Wagula v Republic (Criminal Appeal 39 of 2023)
[2024] KEHC 13663 (KLR) (31 October 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CRIMINAL APPEAL 39 OF 2023

RC RUTTO, J

OCTOBER 31, 2024

BETWEEN

EMMANUEL GITONGA WAGULA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the judgment in the Chief Magistrate Court at Thika by Honourable M. Kurumbu, in Criminal Case No.6725 of 2018 on 16{{^th}} May 2023)

JUDGMENT

A. Introduction

1. The appellant was charged and convicted of the offence of causing grievous harm contrary to Section 234 of the *Penal Code*. The particulars of the offence were that on the 1st of October 2018, at Mugutha area in Juja Sub-County within Kiambu County, he unlawfully did grievous harm to one Jason Andrew Ndirangu Njoki.

2. The Appellant pleaded not guilty to the charge. After hearing the case, the trial court found him guilty, convicted him and sentenced him to pay a fine of Kshs 200, 000/= and in default to serve 1 year imprisonment.

3. Being aggrieved by the decision of the trial court, the Appellant lodged this appeal on the following grounds, that: -

    a. The whole trial offended and disregarded the fundamental rights of the Appellant regarding fair trial as enshrined under Article 50 of the *Constitution* of Kenya 2010;

b. The Learned Magistrate erred in fact and in law in holding that the prosecution had proved the charge beyond reasonable doubt hence erroneously convicting the Appellant against the weight of the evidence.

c. The Learned Magistrate erred in fact and in law in convicting the Appellant without sufficient evidence of positive identification and/or recognition.

d. The Learned Magistrate erred in law and in fact in disregarding the defence of alibi tendered by the Appellant and which was sufficiently corroborated by two independent witnesses.

e. The learned trial magistrate misdirected herself by relying on extraneous matters not part of the evidence tendered by the witnesses hence arriving at the wrong decision.

f. The learned trial magistrate erred both in fact and law by shifting the burden of proof to the Appellant and thus failing to give the benefit of doubt to the Appellant thereby arriving at an unjust decision.

g. The learned trial magistrate misapplied and/or failed to apply sound sentencing Policy as set out in our jurisdiction thereby meting out a sentence that was extremely harsh in the circumstances.

h. The learned trial magistrate without justification disregarded the pre-sentence probation report which was favorable to the Appellant.

i. The Learned Trial Magistrate failed to consider the Appellant's mitigating circumstances hence the sentence was unlawful.

B. Prosecution's case

4. Before the trial court, the prosecution case was as follows: PW1, Jason Andrew Ndirangu, the complainant, testified that on 1/10/2018, at about 3.00pm, while he was a student at Kenyatta University, he met Juliana Watetu who took him to a house where they found a child. That Juliana locked the door and ominously told him, "This will be bad." That the appellant then emerged from the bedroom and instructed Juliana and the child to leave, after which he locked the door. PW1 stated that he had met the appellant before and believed the appellant suspected him of having an affair with Juliana. PW1 testified that the appellant questioned his presence in the house, to which he explained. That the Appellant then took his phone, scrolled through his messages. Thereafter, he attacked him, hitting him in the mouth causing him to bleed. PW1 stated that he tried to leave the house, but his efforts were unsuccessful as the door was locked.

5. PW1 further testified that at approximately 6p.m., the appellant opened the door for someone but forgot to lock it, providing PW1 an opportunity to escape. However, the appellant pursued him, caught up with him outside the gate, and continued attacking him while shouting "Thief! Thief!". During the altercation, the appellant struck PW1's face and mouth and bit off a portion of his left ear. PW1 testified that he shortly lost consciousness. Upon regaining consciousness, he fled to seek assistance from his friend, Edwin Kimani (PW3). PW1 testified that he reported the incident and was subsequently issued with a P3 form and treatment notes, marked as PMF1 (a) and (b), respectively.

6. PW2, Peter Musyoka, testified that PW1 borrowed his phone to call a friend and informed him that he was going to meet that friend. Later Edwin Kimani called him and reported that PW1 was at his house and badly hurt. He testified that when he arrived, he found PW1 bleeding heavily; his ear had

been bitten off, and he had injuries around his right eye. He stated that PW1 had told him he had been assaulted by Emmanuel whom he did not know.

7. PW3, Edwin Kimani, testified that on 1/10/2018, at approximately 8 p.m., PW1 knocked on his door. Upon opening it, he observed that PW1 appeared frightened, he had injuries; and he informed him he had been assaulted by someone.

8. PW4, Samuel Gichuki Igogo, a clinical officer, produced the P3 form and treatment notes as PExhibit 1 (a) and (b). He testified that the history provided by PW1 indicated that he had been assaulted by someone known to him. PW1 presented a broken upper incisor, a bite on the upper ear with a portion missing, and bruises on his knees. The injuries were approximately one day old.

9. PW5, the investigating officer, PC Julius Mbingi No. 100894, stated that the initial report was recorded at Ruiru Police Station, and PW1's statement was documented and referred to Mugutha Police Post. After the P3 form was completed, the appellant was arrested. PW5 observed that PW1 had injuries to his ear and upper incisors and claimed that the appellant had assaulted him. He indicated that Juliana was implicated in the incident; however, she refused to provide a statement.

C. Defence case

10. The appellant gave sworn evidence and called 2 other witnesses. He testified as DW1 and stated that he had never seen the complainant before and only recognized him in court. His defense was that on 1st October 2018, he resided at his farm in Njeri. On that day, he went to his Wamagana farm with his workers, farm veterinarian, and a client to whom he was selling livestock. He stated that he sold some of his livestock and did not leave Njeri. DW1 asserted that he did not know the complainant and did not assault him.

11. He further testified that on 2nd October 2018, while at Juja, the police arrested him, no statement was taken from him neither was he informed of the reason for his arrest until he appeared in court on 3rd October 2018.

12. DW2, Julius Wanjau, a veterinary officer, testified that on 1/10/2018, he was in Tetu, Nyeri, with Dr. Gitonga, the appellant, and farm workers. He stated that they were involved in selling cows, and Dr. Gitonga arrived at approximately 11 a.m. On cross-examination, he stated that he did not possess any evidence to substantiate his presence at the farm on the material day or to prove that he was a veterinary officer. He acknowledged that Dr. Gitonga was his employer until his arrest and clarified that his only relationship to the accused was as a former employee.

13. DW3, George Muriu Muthee, testified that on 1/10/2018, he went to Tetu, Nyeri, to buy cows from the appellant and spent time with him on the farm from midday until 5 p.m. On cross-examination, DW3 admitted that he had no evidence to prove that he was in Nyeri with the accused on 1/10/2018 from 11 a.m. to 5 p.m.

14. At the close of the defence case, the prosecution made an oral application to recall a witness to rebut the alibi defence. The court granted this application, clarifying that the opportunity was limited to rebutting the alibi and did not reopen the prosecution's case. The court noted that the defence would also be given the opportunity to cross-examine the recalled witness.

15. Ultimately, the prosecution did not recall the witness and proceeded to close their case. Subsequently, both parties were directed to file submissions, and a judgment date was issued in court.

D. The Appeal

16. The appeal is as set out in the earlier paragraphs of this judgment. By consent of the parties, the appeal was disposed by way of written submissions. As at the time of writing of this judgment, only the Appellant had filed his submissions dated 13/5/2024.

Appellant's Submissions

17. The Appellant has raised two key issues: whether the conviction and sentencing are safe, and whether the Learned Magistrate erred in disregarding the Appellant's alibi defence.

18. The Appellant submitted that he presented an alibi defence and called two witnesses, to support this defence. However, that the court dismissed the alibi, which he submits is contrary to the principles of criminal law procedure and practice. He maintains that this alibi evidence was not rebutted by the prosecution and that the Learned Magistrate appeared to have favored the prosecution's case. He relied on the case of *John Ochieng Ogira v Republic* [2022] eKLR where the court held that, "In view of the contradictions in their evidence, the alibi defence of the accused was not displaced. He ought to have been acquitted.....".

19. The appellant submitted that the state did not prove the charge against him to the required standard. That none of the prosecution witnesses established a connection between him and the offence of grievous harm, as none of the witnesses were eyewitnesses to the incident. The Appellant argues that it is illogical for the complainant to assert that he was attacked inside an apartment while no neighbors heard any noise or altercations. Furthermore, he submitted that the Investigation Officer did not visit the scene of the crime to ascertain whether the alleged incident occurred in the specified apartment.

20. Regarding the safety of the sentencing, he submitted that the sentence imposed is excessively harsh, considering the circumstances surrounding the alleged offence. He asserted that the court failed to consider the pre-sentence report which was favorable to him. Furthermore, the Appellant notes that prior to sentencing, the trial court, in blatant disregard of established procedures, ordered the complainant to be compensated in the sum of Kshs 500,000, despite the fact that this is not a civil matter. The Appellant indicates that at the time of sentencing, he had raised Kshs 400,000, which was paid to the complainant, who confirmed this on 12/5/2023.

21. Consequently, the Appellant requested that the court allows the appeal as prayed. He relies on the case of *John Mwita Nchore v Republic* [2014] eKLR which held that, "The evidence of the prosecution has too many loose ends which lead me to conclude that the conviction of the Appellant is unsafe. I therefore allow the appeal, quash the conviction and sentence. The Appellant is set free unless otherwise lawfully held."

E. Analysis and determination

22. Outrightly, there is a matter that needs addressing in limine. In this matter, the Respondent, ordinarily represented by the Office of Director of Public Prosecution (ODPP) have not filed submissions. Thus, the appeal has no response to it. This begs the question, should the appeal be allowed as unopposed and/or conceeded? The answer is in the negative. While the ODPP has obviously abrogated its duty, which is a great breach of the constitutional mandate bestowed to it, to prosecute all criminal matters,

this Court has a fundamental duty to do justice. In *Odhiambo v Republic* [2008] KLR 565, the court stated:

> " The court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to clear and fresh scrutiny and re-assess it and reach its own determination based on evidence. (See also *Norman Ambich Mero & Another v Republic* (Nyeri Criminal Appeal No. 279 of 2005).

23. Consequently, this Court will proceed to consider the appeal on its merit, notwithstanding the lack of the Respondent's input.

24. This being a first appeal, this Court has a duty to reconsider and re-evaluate the evidence adduced before the trial court and make its own independent conclusion. It should however give regard to the fact that it has neither heard nor seen the witnesses testify. See the cases of *Pandya v R* {1957} EA 336; *Ruwalla v R* {1957} EA 570 and Kisumu Criminal Appeal No. 28 of 2009 *David Njuguna Wairimu v. Republic* [2010] eKLR where the Court of Appeal held that:

> " the duty of the first appellate court is to analyse and re- evaluate the evidence which was before the trial court and itself come to its own conclusion on that evidence without overlooking the conclusion of the trial court. There are instances where the first appellate court may depending on the facts and circumstances of the case, come to the same conclusion as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

25. Having considered the evidence adduced before the trial court for the prosecution, the defence, the grounds of appeal and the submissions filed by the appellant's counsel I discern the following two issues for determination: -

    a. Whether the Learned Magistrate disregarded the Appellant's alibi defence.

    b. Whether the sentence imposed on the appellant was manifestly excessive as to warrant interference by this court.

26. The case before this court, according to the complainant, is that he was assaulted by the Appellant. This evidence was corroborated by the evidence of PW2 and PW3, who confirmed that the complainant had visible injuries and that they assisted in taking him to the hospital. On the other hand, the Appellant presented an alibi defence, stating that he did not commit the offence as he was in Nyeri at the time, accompanied by DW2 and DW3.

27. This court notes that the trial court addressed itself to the issue of alibi as raised by the Appellant during trial. The trial court observed that the issue of alibi did not feature during the hearing of the witnesses. The court stated that usually, "where an accused person's hypothesis is that he was not at the scene, that issue comes out prominently during cross examination especially of the complainant, the investigating officer and the arresting officer(s) and eye witness(es) (if any). In this instance, the issue of him being in Nyeri or elsewhere never came up." Further in examining the totality of the evidence adduced the trial court held that "the point that will determine the truthfulness or otherwise of the alibi is what happened on 3/10/2018 when the accused was arraigned in court. This is what was recorded by Hon A.M Maina (SPM) as the words of the accused; "I suffered injury on my jaw and right leg. I was attended

at ruiru District hospital but I am still unwell and I need medical attention." These words have the effect of completely destroying the accused persons defence. They mean the accused was at the scene of crime and was also injured; he had been treated at Ruiru District hospital between 1/10/2018 and 2/10/2018 when he was arrested; the issue if being at nyeri on 1/10/24 did not exist at the time of plea and therefore is a total afterthought."

28. The question that this Court has to determine is whether the Appellant raised a defence of alibi which the trial court disregarded. In considering this issue, this Court is cognizant that the prosecution always has the burden of disapproving an alibi where one is raised. This is a legal burden that can never be shifted to the defence. Hence allegations that an alibi was not considered has to be thoroughly examined.

29. Occasionally, the alibi defense may be raised 'late' in the day when the defence has already closed its case. Does it follow that the alibi stands? Not outrightly. Where an alibi is raised when prosecution has closed its case, like in this instant case, an application may be made and if allowed the prosecution granted a chance to rebut the alibi. In this case, we note that such an application was made and granted. However, the prosecution never recalled the witness it had indicated was to come and rebut the alibi. Does this mean an automatic acceptance of the alibi by a court? I do not think so.

30. Where an alibi is raised late in the day and the prosecution has no chance to rebut the same, it does not follow as a matter of course that the alibi stands. In such an instance, the trial court is under an obligation to weigh the alibi against the totality of the prosecution evidence. This position was emphatically stated by the Court of Appeal in Juma Mohamed Ganzi & 2 other v Republic [2005] eKLR as follows:

> "The trial Magistrate considered the case of each appellant separately. She weighed the defence of alibi of each appellant against the weight of the prosecution evidence. This is the correct approach where the defence of alibi is first raised in the appellant's defence and not when he pleaded to the charge – see *Wang'ombe v The Republic* [1980] KLR 149.

31. I note that in the instant case, while the prosecution failed to call the witness it intended, the trial court correctly directed itself in evaluating the alibi alongside the totality of the evidence on record, in particular, the appellant's own account when he was first arraigned in court on 3rd October, 2018. I have re-evaluated the record and find the appellant's defence could not dislodge the prosecution's case as given by PW1, PW2 and PW3. His 2 witnesses' testimony was shaken when they did not produce anything to confirm being with him on the material day. In particular, while DW3 stated that he went to buy cows from the appellant, he had no proof of such a transaction. The upshot is that I find that the appellant's defence was considered and correctly dismissed by the trial court having failed to dislodge the strong prosecution case against him. This ground of appeal fails.

32. Having addressed the issue of alibi, I find that the offence of grievous harm was proved to the required standard. The evidence of PW1 the victim was unshaken and while he was a single identifying witness, having warned myself on the dangers of relying on a single witness, (See the cases of *Ogeto v Republic* [2004] KLR 19 and *Roria v Republic* [1967] EA 583) I find that his testimony taken alongside that of PW2 and PW3 points to the appellant as the person who did grievous harm to him. He mentioned the appellant immediately to PW2 and the evidence on record show that he was locked in the house with the appellant/assailant for a considerable period of time, hence identification was proper. The evidence of PW4, the doctor confirmed the injuries as grievous, hence the trial court was right in convicting the appellant as charged.

33. Turning to the issue of sentence, the appellant was sentenced to pay a fine of kshs 200,000/- or in default to serve 1 year imprisonment. The Appellant paid the fine. In this appeal, he contends that the sentence was excessive. That the Court failed to consider that he had paid 400, 000 to the complainant.

34. It is trite law sentencing is an exercise of discretion and an appellate court will not interfere with that exercise of discretion unless it is shown that the same was exercised whimsically. The appellant was charged with the offence of causing grievous harm contrary to section 234 of the Penal Code. The sentence prescribed in law is life imprisonment. Is a sentence to pay a fine of 200, 000/= or in default to serve one year imprisonment excessively harsh. I do not find so. The sentence was properly meted out and I see no reason to interfere with it.

35. Lastly, the appellant argued that in sentencing him, the trial court failed to take note that the complainant had been given kshs 400,000/- as compensation. The jurisdiction of a criminal court to order for compensation on top of any sentence that it may mete out is well anchored in Statute and caselaw. In *Ian Ochieng Owaga v Republic* [2022] eKLR, the court held thus:

> "
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> " 15. Turning to the issue whether the learned trial magistrate erred in making an order for compensation in count 1, I am unable to agree with the applicant's submissions that the trial court lacked jurisdiction to make such an order and that orders for compensation can only be made in civil suits. I say so because Section 31 of the *Penal Code* expressly allows courts to order compensation in criminal cases in addition to or in substitution of any other sentence. For the avoidance of doubt, Section 31 of the *Penal Code* provides that:
>
> "Any person who is convicted of an offence may be adjudged to make compensation to any person injured by his offence, and the compensation may be either in addition to or in substitution for any other punishment."
>
> 16. As I held in *Francis Gachugu Njuguna v Republic*, [2021] eKLR, which has been cited by the applicant, Section 31 of the *Penal Code* must be read together with Section 175 (2) (b) of the *Criminal Procedure Code* which also provides for circumstances in which compensation can be ordered in criminal proceedings. The provision states as follows:
>
> "(2) A court which—
>
> a) .....
>
> (b) finds, on the facts proven in the case, that the convicted person has, by virtue of the act constituting the offence, a civil liability to the complainant or another person (in either case referred to in this section as the "injured party"),
>
> may order the convicted person to pay to the injured party such sum as it considers could justly be recovered as damages in civil proceedings brought by the injured party against the convicted person in respect of the civil liability concerned."

17. From the foregoing, there cannot be any doubt that courts have jurisdiction and discretion to order, in appropriate cases, compensation in criminal cases."

36. The upshot is that, I find that in ordering that the appellant compensates the complainant and further sentencing the appellant to a fine or in default 1 year imprisonment, the trial court fell into no error.

37. Ultimately, I find no merit in the appeal and it is hereby dismiss it in its entirety.

Orders accordingly.

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 31ST DAY OF OCTOBER 2024

For Appellant:

For Respondent:

Court Assistant: