Nesa v Republic (Criminal Appeal E013 of 2021)
[2023] KEHC 18709 (KLR) (26 May 2023) (Judgment)

Neutral citation: [2023] KEHC 18709 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E013 OF 2021

JN ONYIEGO, J

MAY 26, 2023

BETWEEN

ABDIRIZAK MOHAMED NESA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence delivered on 9th day of April 2021 by A.K. Mokoros Principal Magistrate Wajir)

JUDGMENT

1. The appellant herein was charged with the offence of Grievous harm contrary to Section 234 of the *Penal Code*. Particulars were that, on the 18th day of January 2021, at Wajir township, willfully and unlawfully did grievous harm to Temenech Mana Kaba.

2. Count two, he was charged with the offence of being unlawfully present in Kenya contrary to Section 5(1)(j) as read out with Section 53(2) of the *Kenyan Citizenship and Immigration Act* No 12 of 2011. Particulars were that on the 19th day of January 2021, at Wajir East -sub-county within Wajir County, being an Ethiopian citizen was found in Kenya illegally and without any document warranting his stay in Kenya which was in contravention of the said Act. He however denied count one and pleaded guilty to count two consequences whereof he was convicted and sentenced to a fine of Ksh 20, 000 in default serve six months-imprisonment.

3. Having returned a plea of not guilty in respect of count one, the case proceeded to full trial with the prosecution calling a total of three witnesses. On his part, the appellant tendered his unsworn defence and upon close of the trial, the court delivered its judgment on April 9, 2021 thus convicting him. He was subsequently sentenced to seven years-imprisonment on the same day.

4. Aggrieved by the conviction and sentence in respect of count one, the appellant lodged his appeal on April 22, 2021 and amended on February 21, 2022 citing six grounds as follows; that the broken tooth claimed to have been knocked out was not submitted in court as an exhibit; the medical examination could not hold as the stains of blood on the complainant's clothes were not fresh; there was no eye witness at the scene when the incident occurred; there was no tangible evidence to warrant a safe conviction; prosecution failed to prove its case beyond reasonable doubt and that, the trial court did not properly consider his defence.

5. During the hearing, the appellant merely adopted his amended grounds of appeal as his submissions.

6. On his part, Mr Kihara principal state counsel representing the respondent filed his submissions on June 1, 2022. Learned counsel urged the court to find that the complainant having interacted online regularly with the accused as her boyfriend for over five months prior to her being assaulted by the appellant during day time, she knew him very well. That she recognized him positively and that the circumstances were favourable hence there was no need for identification parade to be conducted. In that regard, the court was referred to the holding in the case of *Joseph Otieno oketch vs Republic* (2019) eKLR where the court held that where there is evidence of recognition, it is not necessary to conduct identification parade.

7. On the question that the evidence of the complainant was not corroborated, counsel submitted that it was not correct as the arrest of the accused was based on the description given to the arresting officer (pw3) by the complainant (pw1) who stated that she was attacked during day time by a person she had regularly communicated with on line. That there was evidence of her having lost her tooth as a result of the attack a fact corroborated by medical evidence produced by the clinical officer (pw2) and production of blood stained clothes by the investigating officer (pw3).

8. Regarding non-production of the tooth that was knocked out, counsel contended that it was not fatal. In support of that submission, the court was referred to the case of *Joseph Otieno Oketch v Republic* (supra) in which the court relied on the finding in criminal Appeal No 274 and 275 of 2009 at Eldoret in *Peter Okee Omukaga & another v Republic* (unreported) where the court of appeal held that non-recovery of stolen items did not in any way point to the innocence of the appellants.

9. In conclusion, learned counsel urged that the prosecution had proved beyond reasonable doubt that the complainant did sustain grievous harm occasioned by a known person in this case the appellant.

10. I have considered the record of appeal herein, grounds of appeal and parties' respective submissions. Issues that arise for determination are; whether the complainant was injured on the material day; if so, who injured her: whether there was positive identification.

11. The appellant was charged with the offence of causing grievous harm c/s 234 of the penal code which provides that;

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

12. Section 4 of the penal code goes further to interpret what grievous harm entails 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;

> " harm" means any bodily hurt, disease or disorder whether permanent or temporary".

13. This court being a first appellate court is duty bound to re-evaluate, re-assess and re-examine afresh the evidence tendered before the trial court and make or arrive at an independent decision or determination without losing sight of the fact that the trial court had the advantage of listening to, seeing and assessing the general demeanour of witnesses. See *Gitobu Imanyara & 2 others v Attorney General* [2016] e KLR, where the Court of Appeal stated that;

> "[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect"

14. Similarly, in *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] e KLR, the court emphasized on the duty of the first appellate court as follows;

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way"

15. The evidence of the complainant one Temenech Mana (PW1) erroneously indicated as pw2, is to the effect that on the material day, she was at Soko mjinga in company of a lady friend when a man she identified as the accused(appellant) confronted her asking her whether she was Temenech. That when she answered positively, the said man whom she recognized through his voice as the person she had previously engaged with over five months as a boy- friend through face book started beating her. That he hit her severally on the face, mouth, and eyes consequences whereof she lost one tooth (upper incisor) and bled.

16. She further stated that, she picked her tooth and reported to the police at Wajir police station from where she was referred to Wajir County hospital where she was treated and a p3 form filled by a clinical officer one Victor on whose behalf Thomas Nyagah (PW3) produced the p3 form confirming that pw1 reported having been injured by a known person and as a result lost her tooth. That her clothes were stained with fresh blood but were not torn. He further stated that one upper tooth was missing and another one loose. He assessed the age of injuries as one day and classified the degree of injury as grievous harm hence produced the p3 as Pex.no 1.

17. Pw3 the investigating officer told the court how he received a report from the complainant who reported that she had been assaulted by one Abdirazack Mohamed(appellant) a person known to her. That at the time she reported, she was bleeding from the mouth. That upon investigation, he got information that the suspect was hiding at a place known as Lanbib from where he arrested him and preferred the charges in question.

18. In his unsworn defence, the appellant denied the offence. He stated that the alleged lost tooth was not produced in court nor was it handed over to pw2 and pw3. He opined that the charges were malicious and a fabrication.

19. It is trite law that in a criminal case, the onerous legal duty to prove a case beyond reasonable doubt lie squarely with the prosecution. It does not shift to the accused person. See *Kiilu and another v Republic* [2005] e KLR and *Peter Wafula Juma and 2 others v Republic* [2014] eKLR where the court held that;

> " As I have already stated, the expression ''burden of proof'' entails two distinct concepts; ''legal burden of proof'' and ''evidential burden''. The two are different, and understanding the distinct application of each is essential. It is also important to understand the position of the law on burden of proof in criminal cases and civil cases; there is a marked difference especially on the legal burden of proof. We shall deduce that difference in the application of the legal burden from the sources I am going to quote below.
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> Legal burden of proof; does it shift?
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> According to Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14:
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> The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.
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> The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues".

20. In the instant case, the applicant claimed that prosecution did not prove its case beyond reasonable doubt. According to the evidence of pw1, she was attacked by somebody she knew before through his voice. She reported the incident to the police who referred her to the hospital where she was treated. A perusal of the p3 form produced as ex no1 revealed that the complainant had a missing tooth, adjacent loose tooth and stitched wound on the right orbital. On the status of the dress, it had fresh blood stains. This evidence was further corroborated by pw3 the investigating officer. From these set of evidence, there is no doubt in my mind that the complainant did sustain injuries on the material day.

21. As to whether failure to produce the lost tooth as an exhibit is fatal to the prosecution case, I do not think so. As long the rest of the evidence does point towards loss of a tooth on the material day, non-production of the same due to omission by the investigating officer does not mean that the complainant did not sustain the injury. See Joseph Otieno case (supra) where the court held that failure to produce a stolen item does not mean that such item was not stolen.

22. Having held that pw1 sustained injuries on the material day, what was the degree of these injuries. From the definition and interpretation of what constitutes grievous harm, the injury suffered by the complainant is permanent in nature hence grievous harm. Who then inflicted the injury in question.

23. It was the complainant's testimony that it was the appellant who attacked her following an online relationship gone sour. According to her, when the appellant asked her to confirm whether she was Tenemech, she immediately recognized the voice as that of the appellant. When she reported to the police and hospital, she was specific as to the person who had attacked her by name. it was based on this information that the appellant was arrested. It is trite law that voice recognition of a suspect is as

good as visual identification. In the case of *Safari Yaa Baya v republic* [2017] eKLR the court had this to say regarding voice recognition;

> "With regard to voice recognition, it has been stated time without number that voice identification is just as good as visual identification. However, just like visual identification, care has to be taken to ensure that the voice was that of the appellant, that the person testifying as to the voice recognition was familiar with the voice and recognized it, the conditions prevailing at the time of the recognition were favourable and it should also be borne in mind that voices may at times resemble. See Karani v R [1985] KLR 290 and Choge v R [1985] KLR 1. In the latter case, this Court delivered itself thus on the issue:
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> ".....There can be no doubt that the evidence of voice identification is receivable and admissible in evidence and that it can, depending on the circumstances carry as much weight as visual identification, since it would be identification by recognition rather than at first sight. In Rosemary Njeri v Republic [1977] Criminal App No 27, a victim of the offence of grievous harm testified she heard the appellant say 'break her legs'. The reception of this evidence was upheld in the High Court on the first appeal and also on the second appeal in which this Court said".

24. From the evidence of pw1, she had no doubt that the voice of the person who attacked her was that of the appellant. She had interacted with the appellant for over five months. The cause of the attack was said to be a relationship gone sour after pw1 discovered that the appellant had another lady. The attack and communication was at close range hence very clear visibility. In other words, the conditions were favourable for recognition and therefore clear voice. I am convinced that there was no possibility of error in voice recognition under the circumstances.

25. As to lack of an eye witness, the law is clear that there is no maximum number of witnesses who must testify. It is trite that a court can convict based on the evidence of a single witness as long as the court is satisfied that the witness is telling the truth. see *Roria v Republic* [1967] eEA and *Ogeto v Republic* [2004] KLR where the court held that;

> "it is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the court has to bear in mind it is possible for a witness to be honest but to be mistaken".

26. Regarding the issue that the trial court did not consider his defence, the same is not correct as paragraph 36 of the court's judgment is clear that the court did make reference to his defence. His defence is a mere denial hence not sustainable.

27. Taking into consideration the circumstances under which the offence in question was committed, there is no doubt that the evidence of the prosecution was and still is watertight thus pointing a blame worth finger towards the accused as the culprit hence guilty of the charges framed against him.

28. As regards sentence which although not specifically challenged, the court is duty bound to consider whether it is commensurate to the offence bearing in mind the same is at the discretion of the court unless it is excessive or the trial court took into consideration irrelevant factors. In my view, the sentence meted out is a bit excessive taking into account the nature of the injuries sustained. In that regard, I am inclined to substitute the sentence of Seven years with four years to be calculated from the date of sentence.

ROA 14 days

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 26TH DAY OF MAY 2023

J.N.ONYIEGO

JUDGE