Chirchir v Republic (Criminal Appeal E044 of 2023)
[2024] KEHC 15438 (KLR) (28 November 2024) (Judgment)

Neutral citation: [2024] KEHC 15438 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL APPEAL E044 OF 2023

RL KORIR, J

NOVEMBER 28, 2024

BETWEEN

ENOCK KIPKIRUI CHIRCHIR ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the Conviction and Sentence in Criminal Case Number E302 of 2022 by Hon. E. Muleka in the Senior Principal Magistrate's Court at Sotik)

JUDGMENT

1. The Appellant was charged with the offence of grievous harm contrary to section 234 of the Penal Code. The particulars of the charge were that on 1st April 2022 at Kaplekwa area in Sotik Sub-County within Bomet County, he unlawfully did grievous harm to Weldon Kirui by knocking him with a bolt nut on the left eye damaging the globe and the orbit.

2. The Appellant pleaded not guilty to the charge before the trial court, and a full hearing was conducted. The prosecution called four (4) witnesses in support of its case. At the conclusion of the Prosecution case, the court found a prima facie case against the Appellant and put him on his defence. The Appellant presented his defence and did not call any witnesses.

3. At the conclusion of the trial, the Appellant was convicted for the offence of grievous harm and sentenced to serve 15 years in prison.

4. Being dissatisfied with the Judgment dated 27th July 2023, the Appellant appealed against his conviction and sentence and relied on the grounds reproduced verbatim as:-

    i. That the trial Magistrate erred in law and fact by failing to realize that my right to a fair hearing under Article 50(2) of *the Constitution* was violated.

ii. That the trial Magistrate erred in law and fact by failing to realize that the Prosecution's case was not proved beyond reasonable doubt.

iii. That the Prosecution witnesses' evidence was marred with contradictions and discrepancies.

iv. That the sentence is harsh and excessive in the circumstances.

5. The Appellant filed further grounds of Appeal that are paraphrased as follows:-

i. That the trial Magistrate erred in law and fact by relying on the Prosecution's evidence which had inconsistencies and contradictions.

ii. That Prosecution failed to identify the Appellant as the perpetrator of the offence.

iii. That the evidence adduced was weak and immaterial hence the conviction was unsafe.

iv. That the trial Magistrate erred in law and fact when he rejected his alibi defence.

6. This being the first appellate court, I have a duty to re-evaluate the evidence on record and come to my own conclusion. See Peter M. Kariuki vs Attorney General (2014) eKLR.

The Prosecution's Case.

7. It was the Prosecution's case that the Appellant attacked Enock Kipkirui Rotich (PW1) with a rungu with a nut causing him damage to his eye. PW1 testified that he lost consciousness after the attack.

8. Vitalis Chesang (PW3) who was a clinical officer stated that he examined PW1 and found that he his left eye was bleeding. PW3 stated that he treated PW1 and sent him to have an x-ray on his head which showed the result of a fracture of the skull, causing him to refer PW1to Tenwek Hospital.

9. It was PW3's testimony that PW1 came back after a week and he had a bandage on his head. That the Discharge Summary from Tenwek Hospital showed that PW1 had undergone eye surgery. PW3 classified the degree of injuries as grievous harm.

10. No. 247338 PC Calvins Andoke (PW4) who was the Investigating Officer stated that after investigations, it became clear that on the material day, the Accused waylaid PW1 at around 11 p.m. and hit him. That PW1 was able to identify the Accused through his voice because they talked and he was familiar with the Appellant's voice.

The Appellant's case.

11. The Appellant, Enock Kipkirui Chirchir (DW1) denied committing the offence. He stated that on the material day, he was working in a hotel and thereafter went to sleep. DW1 further stated that PW1 stated that he was hit on the material day at 10 pm yet the doctor stated that PW1 was admitted on the material day at 2 p.m.

The Appellant's submissions

12. The Appellant submitted that the trial court erred when it relied on conflicting evidence from the Prosecution. That PW1's evidence that he was hit and lost consciousness was in contrast to the evidence that PW1 was taken to hospital by his mother, brother and Peter. The Appellant further submitted that it was not clear how the three people knew that PW1 had been attacked and needed help.

