Simon v Republic (Criminal Appeal 91 of 2015)
[2024] KECA 1092 (KLR) (26 July 2024) (Judgment)

Neutral citation: [2024] KECA 1092 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 91 OF 2015

W KARANJA, J MOHAMMED & AO MUCHELULE, JJA

JULY 26, 2024

BETWEEN

JACK MWANGI SIMON .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against the Judgement of the High Court of Kenya at Nyeri (H.I Ong'udi and J. Ngaah, JJ.) dated 15th December, 2015) In H.C.CR.A. No. 371 of 2007)

JUDGMENT

Background

1. Jack Mwangi Simon (the appellant) and his two co-accused were jointly charged with the offence of attempted robbery with violence contrary to Section 297(2) of the Penal Code before the Chief Magistrate's court at Nanyuki. The appellant was convicted and sentenced to death. His two co-accused were acquitted.

2. The particulars of the offence were that on 11th July, 2006 at Makutano Village in the then Laikipia District within the then Rift Valley Province, the appellant jointly with his co-accused and others not before court while armed with dangerous weapons namely pangas, they attempted to rob Rose Njiru Musembi and at or immediately before or immediately after the said attempt threatened to use actual violence to the said Rose Njiru Musembi. The prosecution called four (4) witnesses in support of its case.

3. Briefly, the evidence before the trial court was that the complainant, Rose Njiru Musembi (PW1), on the night of 10th July 2006 and 11th July, 2006 at around 11.00pm was in her house when she heard a lady call one Mwangi on telephone telling him that "she was at home" and therefore "he could come". It was her further testimony that at about 3.00am the following morning, she heard intruders moving in her compound and that she was able to see three of them as there was moonlight. It was her evidence

that one of the intruders was armed with a rungu, another one had an iron bar while the other one had a pistol. That sensing imminent danger, she called Administration Police (AP) Officers from their camp at Nturukuma.

4. It was PW1's further evidence that after a while she heard a gunshot and commotion and it appeared to her that more people had entered her compound. That she went out of her house and found that one of the people that she had earlier seen armed with a panga and iron bar had been arrested. It was her evidence that the person arrested was the appellant.

5. It was PW1's further evidence that the appellant and his two co-accused had previously forcefully entered her house in June 2006, asked her for money and while escorting her to her shop ostensibly to give them money, examination PW1 testified that she was able to see the appellant outside her house as there was moonlight on the material night.

6. Corporal Felix Kingori, No. 204646 (PW2) from Nturukuma AP camp testified that on the material night he was at the camp when he received a call from PW1 reporting that there were intruders in her compound. That PW1 notified him that the intruders were armed with a panga, a rungu, an iron bar and pistol. PW2 and his colleagues, including PW3 rushed to the scene and saw three people in PW1's compound. It was PW2's further testimony that there was moonlight and visibility was clear. It was his evidence that he and his colleagues hid in a thicket with long grass. That a motor vehicle which had a lot of light approached and the three intruders upon seeing the vehicle jumped from the complainant's compound and ran towards him and his colleagues in a bid to escape. It was his further evidence that he ordered them to lie down but they refused to do so and he fired his gun. It was PW2's further evidence that the appellant fell down and was arrested while his two co- accused disappeared into the forest.

7. PW2 further testified that the appellant was arrested with an iron bar and a panga. That he interrogated the appellant who led him and his colleagues to his accomplices' houses leading to the arrest of the two co- accused.

8. PC Aden Wako, No. 21099 (PW3) testified that on the material night, while with PW2, they received a call from PW1 to the effect that there company of PW2, they proceeded to the scene and found three men in PW1's compound at the fence, squatting. That they ordered the intruders to stand up but they instead ran away. PW3 testified that he and his colleagues chased and arrested the appellant while the other intruders escaped. PW3 further testified that the appellant was holding a panga and a metal bar when he was arrested.

9. PC Stephen, No. 71372 (PW4) testified that he was the Investigation Officer based at Nanyuki Police Station. It was his testimony that on the material day, he was on duty when he was called by the duty officer to visit a scene at Makutano as PW1 had reported an attempt to rob her. That he proceeded as directed and on arrival, he found the appellant had been arrested by AP's from Nturukuma Administration Police Camp. It was his testimony that he found a panga and an iron bar at the scene which were produced as exhibits. PW4 testified further that he accompanied the appellant and the other officers to the homes of the accomplices who the appellant had alleged to have been in the company of during the attempted robbery.

10. At the conclusion of the prosecution case, the trial court found the appellant and his two co-accused had a case to answer and they were put on their defence. The appellant chose to remain silent while his 2 co- accused gave unsworn statements without calling any witnesses. The two co-accused denied having anything to do with the attempted robbery.

11. After conclusion of the case, the trial court found the appellant guilty of was convicted and sentenced to death. The two co-accused were acquitted under Section 215 of the *Criminal Procedure Code*.

12. Dissatisfied by the conviction and sentence, the appellant filed an appeal to the High Court on the grounds that the prosecution evidence was inconsistent; that the evidence adduced did not disclose the offence of attempted robbery; that the weapons alleged to have been recovered from him were not exhibited; and that essential prosecution witnesses were not called to testify such as the complainant's workers who were alleged to have alerted her of the impeding robbery. The appellant urged that the prosecution failed to discharge its burden of proving that he attempted to rob the complainant; and that in convicting him the trial court contravened Section 169(1) of the Penal Code and failed to reach the correct conclusion upon analyzing the prosecution evidence. The State opposed the 1st appeal and maintained that there were no contradictions in the prosecution case; that in accordance with Section 143 of the *Evidence Act*, no particular number of witnesses ought to have been called to prove certain facts; and that once it was established that the appellant was found armed in the appellant's compound at odd hours, the presumption was that he was there to commit the offence with which he was charged and the burden was on him to rebut the presumption. The High Court, (H. I. Ong'udi and J. Ngaah JJ.) dismissed the appeal on conviction and upheld the sentence imposed by the trial court.

13. Undeterred, the appellant filed an appeal to this Court in which he raised the following grounds of appeal in the memorandum of appeal, to wit: that the High Court erred in law: in upholding his conviction in reliance to the prosecution witnesses' evidence whose credibility remained to be totally doubtful and questionable; in upholding the conviction on the basis of defective charges in light of no clear specification of the irregularities of Section 297(2) of the *Criminal Procedure Code* thus contravening Section 214 of the Criminal Procedure Code; in upholding conviction without fully evaluating and analysing the entire record as they were duty bound to do as the 1st appellate court; in upholding the appellant's conviction without fully complying with the provisions of Section 169(1) of the *Criminal Procedure Code*; and in upholding the sentence imposed by the trial court that was harsh and excessive.

Submissions by Counsel

14. At the hearing of the appeal, the appellant was represented by learned counsel, S.K Njuguna Advocate who relied on his written submissions with brief oral highlights. In arguing the appeal, counsel submitted that PW1 testified that she was ordered to open the door by the assailants whereupon she called the police. Counsel asserted that there was no evidence to show any attempt by the appellant to break either the window or the doors to gain access into PW1's house. Counsel asserted that the only words spoken by the intruders were said to be "open the door." Counsel asserted that the intruders did not do anything untoward other than to utter the said words. Counsel further submitted that PW1 was neither assaulted nor threatened with actual violence on her or her property. Further, that the evidence tendered by the prosecution witnesses only proved preparation to commit a felony but not an attempt to commit robbery with violence. Counsel submitted that the words spoken were not enough towards the execution of the offender's purpose before the crime of attempted robbery with violence is constituted. Counsel submitted that there was no act proving the commission of the offence of attempted robbery with violence and that in the circumstances, the ingredients of Section 297(2) of the Penal Code were not satisfied to justify the conviction of the appellant.

15. Counsel relied on the High Court case of *Sammy Maina Karanja v Republic* (2003) eKLR where Muga Apondi, J. and Jessie Lesiit, J. (as she then was) stated as follows:

> " ...that to constitute an attempted robbery, the appellant must be shown to have assaulted the complainant and specifically with the intention to steal something 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 to prevent or overcome resistance to its being stolen."

16. Counsel further submitted that there was contradiction in the prosecution evidence of PW2 and PW3 suggesting that they were not speaking of the same incident. Counsel asserted that the evidence of P2 and PW3 did not corroborate each other as while PW2 testified inter alia, that he saw three people in PW1's compound and that the intruders had hidden themselves in a thicket with long grass, PW3 testified that he saw three men in PW1's compound and that the intruders were at the fence squatting.

17. Counsel further submitted that the appellant was not accorded a fair hearing pursuant to Article 50(2)(c) and (j) noting that the prosecution witnesses' statements were supplied to him at an advanced stage of the proceedings. Counsel relied on the High Court case of *Joseph Ndung'u Kagiri v Rep* [2016] eKLR where Mativo, J. (as he then was) stated that:

> "It is not disputed that the accused persons were not provided with witnesses' statements prior to the trial or during the trial yet all the four prosecution witnesses testified and the trial magistrate never addressed himself to this issue...rely on in their evidence in advance ..."
>
> Article 50(2)(j) correctly interpreted means that an accused person should be furnished with all the witnesses' statements and exhibits which the prosecution intends to.....

18 On the death sentence imposed by the trial court and upheld by the 1st appellate court, counsel submitted that the same is harsh and excessive in the circumstances of this case. Counsel relied on this Court's decision of *Boniface Juma Khisa v Republic* [2011] eKLR which held that there is a conflict between Sections 297(2) and 389 of the Penal Code.

19. Counsel further submitted that the appellant has been in remand and in prison for over seventeen (17) years and should be released on the basis of the Boniface Juma Khisa decision (supra). Counsel further submitted that the time spent in custody should be taken into consideration in compliance with Section 333(2) of the *Criminal Procedure Code*. It was counsel's further submission that the principle applied in the case of *Francis Karioko Muruatetu & Ano. v Republic* [2021] eKLR) should be applied in the instant appeal resulting in the exercise of discretion by this Court to interfere with the sentence noting that the words allegedly uttered by the appellant were uttered without any further adverse action. Counsel urged this Court to quash the appellant's conviction and set aside the sentence meted out on the appellant by the trial court and upheld by the 1st appellate court.

20. Mr. Naulikha, the learned Prosecution Counsel representing the State opposed the appeal and relied on his written submissions with brief oral highlights. Counsel submitted that the evidence of PW1 as corroborated by PW2 and PW3 proved all the ingredients for the offence of attempted robbery with violence. Counsel submitted that the appellant had the intention to commit the offence as testified by PW1 that a similar attack was made by the appellant and his accomplices in June 2006 where they demanded money from her and were leading her to her shop but ran away upon seeing a group of people walking towards them.

21. On the issue of breach of the appellant's Constitutional right to be supplied with witness statements before hearing, counsel submitted that this did not prejudice the appellant as he was allowed time to cross- examine the witnesses to his satisfaction. Counsel asserted that the appellant actively participated in the trial process and he had an opportunity to request for an adjournment but he did not and chose to proceed without being supplied with the witness statements.

22. On the legality of the death sentence, counsel submitted that Section 297(2) of the *Penal Code* provides for death sentence in case of attempted robbery with violence while Section 389 thereof provides for a

term not exceeding 7 years for attempted felonies in cases where no other punishment is provided for. Counsel submitted that the two provisions of the law are not in conflict and the death sentence meted on the appellant is lawful. Counsel urged us to dismiss the appeal in its entirety for lack of merit.

Determination

23. We have considered the rival submissions in light of the record before us. As elucidated in section 361 of the *Criminal Procedure Code*, our jurisdiction as a second appellate court is limited to a consideration of matters of law only. This Court will normally accept the concurrent findings of fact by the two courts below unless it is shown than such findings are based on no evidence or were arrived at by misapprehension of the evidence or if it is demonstrated that the courts below acted on wrong principles in making the findings.

24. We discern the issues for determination in this appeal to be: whether the offence of robbery with violence was proved beyond reasonable doubt against the appellant; and whether we should interfere with the sentence imposed by the trial court and upheld by the 1st appellate court.

25. The appellant was charged and convicted of the offence of attempted robbery with violence. Section 297 (1) and (2) of the *Penal Code* provides 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 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 sentence death.

26. For the prosecution to secure a conviction for the offence of attempted robbery with violence contrary to Section 297(2) of the *Penal Code* the following ingredients must be established –

    i. that the accused assaulted the victim with the intent to steal.

    ii. that immediately before or immediately after the time of the assault, uses or threatens to use actual violence to any person or property;

        a. in order to obtain the thing intended to be stolen; Or

        b. to prevent or overcome resistance of its being stolen. In addition to that, under Section 297(2), there should be proof that:

    iii. the offender is armed with dangerous or offensive weapon or instrument, or

    iv. is in company with one or more person(s), or

    v. 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.

27. *Russell on Crime*, 11th Edition Volume 1 at page 194 elaborates on what amounts to attempted robbery with violence:

> " ...enough must have been done towards the execution of the offender's purpose before the crime of attempt is constituted. Therefore, evidence which merely goes to establish his

intention, and which does not go to establish a step taken by him in order to achieve the result which he intended, is solely evidence of mens rea and is no evidence at all of actus reus."

28. Further, *Harris's Criminal Law* 21[St] Edition states as follows:

> "The mere intention to commit a misdemeanour is not criminal. Some act is required, and we do not think that all acts towards committing a misdemeanour are Indictable. Acts Remotely Leading To The Commission Of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are." [Emphasis supplied].

29. From the evidence on record as regards the ingredients of the offence of attempted robbery with violence, the appellant was armed with dangerous and offensive weapons namely a panga and an iron bar which were produced as exhibits in court and the appellant did not dispute the same. He opted to remain silent during his defence. The prosecution proved that the appellant was arrested in PW1's compound while armed with an iron bar and panga. The question is whether there is evidence to prove that the appellant assaulted PW1 with the intention to steal 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 to prevent or overcome resistance to its being stolen?

30. The 1st appellate court in dismissing the first appeal stated that:

> " The presence of armed men in PW1's compound at such odd hours must have put PW1 in reasonable fear or apprehension of an imminent attack or battery to her person for purposes of injuring her."

31. In *Morris Muteti v Republic* [2014] eKLR this Court adopted the definition of assault in *Black's Law Dictionary*, Ninth Edition, inter alia, as:

> " The threat or use of force on another that causes that person to have a reasonable apprehension of imminent harmful or offensive contact; the act of putting another person in reasonable fear or apprehension of an immediate battery by means of an act amounting to an attempt or threat to commit a battery."

This Court in *Morris Muteti* case (*supra*) went further to state:

> " Assault is explained therein, not necessarily as a physical harmful contact but is enough that a show of force raising an apprehension in the mind of the victim is exhibited."

32 We have carefully considered the record and we find no evidence that demonstrates that the appellant assaulted PW1 with the intention to steal or any proof of the use or threat to use violence. PW1 testified that the appellant ordered her to "open the door." We find that these words in the absence of any further adverse action do not constitute assault with intention to steal. The words allegedly spoken by the appellant were not sufficient to prove that the intruders' purpose constituted the ingredients of the crime of attempted robbery with violence. From the foregoing, we find that there was no evidence capable of constituting the offence of robbery with violence in the instant appeal. We are therefore satisfied that the prosecution failed to prove its case against the appellant beyond any reasonable doubt.

33. In the circumstances, we are inclined to allow the appeal, quash the conviction and set aside the death sentence. The appellant shall be set at liberty forthwith unless otherwise lawfully withheld.

34. It is so ordered.

DATED AND DELIVERED AT NYERI THIS 26TH DAY OF JULY, 2024.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR