Chepyegon v Republic (Criminal Appeal E028 of 2019)
[2023] KEHC 17901 (KLR) (27 January 2023) (Judgment)

Neutral citation: [2023] KEHC 17901 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KABARNET

CRIMINAL APPEAL E028 OF 2019

SM MOHOCHI, J

JANUARY 27, 2023

BETWEEN

DAVID KIPCHOGE CHEPYEGON ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against the Judgement, conviction and sentence in CM'S Cr No. 564 of 2018 - Kabarnet, Republic v David Kipchoge Chepyegon, delivered by N.M. IDAGWA, R.M. delivered on 05.04.2019.)

JUDGMENT

Introduction

1. The Appellant was charged with the offence of causing grievous harm contrary to section 234 of the Penal Code. The particulars of the offence were that on the 25th day of July, 2017, at around 2:00pm in Kitibei Village in Baringo North Sub-county within Baringo County, unlawfully did grievous harm to Cyrus Kiprop Kiptui.

2. He was tried and convicted by Hon. N.M. Idagwa, (RM) and sentenced to serve fifteen (15) years imprisonment for the offence. Being dissatisfied with the said judgement, on 18th April, 2019 he lodged the Appeal herein setting out six (6) grounds of appeal challenging both conviction and sentence.

3. The Appellant wants the appeal allowed, conviction and sentence set aside and he be set at liberty.

4. He subsequently sought leave to amend his ground which application was allowed to have four (4) grounds as here under;

    i. That, he is a first (1st) offender.

    ii. That, the sentence meted upon him was harsh, unjust and in human.

iii. That, he has been in prison for a long time.

iv. That, he is remorseful, repentant and reformed and has learnt the incarceration behind bars.

5. He thus pleaded with the court for his appeal for mitigation, setting aside the sentence, substituting the same with an ideal and proportionate term of sentence and/or set any other orders as it may deem fit.

Prosecution Case

The prosecution called a total of 5 (five) witnesses in support of the charges.

6. PW1 Purity Kiptui Kimonda, testified that on 25/7/2017, she was grazing cows at home when she heard screams, and scuffle and witnessed the Appellant cutting the complainant (her brother) with a 'panga' on the eye and forehead. She told the Court that Appellant is well known to her as he comes from her home area.

   On cross-examination, PW1 told the Court that the Appellant had called the complainant to go his home help arrange firewood for burning charcoal. That the complaint had left with the Appellant. She reiterated that she saw the Appellant cut the complainant and denied the allegation that the complainant had been cut with an iron sheet.

7. PW2 Janet Chemtai, testified that the complainant is her son and that on the material date at around 2:00pm, he returned home and had been injured on one side of the forehead and the intervention she and others undertook to avail medical attention to the complainant at Kabartonjo hospital where he was given first aid and an ambulance was called and it took him to Baringo County Referral Hospital where an X-ray was done. She told the court that they were advised to take the complainant to Moi Teaching Referral Hospital but they did not have the funds.

   She testified that the complainant was admitted for one month four days of which the first six days he was in a coma unable speak and that she later reported the matter to Kabarnet police station where she was referred to Kabartonjo police station

   On cross-examination, PW2 reiterated that on the material date the Appellant came to her home at 6:00am in the company of his brother to request the complainant to go and assist him with work. She also reiterated that the Appellant had cut the complaint with a panga.

8. PW3 Cyrus Kiprop Kiptui, the complainant testified that on 25/7/2017 at about 9:00am, the Appellant came to their home and requested him to go help him with arranging firewood for burning charcoal. He testified that the Appellant is their neighbour and that they had agreed that he would pay him Kshs.200/= a day.

   He told the Court that when they arrived at the Appellant's home, he met Isaiah who was the Appellant's uncle. That the Appellant told him that he was to work with Isaiah.

   He testified that after showing them what to do, the Appellant left and they worked up to 1:00pm when the Appellant came back and told them to leave as the work was done. That when he asked the Appellant to give him his money, the Appellant refused.

   He testified that he then took the Appellant's axe until he paid him his money back. He told the court that he then begun walking ways and after about two steps, he heard footsteps behind him and when he turned, he saw the Appellant behind him with a panga and he immediately cut him on the head with panga. He told the Court when he saw the that Appellant was going to kill him, he run home.

   He testified that on arrival home he was bleeding heavily. That he found his mother and his sister Purity. He told the Court that he fell and down and did not know what happened next and when he woke up,

he found himself at Baringo Referral Hospital and that his entire body was in pain. He was taken to theatre and stayed in hospital for about a month. That after he was discharged, he recorded a statement at Kabartonjo police station and a P3 Form was filled in hospital.

He testified that after the incident the Appellant disappeared and when he resurfaced, he was arrested by the Assistant-Chief.

On cross-examination, the complainant reiterated that the incident had occurred on 25/7/2017 after he had completed arranging the Appellant's firewood.

9. PW4 Robert Kikwai, testified that he is a Clinical Officer from Kabartonjo Sub-county hospital and has been working there for more than seven years. He produced the P3 Form and the discharge summary for the complainant.

He testified that the discharge form shows that the complainant was admitted on 26/7/2017 with a history of being assaulted and sustained a penetrating head injury which was ascertained by CT scan. That the fractured skull was repaired and various laboratory tests were conducted on the complainant and that the complainant was treated with antibiotics. He further testified that the complainant was scheduled to be attending out-patient clinics. On examining him, the Clinical Officer observed that the patient had a cut wound on the head, thorax, abdomen, upper limbs and lower limbs were normal. That the approximate age of the injury was 3 months. He told the Court that the probable type of weapon was sharp.

On cross-examination, PW4 reiterated that he was the one that filled the P3 Form indicating that the complainant was first treated at Kabarnet Referral Hospital and the weapon used was a sharp object occasioning injury that he classified as maim.

The Appellant prayed that the complainant be recalled for cross-examination.

On further cross-examination PW3 told the Court that there was no written agreement between him and the Appellant stating that they were to work together on that material date. PW3 denied the allegations that he stole the Appellant's iron sheet. He reiterated that the Appellant had asked him to go help him prepare trees for burning charcoal. He told the Court that the Appellant had injured him while on the road near his gate. He reiterated that the Appellant never paid him for the work done that day. He also reiterated that the Appellant was to pay him Kshs.200/= for the day. he denied allegations that he had threatened the Appellant.

10. PW5 No. 75116 PC Jackson Kariuki, testified that he attached to Kabartonjo patrol base. He told the Court that on 28/7/2017 he received a report and booked a complaint from woman called Mrs. Samo that her son had been assaulted and was admitted at Kabarnet Hospital and that after the complainant was discharged he recorded the complainant's statement, issued the P3 Form which was filled in hospital.

He told the Court that he searched for the Appellant who had escaped his home and that on 1/7/2018, the Appellant was arrested by an AP police of Kipraman. He then charged the Appellant.

On cross-examination, PW5 reiterated that it was AP Officers who had arrested the Appellant. He told the Court that the Appellant had used a panga to cut the complainant but the said panga was never recovered.

Defense Case

11. At the close of the prosecution case, the Appellant was placed on his defence. He testified on oath that he is a power saw operator and was coming from work and on arriving at a shopping center he bought food and medication then when he entered a hotel to borrow money to swallow the said drugs,

the Assistant-chief came and slapped him dragged him on the ground and stepped on his testicles and handcuffed him from the back then took him into a bush and beat him up and forced him to plead guilty in this case.

12. He told the Court that he had blindfolded and covered him so that he couldn't scream. He told the Court that he further forced him to urinate in a tin and drink it before taking him to Kipsarman division and then to Kabarnet police station where he was charged

Appellant's Submissions

13. The Appellant submitted that the prosecution failed to establish a prima facie case against him. The Appellant further submitted that the prosecution failed to discharge the onus of proof to the required standard so as sustained the charge that was preferred against him.

14. Regarding the witnesses, the Appellant submitted that PW1, PW2 and PW3 all gave different names to the victim. He submitted that PW1 referred to the complainant as "Silas Kiprop", PW2 referred to the victim as "Taraus Kiptui" whereas the victim himself referred to himself as "Cyrus Kiprop Kiptui". The Appellant argued that due to the said contradictions their testimonies were not credible.

15. The Applicant submitted that the charge sheet in this matter was defective. The Applicant contended that in the charge sheet, he was charged with unlawfully causing grievous harm whereas in the P3 Form that was produced by the doctor, he opined that the injuries caused were maim.

16. The Appellant contended that all the key witnesses in this matter were family members. The Appellant faulted the prosecution for not presenting the neighbours who were also crucial witnesses in this matter. The Appellant maintained that the evidence by a sister, mother and brother should not be taken to be truthful but rather as a form of set up.

Appellant Written Submissions

Introduction

17. The appellant opened his appeal urging that the prosecution failed to establish a Prima Facie case against him in the offence set out in the charge sheet, In Republic Vs Thomas Patrick Gilbert Cholmondeley CR. Case No. 55 of 2006 the accused person sentenced to serve 8 months for the offence of murder contrary to section 204 of the penal code and in so doing the same court put into consideration the period he had spent under the pretrial custody.

18. It was the prosecution case that on the 25/7/2017 the appellant assaulted one Cyrus Kiprop Kiptui by cutting him using a panga on the head. Presented five witnesses to prove its case and he was found guilty of the offence and sentenced to 15 years imprisonment.

19. However, being aggrieved and dissatisfied with the decision of the trial court, he sought leave to appeal and mitigation based on the following grounds.

Supplementary Grounds of Mitigation

Ground One and Two Expounded Together

20. That he is a first offender and pleaded not guilty to the charge, however he was found guilty is contented with the conviction but seek for review of sentence pursuant to section 362, 364 (1) b and 365 of the CPC chapter 75 laws of Kenya in reliance to Article 25 C and 50 P and A of *the constitution* of Kenya 2010. That, this court be pleased to reduce my term of sentence to proportionate terms.

21. He submits that the offence was not deliberate and the same was caused by social psychological forces, that the sentence impost to me is too harsh, in human, unjust and unfair. He craves for leniency in reduction of his term of sentence to a lesser term or as the court shall dem fit he relies on; -

    i. Moses Kitui Barasa v Republic ELD HCCR Pettion No. 7 of 2018

    ii. Robert Kimutai Cheruiyot, ELD HCCR APP No. 195 of 2019.

    iii. Ben Pkiech Loyatum v Republic ELDPettion No. 24 of 2019

Ground Three and Four Combined

22. The Appellant Submits that he has served his imprisonment since the year 2017and his incarceration has deeply humbled him. He urges his remorsefulness as justification for a light sentence on me in regard to the powers bestowed to it completed under section 345 of the CPC chapter 75 in reliance to Article 23 (1), 159 (2) a & b, 165 (3) a, b & d (6) (7) and 258 (1) of *the constitution* 2010 and allow me reflect on my life and reflect to an appropriate direction. court be further guided by;

    i. Michael Kathewa Laichena & 8 others v Republic [2018] EKLR.

    ii. Wycliff Wangusi Mafura v Republic [2018] EKLR.

Respondent'submissions

23. The state orally opposed the appeal by arguing that;Corroboration of evidence by the complainant and PW3evidence was corroborated by the evidence of PW1 (an eye witness)That Section 382 of the Criminal procedure code provides that the charge sheet should be brief and clear with particulars.As to whether the Appellant's defense case was considered by the trial court can be seen as from page 10 and that the court was satisfied,On the question of sentence, the appellant was charged with the offense of causing grievous harm which carries life sentence and considering the serious injuries inflicted upon the complainant and the gravity of the offence the state submitted that the sentence was commensurate and lenient to the appellant.The state urged the court not to disturb the conviction against the appellant and accordingly dismiss the appeal

Issues for Determination

24. Having considered the evidence on record, the amended grounds of appeal as couched in the petition of appeal, the submission both in support and opposition of the appeal, I take the view that the issues for determination are as follows:

    a. Whether the prosecution proved the offence of grievous harm beyond reasonable doubt?

    b. Whether the conviction and the sentence imposed by the trial court was sound and safe?

Findings, Analysis and determination

25. This Court has a legal obligation to re-analyze, re-evaluate and assess the evidence adduced in the lower court so as to form its own conclusion(s) in line with the settled principles established in the case of Okeno v Republic [1972] E.A, 32 at pg 36 EA 424,

    "An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellant's court own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower

court's findings and conclusions; it must make its own findings and conclusions. Only then can it decide whether the magistrate's findings can be supported. In doing so, it should make an allowance for the fact that the Trial Court has had the advantage of hearing and seeing the witnesses.''

26. The Court has scrutinized the entire record of Appeal, proceedings before the Trial court and exhibits produced which reveals the appellant was a neighbor to the complainant and would regularly engage him in casual work for pay there was no prior bad blood between the appellant and his neighbors in fact he is described by one witness as "our family friend for a long time.

27. The Scrutiny reveals further that the Appellant and the complainant differed over payment of a daily wager of kshs 200/- and in the exchange, the complainant forcefully took away the appellants axe in lieu of the daily wager and walked away only for the appellant to suddenly cut him with a panga on his head.

28. It is noteworthy that prior to this attack PW1 overheard the verbal confrontation between the complainant and the Appellant see (Line9&10 of pg 8) record of appeal- "I heard screams, one saying "unajua nipe pesa yangu nitakuua", which would infer one party was demanding money with threat to kill, I would infer the words to have been used on the appellant by the complainant.

29. The court equally makes a general note that the trial court at the end of the trial framed two issues namely; Was the complainant injured? And Who injured him?

The Law

30. Chapter 22 (Offences Endangering Life and Health) of the Penal Code, Section 231 provides that; Any person who, with intent to maim, disfigure or disable any person, or to do some grievous harm to any person, or to resist or prevent the lawful arrest or detention of any person –

    a. unlawfully wounds or does any grievous harm to any person by any means whatever; or

    b. unlawfully attempts in any manner to strike any person with any kind of projectile or with a spear, sword, knife or other dangerous or offensive weapon; or

    c. unlawfully causes any explosive substance to explode; or

    d. sends or delivers any explosive substance or other dangerous or noxious thing to any person; or

    e. causes any such substance or thing to be taken or received by any person; or

    f. puts any corrosive fluid or any destructive or explosive substance in any place; or

    g. unlawfully casts or throws any such fluid or substance at or upon any person, or otherwise applies any such fluid or substance to the person of any person, is guilty of a felony and is liable to imprisonment for life.

31. It is this courts view that Chapter 22 (Offences Endangering Life and Health) of the Penal Code, appreciates the multi-prong measurement test of intent and gravity of injuries inflicted, and thus, a crime committed purposefully, would carry a more severe punishment than if the offender acted knowingly, recklessly, or negligently and on the other hand, a crime inflicting bodily injuries, would result into a felony or a misdemeanor based on seriousness of the injuries, to be determined by health science.

32. On the first limb, the burden of proving the offence of grievous harm beyond reasonable doubt, lays squarely with the prosecution. To sustain conviction in an offence of grievous harm, the Prosecution must prove the following multipronged test;

a. that the Appellant was with intent to maim, disfigure or disable any person, or to do some grievous harm to any person; and

b. unlawfully wounded or caused grievous harm to the complainant or the victim by any means whatsoever.

33. The interpretation to these terms is encapsulated in terms of Section 4 of the Penal Code. 'Harm' is defined as any bodily hurt or disease or disorder whether temporary or permanent. 'Grievous harm' is defined as harm which amounts to maim or Dangerous harm, or which seriously or permanently injures health or is likely to so injure health. It also refers to permanent disfigurement or any permanent serious injury to any external or internal organ, membrane or sense. 'Dangerous harm' is said to refer to endangering life. Last but not least, 'maim' means destruction or permanent disabling of any external or internal organ or membrane or sense.

34. The Court finds that, there exists a clear distinction between maim and grievous harm to the extent of injury as classified, that would aggravate the criminal sanction upon conviction and that proof of maim does not necessarily mean proof of grievous harm.

35. The Court has soul-searched as to why the prosecution never preferred the appropriate charge as per the classification of injury occasioned upon the complainant or if it was an oversite, as to why the trial court erred in failing to note the classification as per the documentary evidence?

36. This court finds that the prosecution failed in leading any evidence to satisfy the first limb of the test and show case the mental intent of the appellant at the time of committing the offence.

37. The court finds the contrary to have been the case that, the Appellants submissions as a 1st offender, a good neighbor who in a reckless explosion of emotion, anger and rage attack an employee he has refused to pay ksh 200/- and the employee in turn threatens to kill the appellant and has taken the appellant's axe in lieu of his wager and is walking away, when the appellant retaliates and attack and cuts the employee with a panga a single blow without talking.

38. The conviction and sentence appealed against is a felony under Section 234 of the Penal Code which has a mental intent to be proved as a critical requirement the entire evidence produced in the trial court the mental intent of the appellant at the time of committing the offence.

39. The Issues framed by the trial court erroneously assumed the classification of injury of "maim" is one and the same thing as classification of injury of "grievous harm". Exhibit 2 pg 2 was explicit on the classification of Maim as the injury and PW Robert Kikwai a clinical officer testified in his evidence in chief and stated "the injury sustained was maim" See (Pg 28 lines 4&5) this expert testimony was uncontested.

40. The Trial Court erroneously analyses the evidence of PW4 by stating that PW4 "he formed an opinion that the nature of injury was grievous" see (Pg 48 lines 3&4) this assertion unfortunately is unsupported by evidence both documentary and oral.

41. The Court finds the conviction to have been unsafe thereby influencing the sentence and had the charges of committing maim been have been preferred, the appellant would have faced misdemeanor related charges. The offences relating to assaults, whether or not causing harms of varying degrees, are provided for in sections 234, 250, 251, 252 and 253 of the Penal Code. Common assault is provided for in section 250, it essentially refers to an assault that leads to no injury or harm or to minimal injury or harm. Section 251 provides for assaults that cause actual bodily injury or harm. Both are misdemeanors, attracting a maximum penalty of five (5) years imprisonment.

42. Having considered all the issues raised in the appeal, I am of the considered view that the conviction of the appellant in Kabarnet CMCCRC No. 564 of 2018 was unsafe and unsound and thus the entire trial court trial fails, the court shall not look into the exercise of discretion in sentencing thereon.

43. This Court shall allow the appeal, quash the conviction of the appellant of the offence of causing grievous harm contrary to Section 234 of the Penal Code and set aside the sentence imposed on him of fifteen (15) years imprisonment.

44. The appellant shall be forthwith set free from prison custody unless he is otherwise lawfully held.

JUDGEMENT READ, SIGNED AND DELIVERED IN OPEN COURT BY;

.....

MOHOCHI S.M (JUDGE)

27.1.2023

In the Presence of;

Appellant in Person

Mr. Abwajo for the Republic (virtual)

Mr. Kenei C.A