Wasali v Republic (Criminal Appeal 296 of 2018) [2024] KECA 1214 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1214 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 296 OF 2018

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

SEPTEMBER 20, 2024

BETWEEN

TYSON WASALI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Bungoma (K. W. Kiarie, J) delivered on 4th October, 2018 in HCCRA No. 217 of 2016)

JUDGMENT

1. This is a second appeal by the appellant, Tyson Wasali, who was tried, convicted, and sentenced to death by the Senior Resident Magistrate at Bungoma for the offence of attempted robbery with violence contrary to Section 297(2) of the Penal Code, which conviction and sentence were upheld on a first appeal.

2. Dissatisfied with the outcome of his first appeal, the appellant preferred the present appeal faulting the learned Judge of the first appellate court, and the trial magistrate for erring in law: by making a finding that the appellant was identified thereby warranting a conviction; by sentencing the appellant to death yet there was a lesser punishment prescribed under Section 389 of the *Penal Code* thereby violating his constitutional rights under Articles 27 and 50(2)(p); in failing to take into consideration Section 389 of the *Penal Code* in sentencing the appellant; in failing to take into consideration the sentencing guidelines as well as mitigation in sentencing; by failing to explain to the appellant what mitigation is all about; in failing to take into consideration the circumstances of the crime in sentencing the appellant; and in failing to vary the sentence of the appellant after the respondent pleaded it to be too harsh.

3. Briefly, the facts leading to the appellant's conviction were as follows: On 16th August, 2015 at about 8pm, Michael Kundu Wanjala (Michael) a boda-boda rider was riding a motorbike Registration No. KMDL XXXX, when he was approached by three people. One was a boda-boda rider riding

motorcycle KMCL XXXX, and the other two were said to be his passengers. The boda-boda rider claimed that his motorcycle did not have enough tyre pressure, and, therefore, requested Michael to ferry the two passengers to their destination. The two passengers boarded Michael's motorcycle, but immediately Michael took off, the other motorcyclist blocked Michael, and the two passengers simultaneously attacked him. A struggle ensued and Michael was injured. Luckily for him, Nelson Majeje Simiyu (Simiyu), another boda-boda rider, appeared and upon seeing him, Michael's attackers fled into a sugarcane farm leaving behind the motorcycle that they had come with. Simiyu assisted Michael and took him to hospital. Motorcycle KMCL XXXX was taken to the home of Edward Muyundo, the Assistant Chief of Lunao Sub Location (Assistant Chief). On the same night, the appellant went to the home of the Assistant Chief looking for motorcycle KMCL XXXX. The Assistant Chief arrested him and handed him over to CPC Philip Boen, an officer from Bumula Police Station. Johason Barasa Nyukuri, who was the owner of motorcycle No. KMDL XXXX, testified that at Michael's request he allowed Michael to ride the bicycle to go to Nasianda to check on his maize crop. He later received information that Michael was beaten in an attempt to rob him of the motorcycle.

4. In his defence, the appellant gave an unsworn statement in which he claimed that he was robbed of his motorcycle, and that the robbers were interrupted by an oncoming motorcycle, he then escaped and ran into a maize plantation. He met with an old man who took him to the home of the Assistant Chief. He reported to the Assistant Chief how he was robbed, and the Assistant Chief told him he was calling for assistance. Instead, the Assistant Chief confiscated his phone and he was subsequently arrested.

5. In his first appeal to the High Court, the appellant challenged the decision of the trial court for: Failing to properly analyze the evidence; failing to note that no identification parade was conducted; convicting the appellant on insufficient evidence; and dismissing the appellant's defence.

6. In dismissing the appeal, the first appellate court rejected the appellant's contention that no identification parade was conducted, holding that the identification parade would only have been necessary, if there was a witness who purported to have seen the culprit and was able to identify him at the time of the commission of the offence, such that he could identify him thereafter based on a description he gives. The learned Judge held that the appellant was arrested when he went to the home of the Assistant Chief to claim his motorcycle; and therefore, an identification parade was not necessary. The learned Judge found that unlike Michael, whose injuries were evident following medical examination, the appellant though claiming to be a victim of a robbery, could not explain how his motorcycle left his possession nor did he have any injuries.

7. The appellant filed written submissions in support of his appeal through his advocate learned counsel, Mr. Mabale M. Bagada. He submitted that Michael stated that on the night the incident happened, it was raining and it was at night when he saw the appellant and claimed that he was someone he had seen before. This evidence was not corroborated by Simiyu, to whom Michael made the first report, or Philip Boen who was the investigation officer. Counsel submitted that there was no evidence that the identification parade was not done because Michael knew the appellant. He faulted the trial court for failing to appreciate that the appellant's purported recognition was not corroborated, nor did the witness inform the police at the first instance that he knew or was able to recognize the appellant. He maintained that the circumstances were not conducive for a positive identification as Michael claimed he was being chocked and at the same time one of the assailants hit him and he fell in the water.

8. Counsel also argued that the appellant's mitigation was not considered. He argued that the trial magistrate failed to take into consideration the appellant's young age or the fact that the appellant was a first offender or that he had dependents, and had been in remand for over one year. Counsel submitted that as Michael was not seriously hurt, and nothing was stolen from him, these factors should have counted in having the appellant receive a lesser sentence. The appellant's counsel contended that the

trial magistrate referred to a pre-sentencing report which the appellant was not given an opportunity to cross examine. He maintained that the trial magistrate was constrained by the prescribed penal sentence and the mitigation was just a formality.

9. On sentence, Mr. Bagada submitted that it was harsh, and the learned Judge failed to take into consideration the fact that the respondent had conceded as much. The appellant relied amongst others on High Court Constitutional Petiti*on No. 159 of 2019*, *Mwangi - v- Director of Public Prosecution* [2021] KEHC 113 (KLR), where the High Court held that there was a conflict between Section 297(2) and 389 of the Penal Code, on the penalty for the offence of attempted robbery with violence; that this conflict violates the petitioner's right under Article 50(2)(p); and therefore, the petitioner was entitled to benefit from the lesser sentence imposed by Section 389 of the Penal Code.

10. Counsel for the appellant also referred to this Court's decision in *Bonventure Anziena Mukangai & Another - v- Republic* [2019] eKLR, in which the Court of Appeal quashed a death sentence imposed under Section 389 of the Penal Code, due to the conflict in sentences available, holding that and an accused person has a right to the benefit of the less severe sentence. Counsel argued that the appellant's conviction based on identification by Michael was not secure as the identification was not corroborated by the evidence of the investigating officer, or the first witness that Michael met.

11. In opposing the appeal, the respondent relied on written submissions prepared by Ms. Busienei, a Senior Principal Prosecuting Counsel in the office of the Director of Public Prosecution (ODPP). Relying on this Court's decision in *Joseph Kaberia Kahinga & 11 Others - v- Attorney General* [2016] eKLR, Ms Busienei submitted that to secure a conviction for the offence of attempted robbery with violence under Section 297(1) of the Penal Code, the prosecution had to establish the ingredients of that offence which were: that the accused assaulted the victim with the intent to steal; that immediately before or immediately after the time of the assault he used or threatened 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 of the thing being stolen. Counsel noted that the offence would be aggravated to attempted robbery with violence under Section 297(2) of the Penal Code, if the offender is armed with dangerous or offensive weapons or instruments; or is in the company of one or more persons; or if at the time of the robbery or before or immediately thereafter, he wounds, beats, strikes or uses any other personal violence to the victim or any other person.

12. Ms. Busienei submitted that in the case of the appellant, all the ingredients for the offence of attempted robbery with violence were met. Michael was attacked, chocked and hit on the chin, and an attempt was made to grab the keys to his motorcycle, but this was thwarted by the oncoming motorcyclist. Counsel stated that there was use of violence on Michael as there was evidence that he was injured and that the attackers were three.

13. In regard to identification Ms. Busienei relied on *Nzaro - v- Republic* [1991] KAR 212, where the Court of Appeal held that evidence of identification by recognition at night must be completely water tight to justify conviction. She argued that although the incident took place at night, Michael and Simiyu were consistent in their evidence as Michael confirmed who attacked him, and this was corroborated by Simiyu. She noted that the lamps of the motorcycle assisted Michael in seeing the faces of his assailants. Counsel further noted that the appellant was arrested when he went to the home of the Assistant Chief to claim his motorcycle and this linked him to the offence.

14. In regard to the lesser punishment prescribed under Section 389 of the Penal Code, Ms. Busienei referred to *Simiyu - v- Republic* KECA 247 (KLR), where this Court noted that Section 389 of the Penal Code only applies where no other punishment is expressly prescribed in the Penal Statute. She noted that under Section 297(2) of the Penal Code, there was a specific penalty provided for attempted

robbery. She, therefore, argued that there was no violation of the appellant's constitutional rights under Article 27 & 50(2)(p) of the [Constitution](), as Section 389 was not applicable.

15. Finally on mitigation, Ms. Busienei submitted that the trial court did consider the appellant's mitigation before imposing the sentence, and that the trial magistrate in applying his discretion, was convinced that the death penalty was the most appropriate sentence under the circumstances. She therefore urged the Court to dismiss the appeal and uphold the appellant's conviction and sentence.

16. This is a second appeal, and by dint of section 361(1) of the *Criminal Procedure Code*, the court's jurisdiction is limited to dealing with matters of law only. In *Karingo versus Republic* [1982] KLR 213, the Court held that:

> " A second appeal must be conferred to points of law and Court of Appeal will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence."

17. Further, in *M'Riungu v Republic* [1983] KLR 455, this Court stated as follows:

> " Where a right of appeal is confined to questions of law an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat the findings of fact as holdings of law or mixed finding of fact and law and it should not interfere with the decision of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law."

18. Having considered the evidence that was adduced in the trial court, as reflected in the record of appeal, the grounds of appeal presented before us by the appellant, the contending submissions, and the law, the main issues that we discern for our determination, are whether the learned Judge of the first appellate court properly considered and reanalysed the evidence; whether the conviction of the appellant was solely based on his identification, if so, whether the identification was safe to rely upon; and whether the sentence of death imposed upon the appellant under Section 297(2) of the Penal Code for the offence of attempted robbery with violence, was prejudicial to him given the sentence provided under Section 389 of the Penal Code for attempting to commit a felony or misdemeanour.

19. The evidence before the trial court was fairly straight forward: Michael was attacked by three people who unsuccessfully attempted to steal his motorcycle. The evidence of Michael and Simiyu was clear that Michael was assaulted and injured as he resisted the attempt to steal his motorcycle. His injuries were also confirmed by Belinda Kipsoi who examined him and filled the P3 Form. This evidence was subject of concurrent findings made by the two lower courts. There is also the undisputed evidence that the appellant went to claim motorcycle KMCL XXXX from the home of the Assistant Chief. The concurrent findings of the two lower courts based on the evidence of Michael, Simiyu and the Assistant Chief was that motorcycle KMCL XXXX was recovered from the scene of the robbery.

20. In his defence, the appellant claimed that he abandoned his motorcycle and escaped when he was attacked in an attempt to steal the motorcycle from him, and that he went to the home of the Assistant Chief after being directed there by an old man to whom he explained his predicament. This defence was rejected by the court because although the Assistant Chief agreed that the appellant went to his home to claim the motor cycle, he maintained that the appellant did not have any injury, nor could he explain satisfactorily how he lost possession of the motor cycle. The Assistant Chief caused the appellant to be arrested because he did not believe the appellant's story.

21. The arrest of the appellant was not precipitated by his identification by either Michael or Simiyu, but was the result of his claiming motorcycle KMCL XXXX, immediately after the same had been taken to the home of the Assistant Chief and a report made that the motor cycle had been involved in the robbery attempt on Michael. Both Michael and Simiyu, only confirmed after the appellant's arrest, that he was the motorcycle rider who was with the two other robbers who posed as passengers during the robbery. Michael explained that he talked to the appellant, who requested him to transport the two passengers. Michael, therefore, had the opportunity to clearly see the appellant before he was attacked, and he confirmed that he was able to do this with the aid of the lights of the motorcycle.

22. We are satisfied that the appellant's conviction was primarily based on the prosecution evidence which placed him at the scene of the robbery, which was consistent with his own admission by implication, when he went to claim the motorcycle, that he was the one riding it that night. The identification by Michael and Simiyu was, therefore, merely additional evidence. Thus, there was evidence that there was an attempt to rob Michael of his motorcycle; that Michael was injured during the struggle as he resisted the robbery attempt; that the attackers were three; and that the appellant was one of the attackers. These factors were sufficient to prove the charge against the appellant, and his conviction was therefore anchored on solid ground.

23. Under Section 297(2) of the Penal Code, the sentence provided for an offence of attempted robbery with violence is death. This was the sentence that was imposed upon the appellant by the trial magistrate, and upheld by the first appellate court. However, the appellant has argued that he should have been sentenced under Section 389 of the Penal Code which provides as follows:

> " Any person who attempts to commit a felony or a misdemeanour is guilty of an offence and is liable, <u>if no other punishment is provided,</u> 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." (Emphasis added).

24. The respondent has opposed the appellant's submissions maintaining that there is a specific sentence provided under Section 297(2) of the Penal Code, and, therefore, the trial magistrate did not have to revert to Section 389 of the Penal Code in sentencing the appellant. At a glance, it may appear as if there is a conflict between sections 297(2) and 389 of the Penal Code, but this is not so.

25. These two provisions were considered by this Court in *James Maina Magare & Another - v- Republic* [2012] eKLR; and. starting with section 389, this is how the Court unraveled the provisions:

    15. In our view three things stand out from a reading of this section. Firstly, this section sets out a general offence of an attempt to commit a felony or a misdemeanour. This is an implied recognition that there are instances where specific offences have been provided for in the Penal Code, but no specific provision made for an attempt to commit such an offence. Secondly, the section recognizes that there are situations where no punishment has been provided for an attempt to commit specific offences, and the section therefore provides a formula for sentencing where no other punishment is provided for such attempt. Thirdly, a specific sentence of a term of imprisonment not exceeding seven years, has been provided, where the offence attempted is one punishable by death or life imprisonment. The latter part of section 389 of the Penal Code which provides for the specific sentence, must be read in conjunction with the words "if no other punishment is provided" and "but so that" in the preceding part of that section. In other words, the specific punishment in cases where the offence attempted

is one punishable by death or life imprisonment, is only applicable where the legislature has not provided any other sentence for such an attempt.

15. Thus, for the offence of an attempt to commit robbery with violence under section 297(2) of the Penal Code, in respect of which a sentence of death has been provided under that section, section 389 of the Penal Code cannot apply. The fact that section 297(1) of the Penal Code which provides for the offence of attempted simple robbery, provides for a sentence of seven years, confirms the legislature's intention to provide a more severe punishment for the more serious offence of attempted robbery with violence under section 297(2) of the Penal Code. In our view, the legislature's intention to exclude the offence under section 297(2) of the Penal Code from the application of section 389 of the Penal Code is clear. As was stated by this Court in Evans Kiratu Mwangi v. Republic, Cr. Appeal No. 154 of 2009, Section 297(2) of the Penal Code provides for a sentence of death, and that sentence is therefore lawful.

26. Likewise, in *Charles Mulandi Mula - v- Republic [*2014] eKLR, this Court considered the same issue at length. We reproduce herein the pertinent part of the judgment as follows:

> "(21 ...The Appellant was charged and convicted of attempted robbery with violence contrary to Section 297(2) of the *Penal Code*. This Court was urged to find that the applicable sentence is a term of imprisonment not exceeding seven years under Section 389 of the *Penal Code*. Section 297(2) of the *Penal Code* provides that:
>
> '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.'
>
> Section 389 of the *Penal Code* provides that
>
> '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.' (Emphasis supplied)
>
> (22) It is clear from a plain reading of Section 389 of the *Penal Code* that it applies only where no other punishment is expressly prescribed in the penal statute. Section 297(2) of the *Penal Code* provides for a specific penalty for attempted robbery with violence, and is thus ousted from the remit of Section 389 of the *Penal Code*. This Court has clarified this interpretation in *Mulinge Maswili v. Republic* (Criminal Appeal No. 39 of 2007), where we stated:
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> 'The general penalty for offenses attempted is given as half of the sentence for the completed offence. There is, however, an exception regarding those offences which carry the death penalty or life imprisonment. For such offences, the court is given discretion to mete out sentences not exceeding seven years' imprisonment, and even for those ones, there is a further exception. For attempted offences for which separate and
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> distinct punishment is provided, section 389, above, would not apply. In the former category are offences like murder contrary to section 203 as read with section 204 of the *Penal Code* respectively. Such an offence carries the death

> penalty. The offence of attempted murder does not have a separate distinct punishment. That being so, and because there is no way one can half the death penalty, the trial court has the discretion to mete out a sentence not exceeding seven years' imprisonment.
>
> In the latter category, namely, the offences attempted which carry a separate and distinct sentence that is where the offence of attempted robbery with violence falls. Parliament in its wisdom considered it essential to provide specific sentences for the offences attempted. To obviate conflict section 389 of the Penal Code was worded in such a way as to create an exception to the general penalty provided therein. Hence the inclusion of the phrase 'if no other punishment is provided.'" (Emphasis in Original)

27. The upshot of the above is that the appellant herein, having been charged with the offence of attempted robbery with violence under Section 297(2) of the *Penal Code*, which section clearly provides for a sentence of death, Section 389 of the *Penal Code* which is a penalty section for attempts to commit a felony or a misdemeanour where no other punishment is provided, was not applicable to the appellant as he was liable to be sentenced under Section 297(2) of the *Penal Code*. That section provides for a mandatory death sentence which as stated by the Supreme Court in *Republic - v- Gichuki Mwangi*: *Initiative for Strategic Litigation in Africa (ISLA) and 3 Others (Amicus curiae)* [2024] 23 KLR, the trial court had no option but to impose.

28. Consequently, this appeal fails against both conviction and sentence. It is dismissed in its entirety.

DATED AND DELIVERED AT KISUMU THIS 20TH DAY OF SEPTEMBER, 2024.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR