Nkandika v Republic (Criminal Appeal E109 of 2022)
[2024] KEHC 11022 (KLR) (21 August 2024) (Judgment)

Neutral citation: [2024] KEHC 11022 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E109 OF 2022

LW GITARI, J

AUGUST 21, 2024

BETWEEN

KENNETH GITONGA NKANDIKA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arises from the proceedings in the Principal Magistrate's Court at Tigania Criminal Case No.E083/2022)

JUDGMENT

1. The appeal arises from the proceedings in the Principal Magistrate's Court at Tigania Criminal Case No.E083/2022 where the appellant was charged with grievous harm contrary to Section 234 of the Penal code. The particulars are that on 13/5/2019 at around 10.00 Hours at Kamaroo Sub-Location within Meru County, willfully and unlawfully did grievous harm to Ayub Mutwiri. The appellant was arraigned in court on 21/1/2022 and he denied the charge. A full trial was conducted and in the end the appellant was found guilty, convicted and sentenced to serve ten (10 years imprisonment.

2. The appellant was aggrieved by both conviction and sentence and filed this appeal based on the following grounds:-

    1. The court proceedings of 13th May, 2019 (the proceedings) are incurably defective in that they were based on an equivocal plea which the Hon. Senior Resident Magistrate mistook for a plea of guilty.

    2. The learned Judge erred in law and fact that he failed to not inconsistencies and contradictory evidence adduced before court by the witnesses.

    3. The appellant was denied the right to have salient facts of the case narrated to him and to be given an opportunity to admit, deny or qualify the same.

4. The learned trial magistrate erred in law and facts that he did put into consideration that the appellant was not informed of the seriousness and magnitude of the sentence the case have if the appellant is found guilty of the offence.

5. The learned magistrate erred in facts and law that he failed to note that Mama Karema whose home the complainant alleged to have borrowed the allegedly weapons which was used by the appellant to assault the complainant did not appear in court to testify that she truly assisted the appellant with the said weapon.

6. The learned Judge erred in law by failing to observe the essential witnesses did not testify contrary to section 150 of Criminal Procedure Code.

The appellant prays that the appeal be allowed, the conviction be quashed and he be set at liberty.

3. The respondent opposed the appeal and prayed that it be dismissed.

4. The appeal was canvassed by way of written submissions.

The brief facts of the prosecution's case:

PW1 Ayub Mutuma testified that on13/5/2019 he was looking after a body who had been circumcised when he appellant went here while carrying a file which he used to sharpen a panga. The appellant then told PW1 that he was going to revenge since he had fought with the complainant's

Niece. The complainant then left unaware that the appellant was following him. All of a sudden the appellant hit the complaint three times with the flat side of the panga and when he turned the appellant aimed to cut his neck. The complainant blocked the blow with his arm and his arm was cut. He raised an alarm and neighbours went to his rescue and rushed him to hospital where he was treated. Geoffrey Muthomi (PW3) a clinical officer at Miathene Hospital examined the complainant (PW1) on a complaint of having been assaulted by a person who was well known to him on 30/9/2019. He found that his clothes were bloodstained and he had a deep cut wound exposing tendons. The injury was inflicted using a sharp object. He was treated. The degree of injury was grievous harm. He produced the P3 form as exhibit-1, treatment notes exhibit 2 and treatment card as exhibit -3.

5. The prosecution called Anjerine Muthoni (PW3) as an eye witness. She testified that on the material day at 10.00 a.m. the appellant took a panga from Karma to cut napier grass. The appellant sharpened the panga and said he would cut someone. He then cut the complainant on the hand and ran away. The appellant ran away with the panga. She told the court that she is related to the appellant as she is his aunt.

6. Adinasir of Nchiru Police Station testified that he received the report from the complainant who alleged that the accused confronted him for no reason and cut him on the right hand inflicting a deep cut then ran away. Later on 19/1/2022 the appellant was arrested by members of the public who took him to the Police Station on allegation that the broke a side mirror of a vehicle. PW4 recorded statements of witnesses then charged the appellant. The complainant was treated but his hand was permanently deformed.

7. The appellant upon being placed on his defence opted to keep quiet.

8. In his considered Judgment, the learned trial magistrate found that the charge was proved beyond any reasonable doubts and he convicted him then sentenced him to serve ten years imprisonment.

Appellant's Submissions:

He contends that the trial magistrate erred by failing to inform him that he was supposed to cross-examine witnesses. He relies on Section 208(3) of the Criminal Procedure Code which provides that –

> "If the accused person does not employ an advocate, the court shall at the close of the examination of each witness for the prosecution, asked the accused whether he wishes to put any questions to that witness and shall record his answer."

9. The appellant submits that the testimony of PW2 did not corroborate the testimony of the complainant. It is also his submission that crucial witnesses were not called. He relies on the Court of Appeal decision in David Mwingiria –v- Republic (2017) eKLR:

Respondent's Submissions:-

They addressed grounds 1, 2, 3 and 4 together and submit that the prosecution proved the ingredients of the charge of grievous harm beyond reasonable doubts, reliance placed on Pius Mutua Mbui –v- Republic (2021) eKLR which are:-

a. The victim sustained grievous harm.

b. The harm was caused unlawfully.

c. The accused caused or participated in causing the grievous harm.

On the ground that the charges were framed up, it is submitted hat the appellant has not demonstrated that he had a grudge with the complainant. Further that when he was given a chance to cross-examine, he did not raise the issue. On sentence the respondent submits that it was not excessive as the maximum penalty is life imprisonment. He relies on Wangema -v- Republic (1971) E.A 493. He also relies on Peter Mwandime –v- Republic (2022) eKLR where the court upheld a sentence of fifteen (15) years for the offence of grievous harm. That the learned trial magistrate considered relevant factors that the complainant suffered trauma and will have to live with a permanent disability of a deformed right hand.

10. On the issue of his defence it submitted that the trial magistrate followed the laid down procedure under Section 211 of the Criminal Procedure Code and he chose to keep quiet. That the appellant is not truthful when he says that his defence was rejected.

Analysis and Determination:

This is a first appeal and this court has a duty to re-evaluate all the evidence tendered before the learned trial magistrate and come up with its own independent finding while bearing in mind that it had no opportunity to see the witnesses when they testified and leave room for that. See Okeno-v- Republic (1972) E.A 32.

11. In this appeal he issue for determination which arises is whether the charge against the appellant was proved beyond any reasonable doubts.

The appellant was charged with Grievous Harm Contrary to Section 234 of the Penal code (Cap 63 Laws of Kenya). The section provides as follows:-

> " Means any harm which amounts to a maim or dangerous harm or seriously or permanently injuries health or which is likely to so injure health or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane sense."

In the case cited by the respondent Pius Mutua Mbuvi-v- Republic (supra) laid down the ingredients of grievous harm which include that grievous harm was caused on the victim through an unlawful act of the person accused. This constitutes the criminal liability of the offence which is the actus reus and the mensrea of the offence.

12. The mensrea is whether the appellant unlawfully and intentionally caused grievous harm. The offence of grievous harm becomes complete when a person intentionally and unlawfully assaults another and causes him grievous harm. The respondent in this case relied on the evidence of PW2 who produced a P3 from which shows that the appellant had deep cut wound on the right hand exposing tendons. He classified the injury as grievous harm. The respondent called the complainant who testified that it is the appellant who inflicted the injury on the right hand after he sharpened the panga and cut while alleging that he had beaten his niece. The testimony of PW1 that it was the appellant who cut him was corroborated by PW2 who was an independent witness. The offence was proved in broad-day and there was no possibility of mistake. The appellant escaped with a panga only to be arrested later after committing another crime. The appellant was at large from 19/5/2019 to 19/1/2019 to 19/1/2022 when he was arrested, a period close to three years. The evidence tendered by the prosecution proved that the nature of the injury led to the destruction of permanent disabling of the external as well as internal organ as defined under Section (4) of the Penal Code. The deep cut, with injury to the tendons which was caused with a sharpened panga was caused with intention to cause grievous harm.

This court finds that all the ingredients of the offence of grievous harm were proved against the appellant. He was identified as the person who cut the complainant inflicting an injury and the medical evidence in the P3 produced as exhibit -1 shows that the injury occasioned was grievous harm.

Grounds of Appeal:

The appellant contends that the plea was unequivocal which was mistaken as a plea of guilty. The court finds this ground as misplaced and not supported by the record as the appellant denied the charge and a full trial was conducted and final Judgment was passed by the learned trial magistrate.

The appellant contends that the evidence was contradictory and inconsistent. I have carefully considered the testimony of PW1 & 3 and I found that it was consistent on all material particulars that the accused cut the complainant on the right hand using a panga. The inconsistencies and contradictions are minor and not on material particulars. Such minor contradictions and inconsistencies are best ignored. See Twehangane Alfred- v- Uganda (Court of Appeal Criminal Appeal No.139/2001 (2003 UGCA) cited with approval by the Court of Appeal (Kenya) in Erick Onyango Ondeny –v- Republic (2014) eKLR

The appellant submits that a crucial witness was not called. Section 143 of the *Evidence Act* provides that:

> " No particular number of witnesses shall in the absence of any provision of law to the contrary be required for the prove of any act."

The prosecution has the duty and discretion to call such witnesses as may be necessary to prove a case. They are under no obligation to call a multiplicity of witnesses to prove a particular fact. The court may however fault the prosecution if they fail to summon witnesses where the evidence tendered is barely enough or where some wrong or ulterior motive is shown. This is what the Court of Appeal stated in David Mwingirwa –v- Republic, (2017) eKLR

The question is whether the evidence of the witness alleged by the appellant one Mama Karema whose home the appellant borrowed a panga is a crucial witness.

It is my view that failure to call Mama Karema was not fatal as the respondent had adduced sufficient evidence, well corroborated and proved that the appellant was armed with a panga which he used to cut the complainant. Failure to prove where the appellant got the panga is a none issue. Finally the appellant submits that the learned trial magistrate failed to inform him of his right to cross-examine the witnesses. Article 50(2) (k) provides that:

> " Every accused person has the right to fair trial, which includes the right- to adduce and challenge evidence."

The right is buttressed under Section 208 of the Criminal Procedure Code (supra. It is an issue of rights to a fair trial which under Article 25 of *the Constitution* shall not be limited.

I have carefully perused the record. I note that throughout the proceedings, after each witness testified he was given an opportunity to cross-examine the witnesses. The appellant is being dishonest by stating that he was not informed of his right to cross-examine the witnesses. The ground is without merits. The allegation that he had a grudge with PW4 is an afterthought as it was not put to him during cross-examination.

Sentence:

The appellant submits that the sentence was harsh and excessive.

13. Section 234 of the Penal Code, (supra) provides that a person convicted for the offence of grievous harm shall be sentenced to imprisonment for life. Thus life imprisonment is the maximum sentence. This court can only interfere with the sentence if it is shown that the trial court took into account an irrelevant factor or that it took into account an irrelevant fact or that in all the circumstances of the case the sentence was harsh and excessive. The court should also always bear in mind that sentencing is an exercise of discretion by the trial court which the appellate court should not interfere with unless it shown that the exercise of that discretion was not done judiciously. See Wanjema -v- Republic (1971) EA 493.

    The record shows that the learned magistrate considered the mitigation by the appellant and the impact of the offence committed by the appellant that he will live with deformity for the rest of life. My view is that these were relevant facts which the learned trial magistrate took into account to determine the sentence to impose on the appellant. The sentence of ten years out of a possible life imprisonment was not excessive or harsh. The only issue I take with the sentence is that the learned magistrate failed to take into account the period spent in custody awaiting trial as provided in mandatory terms under Section 333(2) of the Criminal Procedure Code, it provides:

    > " 333(2) Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1)has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

The record shows that the appellant was arrested on 19/1/2022 and remained in custody upto 28/6/2022 a period of five (5) months and seventeen (17) days. The sentence should have been reduced by that period to take into account the time spent in custody. See Abolfath Ahamed & Another –v- Republic (2018) eKLR.

Conclusion:

For the reasons stated I find that the appeal has no merits. I order as follows:

1. The appeal is dismissed
2. The sentence shall be reduced by Five (5) months & 17 days to account for the period he spent in prison awaiting trial as required under Section 333(2) of the Criminal Procedure Code.

DATED, SIGNED AND DELIVERED AT MERU THIS 21ST DAY OF AUGUST 2024.

L.W. GITARI

JUDGE

21/8/2024

Appellant present virtually from Meru G.K. Prison

Ms Mukangu S/C for DPP

The Judgment read out in virtually this 21/8/2024.

L.W. GITARI

JUDGE