Njagi v Republic (Criminal Appeal E045 of 2022)
[2023] KEHC 257 (KLR) (25 January 2023) (Judgment)

Neutral citation: [2023] KEHC 257 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E045 OF 2022

LM NJUGUNA, J

JANUARY 25, 2023

BETWEEN

MICHAEL NJAGI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Conviction and Sentence in Embu Chief Magistrate Court Criminal Case Number E1310 of 2021 by Hon. J. Ndengeri S.R.M)

JUDGMENT

1. The appellant was charged with the offence of causing grievous harm contrary to section 234 of the *Penal Code*. The particulars were that on September 23, 2021 at Mukuria village in Embu North sub county within Embu county unlawfully did grievous harm to Judy Mutito Njiru.

2. The appellant having pleaded not guilty to the charge, the trial commenced and the prosecution called five witnesses. Upon being put on his defence, the appellant opted to keep silent. The learned magistrate found him guilty, convicted and sentenced him to 6 years imprisonment.

3. It is that judgment that provoked the appeal herein by the appellant claiming that:

    i. The ingredients of the offence were not properly proved.

    ii. The learned magistrate erred in both law and fact in finding that the appellant remained silent as of right when actually he had not waived that right.

    iii. The appellant was not given a chance to defend himself.

    iv. The language used during the trial was not recorded.

    v. The honourable magistrate did not consider the appellant's mitigation.

4. The appellant urged the court to allow the appeal, quash the conviction and set aside the sentence and consequently set him at liberty forthwith.

5. I have considered the evidence adduced before the trial court both for the prosecution and the defence; I have also considered the grounds of appeal and I find that the main issue that this court has been called upon to determine is whether the appeal herein has merits.

6. This being a first appeal, this court is under a duty to reappraise the evidence, subject it to an exhaustive scrutiny and draw its own inferences of fact so as to come to its own independent conclusion, as to whether or not, the decision of the trial court can be upheld. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination, (see *Pandya v Republic* [1957] EA 336) and the appellate court's own decision on the evidence. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, [See *Peters v Sunday Post* [1958] EA 424].

7. The appellant herein was charged with grievous harm contrary to section 234 of the *Penal Code*. For the appellant to be convicted of the offence of doing grievous harm under section 234 of the *Penal Code*, the prosecution had to prove each of the following essential ingredients beyond reasonable doubt;

   i. The victim sustained grievous harm.

   ii. The harm was caused unlawfully.

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

8. Section 234 of the *Penal Code* provides 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.

9. 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;

10. Having quoted verbatim the meaning of grievous harm as enumerated above, this court will proceed to consider the evidence on record to determine whether the same supported the offence with which the appellant was convicted and thereafter sentenced. Of importance to note is the evidence of PW2, Dr Phyllis Muhonja who testified that upon examining the complainant, she recorded *inter alia* that the complainant's head was swollen 8x8 cm, there was left eye scleral hemorrhage, right lower limb – reddened and swollen, right side of the lower lip missing and from the P3 form produced in court detailing the injury sustained by the complainant.

11. The complainant who testified as PW1 led evidence to the effect that on the material day, the appellant was beating Raymond Baraka for allegedly having eaten two cakes belonging to the child who had been left by the appellant's second wife. That the complainant intervened when the appellant held Raymond Baraka from behind and hit him on the wall. To this end, it is clear that the appellant herein caused or participated in causing the grievous harm to the complainant who was his wife.

12. Whether or not grievous harm or any other form of harm was caused, must be a matter for the court to determine from the evidence adduced and being guided by the definition in the *Penal Code*. The court will normally be guided by medical evidence when coming to the conclusion on the nature and degree of the injury. In many cases, the courts have accepted and gone by the findings and opinions in the medical reports/P3 forms. 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. In the case herein and from the P3 Form, the degree of injury sustained by the complainant was assessed as maim. [see Court of Appeal decision in the case *John Oketch Abongo v Republic* [2000] eKLR].

