Simiyu v Republic (Criminal Appeal 47 of 2018)
[2021] KECA 247 (KLR) (3 December 2021) (Judgment)

Neutral citation: [2021] KECA 247 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 47 OF 2018

PO KIAGE, J MOHAMMED & M NGUGI, JJA

DECEMBER 3, 2021

BETWEEN

DENNIS SIMIYU ALIAS ANDINUNU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Eldoret (Kimondo & Ngenye-Macharia, JJ.) dated 30th October, 2014 in HCCRA NO. 250 OF 2011)

JUDGMENT

1 The appellant, Dennis Simiyu alias "Andinunu", is currently condemned under a sentence of death imposed on him by the Eldoret Chief Magistrate's Court on 5th December, 2011 upon being convicted of the offence of attempted robbery with violence. The particulars of the offence, which the trial court found to have been proved, were that on the 26th day of February, 2011 at Bondeni village, Nzoia location in Lugari district within Western province, jointly with others while armed with offensive weapons, namely, a rungu and a panga, he attempted to rob Richard Mage of his bag valued at Ksh.1200 and immediately before the time of such attempted robbery wounded him.

2. Upon conviction and sentence the appellant preferred an appeal against the sentence before the High Court. The appeal was heard and dismissed on 30th October, 2014 by Kimondo and Ngenye-Macharia, JJ. provoking the instant appeal.

3. The appeal is based on four (4) grounds which are that, the learned judges erred by upholding the conviction and sentence;

    a. While relying on the evidence of dock identification.

    b. Without observing that the complainant failed to promptly give the names and physical features in his first report to the police.

c. Which was not proved beyond reasonable doubt.

d. Without observing the conflict between sections 297(2) and 389 of the *Penal Code.*

4. At the virtual hearing, learned counsel Mr. Oyaro appeared for the appellant while Ms. Kipyego, the learned prosecution counsel appeared for the respondent. Mr. Oyaro contended that there was a conflict between section 297(2) and section 389 of the Penal code and that in the face of such conflict, the appellant should have suffered the least severe punishment. Further, Mr. Oyaro submitted, the injuries inflicted were not serious to warrant a death sentence. In written submissions dated 27th April, 2021, counsel underscores his argument on the alleged conflict between sections 297(2) and 389 of the Penal Code by citing this Court's decision in *David Mwangi Mugo -vs- Republic* [2011] eKLR and *Evanson Muiruri Gichane -vs- Republic* [2010] eKLR, where the learned Judges opined that there is a conflict between the two clauses. The High Court's decision in *Joseph Kaberia Kahinga & 11 Others -vs- Attorney General* [2016] eKLR, was also highlighted for the proposition that section 297 of the Penal Code does not set out with precision and distinctively clarify the degrees of aggravation of the offence of robbery and attempted robbery to enable an accused person to adequately answer to the charges.

5. According to Mr. Oyaro, the nature of the conflict between the two sections in contention is in the sentence to be meted out for the offence of attempted robbery with violence. In his view, whereas section 297(2) prescribes the sentence of death as punishment for the offence, section 389 provides for a sentence of imprisonment for a term not exceeding seven years. In the result, counsel argues, the conflict between the two sections infringed on the appellant's right to a fair trial under Article 50 of the *Constitution*.

6. Counsel further submits that where there is conflict in a statute like the instant case, the Court ought to interpret the statute purposively. In conclusion, he urges this Court to set aside the sentence or review it for an alternative sentence.

7. Opposing the appeal, Ms. Kipyego posited that there was no conflict between the two sections in question. In brief written submissions dated 5th August, 2021 counsel points out that section 389 was only applicable where the penalty is not provided by the section under which the attempt charge has been preferred. Counsel further contends that the appellant was positively identified by the victim as the person who committed the offence without any rebuttal. Accordingly, the conviction by the trial court was in keeping with the law. In the end Ms. Kipyego implores us to dismiss the appeal and uphold the conviction and sentence by the trial court.

8. 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 that 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. We think the single issue for our consideration is whether there is conflict between section 297(2) and section 389 of the Penal Code.

9. To appreciate the import of the two provisions, we find it necessary to replicate them here. Section 297(2) provides;

> "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". (emphasis ours)

Section 389 on the other hand reads;

"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 ours)

10. The appellant contends that there is a conflict between the two provisions to the extent that they prescribe two different punishments for the same offence of attempted robbery with violence, namely, the sentence of death and imprisonment for a term not exceeding seven years. In the circumstances, the appellant argues, he should bear the less severe sentence, which is imprisonment for a term not exceeding seven years.

11. We concede that this Court has on certain occasions in the past opined that there is a conflict between the two sections. However, the Court thereafter clarified and affirmed that the two provisions are undoubtedly distinct. It comprehensively interpreted the two provisions and the previous decisions suggestive of conflict, in the case *Charles Mulandi Mbula -vs- Republic* [2014] eKLR (Per Kihara Kariuki (P), Kiage, J. Mohammed, JJA). The Court stated thus;

"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 vs. Republic (Criminal Appeal No. 39 of 2007), where we stated:

> '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 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)

12. We note that the High Court cited and followed the above interpretation, and correctly so.

13. Be that as it may, the Supreme Court has since changed the legal position on the mandatory sentence of death in *Francis Karioko Muruatetu & Anor -vs- Republic* [2017] eKLR. The Court held that mandatory sentences are unconstitutional for divesting courts of sentencing discretion to allow for individualized consideration of each offence on its own merits. Based on the Supreme Court's decision and taking into consideration the facts of this case, we are persuaded that it is just to interfere with the sentence.

14. We accordingly allow the appeal on sentence only and set aside the sentence of death. We substitute it with a term of twenty (20) years imprisonment to run from the date the appellant was first sentenced.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF DECEMBER, 2021.

P.O. KIAGE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR