as found in section 297(1) of the Penal Code was not proved.

10. Turning to the seventh ground of appeal, counsel firstly, submitted that the 2nd count is defective in that it is not possible for two people to be found in possession of one imitation gun. Secondly, counsel argued that the failure to produce a ballistics report rendered the charge unproved. Reliance was placed on the High Court decision in John Wabwire Opesa & John Owuor Ondas vs. Republic [2012] eKLR, in support of this submission. Further, that the witnesses talked of a toy gun and, as was held by this Court in Joseph Maina Kimemia & Another vs. Republic [2004] eKLR, a toy gun cannot be said to be a dangerous or offensive weapon.

11. Finally, with respect to the eighth and ninth grounds of appeal, counsel submitted that the appellant was not an exceptionally depraved and heinous character to warrant the death sentence. According to counsel, the appellant's prayer for leniency and that he was a first offender was not considered by the trial court. Counsel consequently urged that the sentence was excessive in the circumstances and in view of the emerging jurisprudence, we should consider imposing a lesser sentence should we uphold the conviction.

12. In opposition to the appeal, learned counsel Mr. Omutelema through the submissions dated 16th May 2024 referred to sections 295 and 297(2) of the Penal Code to identify the elements of the offence of attempted robbery as assault, intent to steal, use or threat of violence, being armed with a dangerous or offensive weapon, and being in the company of one or more other persons. According to counsel, the evidence adduced by the prosecution witnesses established all the elements of the offence. Mr. Omutelema rehashed the evidence on record and urged that the appellant's identity was proved and was never in doubt. Referring to Maitanyi vs. Republic [1986] eKLR, learned counsel asserted that the evidence of identification was foolproof. Additionally, counsel referred to Karanja & Another vs. Republic [1990] eKLR to urge that the evidence on record was corroborated and established the charge as required in law. It was counsel's submission that the appeal against conviction lacked merit and should be dismissed. Regarding sentence, counsel submitted that were we to find that the death sentence was imposed in its mandatory nature, then we may impose a severe prison sentence.

13. Before us is a second appeal and our jurisdiction, is, by dint of section 361 (1) (a) of the CPC, limited to matters of law. This statement of the law has been restated in several decisions of this Court including Alfayo Gombe Okello vs. Republic [2010] eKLR where it was held that:

> "In view of section 361 of Criminal Procedure Code, only issues of law may be raised for consideration as this Court has stated times without number that it will not interfere with concurrent findings of fact by the two courts below unless such findings were made on no evidence at all or on a perversion of it, or if no tribunal properly directing itself on the evidence would make such findings. In such a case, the decision would be said to be bad in law. See for example M' Riungu vs. Republic [1983] KLR 455."

14. Additionally, in discharging our mandate, we are limited to addressing issues raised before the first appellate court. The rationale for this rule is that on appeal, parties invoke the jurisdiction of an appellate court not to revamp their case but to ask the Court to review or reconsider errors by the court appealed from. Thus, Alfayo Gombe Okello vs. Republic (supra), it was held that:

> "Firstly, the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have."

15. The Supreme Court has also addressed this issue of the limited jurisdiction of this Court in Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR) as follows:

> "(47) The record also shows that issue of constitutionality of the sentence was raised for the first time before the Court of Appeal and introduced by way of submissions by counsel representing the Respondent. Having combed through the Record of Appeal and proceedings, we note that the constitutionality of the respondent's sentence was also not raised either before the trial court or the High Court. The respondent having failed to raise the issue of the constitutionality of the mandatory minimum sentence imposed on him in his appeal before the High Court, it is obvious to us that he was precluded from addressing the issue on appeal before the Court of Appeal."

16. The foregoing pronouncement and principles shall apply to our analysis in this case. Upon review of the record, we note that out of the 9 grounds of appeal raised by the appellant, only grounds 6 and 7 were raised before the first appellate court. It follows that only those two grounds are open for our determination. Determining the other grounds being raised for the first time before this Court would turn this Court into a court of first instance. We must therefore shy away from the appellant's invitation to have a say on matters that were not before the first appellate court.

17. Arising from the two grounds of appeal that we have flagged for our determination, the first issue is whether the evidence adduced sufficiently proved the offence of attempted robbery. On this ground, counsel contended that the evidence on record did not prove beyond reasonable doubt that there was an intention to steal. Counsel was of the view that if the evidence on record proved anything, it only proved assault and not attempted robbery with violence.

18. Section 297 of the Penal Code creates the offence of attempted robbery and provides the sentence as follows:

> " 297. Attempted robbery
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> 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 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 the assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."

19. Out of the various elements of this offence, counsel for the appellant specifically asserted that there was no proof of intention to steal. The offence charged was attempted robbery. An attempt to commit a crime is where the accused person takes steps to commit a crime, but for some reason, the intended crime does not come to fruition. Section 388 of the Penal Code defines "attempt" as follows:

> " 388. Attempt defined
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> 1. When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.
>
> 2. It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfillment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.
>
> 3. It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence."

20. The Court in Abdi Ali Bare vs. Republic [2015] eKLR addressed its mind to this section, which we are persuaded to be the right approach, and held thus:

> " The more challenging question in a charge of attempted murder is the actus reus of the offence. Although a casual reading of section 388 of the Penal Code may suggest that an attempt is committed immediately the accused person commits an overt act towards the execution of his intention, it has long been accepted that in a charge of attempting to commit an offence, a distinction must be drawn between mere preparation to commit the offence

and attempting to commit the offence. In the work quoted above by Smith & Hogan, the authors give the following scenario at page 291 to illustrate the distinction:

> "D, intending to commit murder buys a gun and ammunition, does target practice, studies the habits of his intended victim, reconnoiters a suitable place to lie in ambush, puts on a disguise and sets out to take up his position. These are all acts of preparation but could scarcely be described as attempted murder. D takes up his position, loads the gun, sees his victim approaching, raises the gun, takes aim, puts his finger on the trigger and squeezes it. He has now certainly committed attempted murder..."

In the present appeal, to prove attempted murder on the part of the appellant, he must be proved to have taken a step towards the commission of murder, which step is immediately and not remotely connected with commission of the murder. Whether there has been an attempt to commit an offence is a question of fact. The act alleged to constitute attempted murder, for example, must be sufficiently proximate to murder to be properly described as attempt to commit murder. In CROSS & JONES' INTRODUCTION TO CRIMINAL LAW, Butterworths, 8th Edition, (1976), P. Asterley Jones and R. I. E. Card state as follows at page 354:

> "...[A]n act is sufficiently proximate when the accused has done the last act which it is necessary for him to do in order to commit the specific offence attempted..."
>
> The learned authors add that the court must answer the question whether the acts by the accused person were immediately or merely remotely connected with the commission of the specific offence attempted on the basis of common sense. Ultimately therefore, the real question is whether the acts by the accused person amounted to mere preparation to commit murder or whether the accused had done more than mere preparatory acts." (Emphasis Ours)

21. We have carefully considered the record to ascertain whether the evidence proved that the appellant indeed attempted to commit robbery. In this case, we find no fault on the part of the learned Judge of the High Court with regard to her analysis and conclusion. The appellant, in the company of another person, while armed with a toy pistol went to the complainant's residence behind his shop. They woke him up on the pretext that they wanted to sell him wheat, but when he declined to purchase the wheat they requested him to store the wheat for them. When the complainant opened the door, they assaulted him and told his wife to shut up. Why would the appellant in the company of another go to the complainant's house in the middle of the night and threaten him, using what the complainant and his wife assumed to be a firearm if not to commit violent robbery? The appellant, in this case, had gone beyond mere preparation; he had put into action his plan, which was fortunately thwarted by the arrival of the police officers. The complainant and his wife only knew that what they thought was a firearm was a toy pistol after the appellant was apprehended. Wasn't the toy pistol, which the victims perceived as a firearm, not a dangerous or offensive weapon in those circumstances? We think it was. In saying so, we are alive to the provision of section 34(2) of the *Firearms Act*, which provides that a firearm or imitation shall, notwithstanding that it is not loaded or capable of being fired be deemed as a dangerous weapon for the purposes of the Penal Court. We are also cognizant that section 34 (3) of the *Firearms Act* defines an "imitation firearm" to mean anything that has the appearance of being a firearm, whether it is capable of discharging any shot, bullet or other missile or not. Even taking the toy pistol out of the equation, it remains that the charge against the appellant was proved on the ground that he was in the company of another at the time he intended to steal from the complainant.

22. The second complaint by the appellant is that the trial court erred in law by upholding a conviction on the second count without a ballistics report. From the beginning, we must point out that the appellant was charged with being in possession of an imitation gun contrary to section 89(1) of the Penal Code. The said section provides as follows:

> " 89. Possession of firearms, etc.
>
> SUBPARA (1)
>
> Any person who, without reasonable excuse, carries or has in his possession or under his control any firearm or other offensive weapon, or any ammunition, incendiary material or explosive in circumstances which raise a reasonable presumption that the firearm, ammunition, offensive weapon, incendiary material or explosive is intended to be used or has recently been used in a manner or for a purpose prejudicial to public order is guilty of an offence and is liable to imprisonment for a term of not less than seven years and not more than fifteen years."

23. Sub-section (4) defines the terms used in that section. Thus, a "firearm" has the meaning assigned to it by the *Firearms Act*, whereas the term "offensive weapon" means any article made or adapted for use for causing injury to the person, or intended by the person having it in his possession or under his control for such use. Under the *Firearms Act*, a "firearm" means a lethal barreled weapon of any description from which any shot, bullet or other missile can be discharged or which can be adapted for the discharge of any shot, bullet, or other missile. The definitions above when applied to the toy pistol, coupled with the fact that no ballistics report was adduced in evidence, leads us to agree with the appellant's counsel that the second count was not proved. It was not demonstrated that the appellant had a firearm or an offensive weapon. The appeal in respect to the 2nd count therefore succeeds. The conviction on the second count is hereby quashed and set aside.

24. We have already concluded that there is no merit in the appeal against the conviction on the 1st count. The appeal in respect to the conviction on the 1st count therefore fails and is hereby dismissed. The conviction on the second count is set aside.

DATED AND DELIVERED AT NAKURU THIS 24TH DAY OF JANUARY, 2025.

M. WARSAME

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed