



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Ratia (Criminal Appeal 18 of 2019)
[2023] KEHC 672 (KLR) (31 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 672 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CRIMINAL APPEAL 18 OF 2019
F GIKONYO, J
JANUARY 31, 2023**

BETWEEN

REPUBLIC APPELLANT

AND

PARDIO OLE RATIA RESPONDENT

*(From the acquittal by Hon. T. Gesora (S.P.M) in
Narok CMCR No. 799 of 2016 on 21st March 2019)*

JUDGMENT

- [1] The trial court acquitted the respondent on a charge of grievous harm contrary to section 234 of the [Penal Code](#).
- [2] Being dissatisfied with the said acquittal the appellant preferred an appeal vide petition of appeal dated April 4, 2019. The appellant has set out 4 grounds of appeal as follows;
- i. That the learned trial magistrate erred in law and in fact by disregarding eye witness evidence adduced by the prosecution witness.
 - ii. That the learned trial magistrate erred in law and fact in making a finding that the prosecution did not prove their case beyond reasonable doubt.
 - iii. That the learned trial magistrate erred in law and in fact by placing undue weight on the evidence of the defence when the learned magistrate made finding in his judgment that the respondent lied to the court that there was no dispute between the victim and the respondent.



- iv. That the learned trial magistrate erred in law and fact when he used the defence of alibi which relates to May 18, 2016 to acquit when the prosecution evidence was in relation to the offence which took place on May 19, 2016.

[3] The appeal was canvassed by way of written submissions.

Appellant's submissions.

- [4] The appellant submitted that the learned trial magistrate by failing to regard the eyewitness testimony. PW1, PW2, and PW3 witnessed the incident and could positively identify the respondent and the other people who attacked and injured the complainant.
- [5] The appellant submitted that the prosecution proved their case beyond any reasonable doubt. PW1, PW2, PW3, and PW4 were consistent and corroborated each other.
- [6] The appellant submitted that DW1 was lying to the court but the learned trial magistrate still put weight in his evidence and hence erred in law and fact. DW1 and DW3 contradicted each other on the land dispute issue. DW1 denied the existence of a quarrel over shamba while DW3 confirmed there was a land dispute but had been resolved.
- [7] The appellant submitted that the learned trial magistrate erred in law and in fact by relying on the defence of alibi which relates to May 18, 2016 to acquit while the prosecution evidence was in relation to the offence which took place on May 19, 2016.
- [8] In the end the appellant submitted that the acquittal was not safe and urged this court to uphold the appeal.

Respondent's submissions

- [9] The respondent submitted that the evidence adduced against the accused is weak and therefore the prosecution has not met the required threshold of beyond reasonable doubt.
- [10] The respondent relied on the following authorities;
- i. Section 215, 352, and 382 of the *Criminal Procedure Code*.
 - ii. Section 231 and 234 of the *Penal Code*.
 - iii. *Pius Arap Maina Vs Republic* [2013] eKLR.
 - iv. *Stephen Nguli Mulili Vs Republic* [2014] eKLR
 - v. *DPP vs woolmington* [1935] UKHL 1
 - vi. *Ortese Yanor & others vs the State* [1965]
 - vii. *Ricky Ganda Vs the State* [2012]
 - viii. *Uganda vs Sebyala & others* [1969] EA 204
 - ix. The *supreme court of Nigeria in Bakare Vs State* [1987]
 - x. *JMN vs republic* [2022] KLR



Analysis And Determination.

Court's duty

- [11] As a first appellate court, this court is obligated to re-evaluate the evidence afresh, and make its own conclusions, except, bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See *Okeno vs. Republic* [1972] E.A 32
- [12] I have considered the grounds of appeal, the evidence adduced in the lower court, and the respective parties' submissions. I find the main issues for determination to be;
- i. Whether the prosecution proved its case beyond a reasonable doubt.

Elements of the offence of grievous harm

- [13] According to section 243 of the [Penal Code](#):
- Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.
- [14] Accordingly, a conviction for the offence of causing grievous bodily harm, requires proof beyond reasonable doubt: (1) that the complainant suffered grievous harm; (2) which was unlawfully occasioned by the appellant. Positive identification of the assailant is therefore essential element.

Grievous harm

- [15] 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.
- [16] PW1, the complainant, stated that four people came to him Pardio Ratia, Salash Ratia, Ritei Ratia, And Robbert. The four people surrounded him and stoned him. They came throwing clubs at him. He tried to run away but was hit with a club on his right hand.
- [17] PW2 testified that he found the complainant holding his hand.
- [18] PW4, a clinical officer, gave his testimony that he examined the complainant and observed that he had pain in the right upper limb, it was swollen and tender. X-ray showed a fracture of the right humerus bone. He signed the p3 form on 20/5/2016 and concluded that the degree of injury was grievous harm. He produced the P3 form as P Exh1 and clinical notes as P Exh 2.
- [19] From the evidence, I find that the complainant sustained injuries amounting to grievous harm.

Was the grievous harm caused by the appellant?

- [20] PW1, the complainant, stated that on 19/5/2016 at around 11.00 a.m. he was taking care of his cattle when suddenly four people came to him that is Pardio Ratia, Salash Ratia, Ritei Ratia, And Robbert. The four people surrounded him and stoned him. The respondent had a spear and the others had machetes. The respondent told the others to ensure that the complainant does not escape. They came throwing clubs at him. The complainant told them not to kill him but Salash said that day would be



his last. He tried to go back seeking a way to escape but they came near, he turned to run away but was hit with a club on his right hand.

- [21] PW2 testified that he found the complainant holding his hand and was told that it was the respondent and the others who had attacked him. The complainant pointed at the attackers as they were leaving.
- [22] PW3 stated that on 19/5/2016 he was called by the complainant but the network was bad and he heard screams. He then ran to the complainant's home and was told that he was attacked and upon enquiring who did that he saw other people running. He saw Ole Ratia Padio, Salash, Ritei, and Ben.
- [23] In his defence, DW1 stated that on 18/5/2016 he was at a funeral at Kimondi. He slept there and the following day he went to Ntulele to his farm. He arrived at 5.00p.m and was not at the scene of the offence. All the other alleged attackers are his sons except Robert who is his worker. He stated that he had no reason to attack PW1. He claimed he is old and cannot run. He denied that there is a land dispute because the land had already been subdivided. He produced a photo of him at the funeral. He says that the following day they were together till 2.00 p.m when they parted and he headed to Ntulele.
- [24] DW3 a brother-in-law to DW1 testified that on 18/5/2016 they were at the funeral of his father-in-law and DW1 spoke at the funeral. DW1 was of the same age set as his father-in-law so he was left counseling the family. He confirmed that there had been a quarrel over land but it had been solved though the complainant said he was injured. He claimed that it was not possible that DW1 did it because he was at the funeral.
- [25] PW2 and PW3 stated that they were at the scene and they saw DW1 get away with the others. DW3 stated that it was not possible that DW1 was at the scene because he was at the funeral on 18/5/2016. And the following day he left for Ntulele.
- [26] PW5 stated that DW1 was spotted at Ntulele and arrested there. He further stated that he could not tell who exactly hit the complainant and neither could PW1 since he was ambushed.
- [27] PW1 in his testimony stated that DW1 had a spear and a club. He claimed that Salash is the one who hit him. As he was running away, they hurled clubs at him. DW1 hit him with a club. But he could not tell exactly who hit him.
- [28] From the testimony of PW1, one cannot tell exactly that the respondent hit him. PW2 and PW3 arrived at the scene as the attackers were leaving. They, therefore, did not witness the happenings. It is possible that the respondent was present at the scene with his sons and he left for Ntulele after the incident but neither the eye witnesses nor PW1 could tell that DW1 was the one who hit PW1.
- [29] The prosecution bore the onus of unravelling the alibi either by checking it out or through other credible evidence. The alibi was that he went for a funeral on May 18, 2016 and remained there the following to give advice to the family as he was in the same age set with the deceased. This alibi was specific and the prosecution needed to unravel it especially because, only the complainant claimed he positively identified the respondent as the person who hit and injured him. Before a court finds a conviction solely on evidence of a single identifying evidence, it must caution itself of the dangers inherent in such course, by ensuring evidence available is assuring on the identity of the assailant. Evidence by the prosecution show there were four individuals who allegedly were hitting the complainant with clubs. Therefore, it was absolutely necessary that evidence of identification be fortified that the respondent was amongst the persons who, and hit the complainant, injuring him. Such was the evidence that would have eliminated the possibility of mistaken identity and sanctify the court in putting aside the alibi.



[30] On scales of measure of the kind of evidence adduced, the prosecution did not dislodge the alibi that the respondent was away for a funeral and remained there until the following day, which is the relevant or material day herein.

[31] From the foregoing, although the complainant sustained injuries, failure to unravel the alibi places doubt on whether the respondent was present and inflicted the injuries. Any such reasonable doubt created in the prosecution's case must be resolved in favor of the accused. Therefore, there was no positive identification of the respondent as the assailant. The complainant's evidence has gaps that are required to be filled up. However, the court wonders why the persons who are alleged to have injured the complainant have not been arrested and charged.

[32] The prosecution did not, therefore, prove beyond reasonable doubt that the appellant unlawfully occasioned grievous harm upon the complainant contrary to Section 234 of the Penal Code.

[33] Consequently, I find the appeal lacks merit. I dismiss it.

[34] It is so ordered

**DATED, SIGNED AND DELIVERED AT KILGORIS THROUGH MICROSOFT TEAMS
ONLINE APPLICATION THIS 31ST DAY OF JANUARY 2023**

.....

F. Gikonyo M.

Judge

In the Presence of:

1. Ms. Koina for the Appellant
2. Kilele for the Responden
- 3. Mr. Kasaso - CA**