13. It was the Appellant's submission that it was doubtful that PW1 saw his attacker. That PW1 was not a truthful witness. It was his further submission that if PW1 recognised him by his voice, PW1 should have given his name to the people who rescued him.

14. The Appellant submitted that the attacker was not positively identified and this was a case of mistaken identity. That there was no source of light that would enable positive identification of the Appellant. He further submitted that visual identification in criminal law could cause a miscarriage of justice if it was not carefully tested.

15. The Appellant submitted that PW1 was his cousin and they had no grudge between themselves. It was his further submission that his alibi defence was meritious and the trial court had no cogent reason of dismissing the same. That he accounted for his movements on the material day.

16. The Appellant submitted that there was no direct or cogent evidence linking him to the commission of the offence. That he was being framed up. He further submitted that the only evidence that PW2 gave was that he went and woke up PW1's parents and that the said parents did not give any information regarding the attack.

17. It was the Appellant's submission that this court should allow his Appeal, quash his conviction and set aside his sentence.

The Respondent's submissions

18. The Respondent submitted that on the material day, after a disagreement with PW1, the Appellant took a rungu fixed with a nut and hit him on the head. That the medical evidence was contained in the P3 form and the clinical officer stated that PW1 suffered a skull fracture and lost all function in his left eye. They further submitted that the victim suffered grievous harm.

19. It was the Respondent's submission that even though the offence was committed at 10 p.m., the victim and the Appellant were cousins and the victim was able to identify the Appellant by his voice.

20. The Respondent stated that the Appellant gave unsworn testimony and gave a mere denial of the offence without raising any material doubts to their case. That in his testimony, the Accused placed himself on the scene. The Respondent urged this court to dismiss the Appellant's defence in its entirety.

21. It was the Respondent's submission that the maximum sentence for grievous harm was life imprisonment. That considering the fact that the victim completely lost function of his left eye, the sentence of 15 years imprisonment was legal, fit and proper having considered the circumstances of the case

22. I have read and considered the trial court record, the Petition of Appeal dated 10th August 2023, the Grounds of Appeal filed on 17th October 2024, the Appellant's written submissions filed on 17th October 2024 and the Respondent's written submissions dated 14th August 2024. The following issues arise for my determination:-

    i. Whether there were procedural issues affecting a fair trial.

    ii. Whether the Prosecution proved its case beyond reasonable doubt.

    iii. Whether the Accused had a plausible defence which cast doubt on the Prosecution case.

    iv. Whether the sentence was harsh and excessive.

Whether there were procedural issues affecting a fair trial.

23. It was a ground of the Appeal that the Appellant's right to a fair hearing under Article 50(2) of *the Constitution* of Kenya had been violated. Article 50(2) of *the Constitution* of Kenya provided:-

Every accused person has the right to a fair trial, which includes the right—

(a) to be presumed innocent until the contrary is proved;

(b) to be informed of the charge, with sufficient detail to answer it;

(c) to have adequate time and facilities to prepare a defence;

(d) to a public trial before a court established under this Constitution;

(e) to have the trial begin and conclude without unreasonable delay;

(f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(i) to remain silent, and not to testify during the proceedings;

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

(k) to adduce and challenge evidence;

(l) to refuse to give self-incriminating evidence;

(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;

(n) not to be convicted for an act or omission that at the time it was committed or omitted was not—

(i) an offence in Kenya; or

(ii) a crime under international law;

(o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;

(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

24. The Appellant was not specific on which of the rights above was infringed upon by the trial court. I have however keenly gone through the trial court record and noted that the Appellant took plea on 7th April 2022 which plea was unequivocal. I have also noted that the Appellant participated in the trial where he cross examined all the four Prosecution witnesses and when he was placed on his defence, he

adequately presented his defence. There was no evidence to indicate that the Appellant's right to a fair trial had been violated and I dismiss this ground of Appeal.

Whether the Prosecution proved its case beyond reasonable doubt.

25. Section 234 of the Penal Code provided for the offence of Grievous Harm as follows:-

> Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.

26. Section 4 of the Penal Code defines grievous harm as follows: -

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

27. I am persuaded by Kemei J. in Pius Mutua Mbuvi vs Republic (2021) eKLR, where he held that:-

> " .....For the appellant to be convicted of the offence of doing grievous harm c/s 231 as read with section 234 of The Penal Code, the prosecution had to prove each of the following essential ingredients beyond reasonable doubt;
>
> a. The victim sustained grievous harm.
>
> b. The harm was caused unlawfully.
>
> c. The accused caused or participated in causing the grievous harm.....

28. In John Oketch Abongo vs Republic (2000) eKLR, the Court of Appeal held that:-

> " Whether or not grievous harm or any other form of harm is disclosed must be a matter for the court to find from the evidence led and guided by the definition in the Penal Code. A court will be assisted by medical evidence given in coming to the conclusion on the nature and classification of the injury. In many cases the courts have accepted and gone by the findings and opinions in the medical evidence. But, in appropriate circumstances, the court is at liberty to form its own opinion, having regard to the evidence before it as to the nature and classification of the injury."

29. In the present case, the victim Weldon Kipngeno Kirui (PW1) testified that the Appellant came and asked for his phone. That after using his phone, the Appellant asked PW1 for work and when PW1 could not give him work, the Appellant hit him with a nut on his left eye. PW1 stated that he was treated at Tenwek Hospital and where he underwent eye surgery and was released after four days.

30. Vitalis Chesang (PW3) who was the clinical officer stated that he examined PW1 on the material day at around 10 p.m. and PW1 was bleeding on the left eye. That he (PW3) sent PW1 for an x-ray and when the x-ray showed that he had suffered a fractured skull, he referred PW1 to Tenwek Hospital. PW3 further stated that PW1 came back from Tenwek Hospital where he had undergone surgery on his left eye. PW3 produced treatment notes as P.Exh1, Discharge Summary as P.Exh 2 and the P3 form as P.Exh 3 in support of his testimony. PW3 classified the degree of the injuries as grievous harm.

31. When PW3 was cross examined, his testimony on PW1's injury remained uncontroverted.

32. I have looked at the exhibits above and I have noted that the Appellant underwent eye surgery at Tenwek Hospital. This corroborated the testimonies of the victim (PW1) and the clinical officer (PW3) that PW1 suffered an eye injury and was operated on at Tenwek Hospital where he was admitted for four days. He lost one eye and suffered disfigurement and permanent disability. According to the definition of grievous harm as contained in section 4 of the Penal Code, I agree with PW3's classification of PW1's injury as grievous harm. I am also guided by John Oketch Abongo vs Republic (supra), where the Court of Appeal held as follows:-

> " We are satisfied that the complainant's injury amounted to grievous harm as defined in the Penal Code. The definition contains several ingredients of what constitutes grievous harm. We are of the opinion that the presence of any one of these ingredients would suffice to disclose grievous harm. Here, we are satisfied that the complainant's injury did amount to dangerous or serious injury to health both of which are ingredients contained in the definition."

33. Regarding the identity of the Appellant as the perpetrator of the offence, the Court of Appeal in the case of Cleophas Wamunga Vs Republic(1989)eKLR expressed itself as follows:-

> " Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant wholly depends or to a great extent on the correctness of more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification".

34. It was evident that the offence was committed at night. The Court of Appeal in the case of Nzaro vs Republic (1991) KAR 212 held:-

> " Identification/recognition at night must be absolutely watertight to justify conviction".

35. In this case, the victim (PW1) testified that it was the Appellant who hit him on his left eye with a nut on the material day and after he was hit he lost consciousness. When PW1 was cross examined, he reiterated that it was the Appellant who had hit him as he saw him and that he heard his voice as the Appellant asked for his (PW1) phone. Further, the Appellant was his cousin. In his submissions, the Appellant admitted in his submissions in this Appeal that PW1 was his cousin.

36. PW1 stated that he also identified the 3rd Appellant by voice. The Court of Appeal in Dishon Litwaka Limbambula vs Republic (2003) eKLR held:-

> " Normally, evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused person's voice, the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it....."

37. As stated above, the Appellant and the victim (PW1) were cousins. In my view, the Appellant and the victim were familiar with each other and the identification evidence was more of recognition than

identification. In the case of Peter Musau Mwanzia vs Republic (2008) eKLR, the Court of Appeal expressed itself as follows:-

> " We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident....."

38. The victim (PW1) also positively identified the Appellant in the dock. In the case of Muiruri & Others vs Republic (2002) KLR 274, the court held that:-

> " .....We do not think that evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if satisfied that on the facts and circumstances of the case the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identification."

39. Flowing from the above, there is no doubt in my mind that the Appellant was well known to the victim (PW1). The Appellant confirmed in cross-examination that there was no grudge between him and PW1. It is this court's view that PW1 had no reason to frame the Appellant. It is my finding therefore that the Appellant was positively identified as the perpetrator of the offence by the victim.

40. Having established that PW1 had suffered grievous harm which was unlawful and the positive identification of the Appellant as the perpetrator, it is my finding that the Prosecution proved its case against the Appellant beyond reasonable doubt.

Whether the Accused had a plausible defence which cast doubt on the prosecution case.

41. I have considered the Appellant's defence in which he denied committing the offence. He stated that on the material day, he worked at a hotel and was not there when the victim (PW1) was attacked as he was asleep.

42. It was a ground of the Appeal that the trial court did not consider his alibi defence. In the case of R vs Sukha Sign S/O Wazir Singh & 7 Others (1939) 6 EACA 145, the former Court of Appeal for Eastern Africa held that:-

> " If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards, there is naturally a doubt as to whether he has not been preparing it in the interval, secondly, if he brings it forward at the earliest possible moment, it will give prosecution an opportunity of inquiring into the alibi and if they are satisfied as to its genuineness, proceedings will be stopped".

43. It is trite that once the Appellant raised an alibi defence, the onus was on the Prosecution to displace the defence of alibi upon such defence being raised in the trial. This was the holding in the Court of Appeal case of Victor Mwendwa Mulinge vs Republic (2014) eKLR as:-

> " It is trite law that the burden of proving falsity, if at all, of an accused's defence of alibi lies on the prosecution".

44. Further, the Court of Appeal in the case of Wangombe Vs Republic (1980) KLR 149 held as follows:-

> " ..... In Ssentale vs. Uganda (1968) EA 365, 368 (Sir Udo Udoma CJ).... said that a prisoner who puts forward an alibi as an answer to a charge does not thereby assume any burden of proving that answer; it is a misdirection to refer to any burden as resting on the prisoner in such a case; for the burden of proving his guilt remains throughout the prosecution. We agree, we have ourselves said so on more than one occasion. . . .The defence of alibi was put forward for the first time some four months after the robbery when the appellant made his unsworn statement in court. Even in such circumstances the prosecution or the police ought to check and test the alibi wherever possible".

45. The Appellant's defence of alibi (that he was sleeping on the material night) was raised at the defence hearing and not at the beginning of the trial thus denying the Prosecution an opportunity to verify the alibi. I have also noted that the issue of the alibi was not put across the Prosecution witnesses during cross examination. The defence was therefore an afterthought by the Appellant.

46. It is my conclusion that the Appellant's defence was a mere denial and an afterthought and did not displace the Prosecution case which I have already found proven.

Whether the sentence was harsh and excessive

47. Sentencing is at the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. An appellate court would be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice, and or that the court acted upon a wrong principle. See Bernard Kimani Gacheru vs Republic (2002) eK

48. The penal section for the offence of grievous harm is provided by Section 234 of the Penal Code which states that:-

> Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.

49. It was the Appellant's submission that the 15 year sentence was harsh and excessive. In his mitigation before the trial court, the Appellant still denied committing the offence and further stated that he was young.

50. I have considered the circumstances of the case and the nature of injuries occasioned to the victim (PW1) which condemned him to the loss of one eye. It is my view that the 15 year prison sentence was proportional to the grievous harm suffered by the complainant who was a victim of the Appellant's unlawful and violent act. I shall however temper justice with mercy and consider a reduction of his sentence owing to the Appellant's young age.

51. In the end, I affirm the conviction. The Appeal succeeds only to the extent that the Appellant's sentence is reduced from 15 years to 10 years. The sentence shall run from 7th April 2022 being the date of his arraignment and pre-trial custody.

Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED THIS 28TH DAY OF NOVEMBER, 2024.

R. LAGAT-KORIR

JUDGE

Judgment delivered in the presence of the Appellant acting in person, Mr Njeru for the Republic and Siele (Court Assistant).