13. In this case, the court has carefully considered the medical evidence and the findings made by the PW2 in the P3 form. Further, the court has also considered the definition of grievous harm as contained, not only in the *Penal Code*, but also in the P3 form and the court forms a humble view that the complainant's injury amounted to grievous harm as defined in section 4 of the *Penal Code*. The court ultimately finds that all the ingredients of the offence of grievous harm were proved against the appellant beyond reasonable doubt.

14. On the ground that the trial magistrate erred when she found that the appellant remained silent as of right when actually he had not waived that right and further that he was not given a chance to defend himself, it is notable from the record that section 211 was explained to the appellant after a prima facie case was established and the appellant placed on his defence, and he chose to remain silent.

15. In *John Wakabiu Cini v Republic* [2016] eKLR the court stated as follows: -

> " The appellant chose to remain silent willingly and he had the right to do so. However, the fact that he chose to remain silent in my view had no bearing in the case because the burden is always on the prosecution to prove their case against an accused person beyond any reasonable doubt and not to perhaps leave some gaps to be filled by the defense. An accused person does not assume any burden to prove his innocence."
>
> "It is therefore immaterial whether an accused person chooses to remain silent or not upon being called to defend himself pursuant to section 211 of the Criminal Procedure Code. What is material is that the prosecution is under a duty to prove their case and upon proving their case, an accused person cannot be heard to turn back and say the case was not proved because he chose to remain silent or that he did not understand the proceedings when all along the trial evidence abound like in this case that he had fully participated. See JUlius Kipsang v R [2014] eKLR & R v Antony Nganga Wanjiku & anor [2014 eKLR). The appellant in this case cannot say he did not understand the language used at the trial and I find no basis for that."

16. In reference to the above therefore, it was incumbent upon the prosecution to prove its case even if the appellant chose to remain silent throughout the whole trial. My view is that it was inconsequential for the appellant to choose to remain silent given that the prosecution managed to prove its case against him. [See the Court of Appeal decision in *Kahindi v Republic* (Criminal Appeal 33 of 2018) [2022] KECA 493 (KLR) (1 April 2022); also *Akiba Karisa Kazungu v Republic* [2021] eKLR].

17. On the ground that the language used during the trial was not recorded. I have carefully perused the record which shows that during the plea, the charges were read to the appellant who denied the facts in kiswahili language. A plea of not guilty was entered and the matter set down for hearing. That notwithstanding, the court noted the languages used were english/kiswahili. Be that as it may, the court record shows that during trial, the appellant cross-examined almost all the prosecution witnesses and he responded to various applications made by the prosecution. When the appellant was put on his

defence, it is clear from the record that the appellant understood the proceedings and participated fully. There is nothing on record to indicate that the appellant complained of any language barrier. This court finds that once the trial court record shows that the accused person actively participated in the trial; he cannot be heard to say that he was prejudiced for simple reason that the language used in the trial is not indicated in the proceedings and in any case, the same is untrue. [see *Simon Wambua Mukewa v Republic* [2016] eKLR]. The upshot of the foregoing is that this ground of appeal lacks merit and I dismiss it.

18. On the ground that the appellant was convicted without an option of fine, the court notes that the penalty section does not provide for the option of a fine and the court thus rejects that ground of appeal.

19. Whereas it is not in dispute that the complainant suffered harm, the appellant clearly is a first offender. Generally, where a person is said to be a first time offender, the court usually imposes a lesser sentence as opposed to when the accused was a repeat offender. This view is subject to the discretion of the court as other factors such as aggravating circumstances are put into consideration in deciding the appropriate sentence in the circumstances of each case.

20. The trial court in its discretion, imposed a sentence of 6 years which is reasonable and this court does not see any reason to disturb the finding of the trial court on the sentence.

21. As a consequence of the above, I find that the appeal herein has no merit and the same is hereby dismissed.

22. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 25TH DAY OF JANUARY, 2023.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent