Rotich v Republic (Criminal Appeal E010 of 2022)
[2023] KEHC 20915 (KLR) (27 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20915 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KABARNET

CRIMINAL APPEAL E010 OF 2022

RB NGETICH, J

JULY 27, 2023

BETWEEN

LINUS ROTICH ALIAS AMURABI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. N.M IDAGWA – SRM delivered on 27 th January, 2022 in Kabarnet CMC CR. Case No. E691 OF 2021)

JUDGMENT

Background

1. The Appellant, Linus Rotich Alias Amurabi, was charged with the offence of Grievous harm contrary to section 234 of the *Penal Code*. The particulars of the charge were that on the June 11, 2020 at about 1530 hours at Sesia village in Baringo Central sub-county within Baringo county, the accused unlawfully did grievous harm to Solomon Ngetich.

2. When the appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. The prosecution availed 4 witnesses in support of the charges against the accused and after full trial, the Appellant was convicted as charged. He was sentenced to serve twelve (15) years imprisonment. Being aggrieved by conviction and sentence the appellant filed this an appeal to this court on the following grounds: -

    i. The trial court erred in law and fact by sentencing him in a case which was full of contradiction.

    ii. The trial court erred in law and fact by failing to hold that the charge sheet was fatally defective.

    iii. The learned trial magistrate erred in law and fact by failing to observe that witness evidence was inconsistent and uncorroborated as there was no eye witness.

iv. The trial magistrate erred in law by rejecting the Appellants defence causing miscarriage of justice.

v. The learned trial magistrate failed to realize that the case emanated from an injured person who was the complainant and was not sure of the person who caused the injury.

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

Appellant's Submissions

4. The Appellant submits that the prosecution failed to prove their case beyond reasonable doubt as evidence in chief adduced by Pw 1, Pw 3 and Pw4 contradicted their initial statements and evidence was full of falsehood; the information given in evidence in chief by Pw 1 on July 6, 2021 was not in the statement he recorded with the police on April 8, 2021.

5. Further that the complainant in this case stated in his evidence that he was in Baringo Referral Hospital for four months and later referred to Eldoret where he stayed for six months contradicting with the report and the evidence given by the medical expert Benjamin Kendagor who stated that he was admitted at Baringo referral Hospital from June 11, 2020 until July 20, 2020 when he was referred to Tophill for further treatment where he was discharged on 9.8.20 and pray that the witnesses be declared hostile witnesses.

6. Further that there was no eye witness to the alleged offence; that the evidence adduced by the witnesses was circumstantial evidence and appellant refers to the case of *Sawe vs Republic* (2018) K.L.R which sets out the requirements of circumstantial evidence.

7. The appellant submits that the complainant stated that he was injured on June 11, 2020 at 3p.m while in court he said he was injured on June 11, 2020 at 9: 30p.m and urged the court to consider the variance in time.

8. The appellant further submit that the investigations officer said the report was made by Rebecca Chemutai on June 12, 2021 but she never recorded a statement and did not have an O.B Number; and Dr. Benjamin Kendagor clinical officer Baringo County said he received P3 from of Solomon Rotich on June 12, 2021; he received P3 form after one year after the incident as the medical exhibits produced were for June 2021 and not June 2020.

Respondent's Submissions

9. In response, the state counsel submits that the there is no material contradictions which would benefit the appellant; that Pw1 gave coherent account of how the appellant picked a stone and hit him inflicting injuries; the doctor confirmed that Pw 1 sustained injuries and p3 was produced in court as exhibit. Pw1's evidence was corroborated by Pw2 who testified that on the June 11, 2020, she heard screams near her gate and on reaching the scene, she saw the complainant was lying down and the appellant running away from the scene; the complainant was known to pw2 and the incident occurred in broad daylight; that the appellant was positively identified as the person who assaulted the complainant.

10. In respect to ground on defective charge sheet, the Respondent contends that the charge sheet complies with section 134 of the *Criminal Procedure Act* and referred to the case of *Mwaura V Republic* [1976] EA 345 where the court held that a simple error in the particulars of the charge is not sufficient to occasion a failure of justice.

11. On corroboration of evidence, the state counsel submits that the complainant clearly saw the person who threw a stone at him when after he warned him and his colleagues against playing cards. The injuries were confirmed by Pw 3 the clinical officer and Pw 2 who met the appellant running away from the scene of crime; that there was no inconsistency in evidence adduced.

12. On whether accused's defence was considered, the state counsel submits that appellant raised defence of alibi by denying being at the crime scene at the material time. The trial magistrate found that accused's defence was a mere denial and his alibi was displaced by prosecution evidence.

13. On whether the injuries were occasioned by the accused, the state counsel submits that at the last paragraph page 24 of court proceedings, the court observed the accused was identified with certainty and clarity and placed at the scene of crime by Pw 1 and Pw 2 who knew accused well as a neighbor.

14. On the day of hearing of the appeal, the state counsel submitted that P3 form produced in court clearly stated that there was obvious deformity of the accused's head as a result of the injuries; that the complainant had a depressed skull which was also evidenced in medical treatment notes; she further submitted that the complainant also visited hospital in July, 2021 and the contention that P3 form was filled late was clarified by the doctor and the fact that it was indeed a year after did not negate the fact that complainant suffered grievous harm; the doctor said he saw the patient himself; that the complainant was positively identified by the name Amurabi Kibogong in court and the fact that the complainant suffered grievous harm is not in issue and it is the appellant who caused the injuries.

Analysis and Determination

15. This being the first appellate court, I am obligated to reevaluate evidence adduced before the trial court and arrive at an independent conclusion. This I do bearing in mind that unlike the trial court, I did not have the opportunity of taking evidence first hand and observe demeanor of witnesses. For this, I give due allowance. The role of the first appellate court was set out in the case of *Okeno vs. Republic* [1972] E.A 32 as follows:

> " 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 findings and conclusions; 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..."

16. In view of the above, I have considered the evidence adduced before the trial court and submissions filed herein and find the following as issues for determination:-

    i. Whether the charge was proved beyond reasonable doubt

    ii. whether the evidence by the prosecution witnesses was inconsistent/ contradictory and uncorroborated.

    iii. Whether appellant's defence was considered

    iv. Whether sentence imposed was harsh and excessive

(i) Whether the charge was proved beyond reasonable doubt

17. It is the appellant's argument that the court relied on insufficient evidence to convict the appellant; that the court relied on hearsay, contradictory and uncorroborated evidence to convict him.

18. Indeed, it was the duty of the prosecution to prove beyond reasonable doubt. In the case of *Miller – VS- Minister of Pensions* (1947) 2ALL ER 372-373 Lord Denning had this to say about proof of a case beyond reasonable doubt;_

> "That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

19. The appellant was charged with the offence of causing grievous harm under section 234 of the *penal code* which provides that a person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.

20. There is no dispute that the complainant sustained injuries classified as grievous harm. From the P3 form and testimony of the Doctor (PW3) and that of the complainant (PW1), the injuries were so severe. He testified that he was attacked by the accused while on his way to his home from work.

21. The complainant said Pw 3 responded to his screams and on reaching her gate where the screams emanated from, she saw the accused running from where the complainant was lying. Pw3's evidence places the appellant at the scene. This corroborated complainant's evidence; the complainant who is a police officer said he was work when he met accused and other boys playing cards. Being a police officer, he warned them and while the other boys run away, the accused picked a stone and hit him inflicting serious injuries. The complainant said he knew the accused by the name Amurabe Kibogong and is his neighbor from childhood. The incident occurred at 3.30 pm; it was in broad day light and there can never be mistake in identification more so identification of a known person. PW2 confirmed seeing the accused whom she had known for many years as Amurabi Kibogong.

ii.Whether the evidence by the prosecution witnesses was inconsistent/ contradictory and uncorroborated.

22. It is trite that a trial court can safely rely on the evidence of a single witness to convict as long as it cautions itself of the dangers of convicting based on such evidence or that it is satisfied with the credibility of such witness to sustain a conviction.

23. Court of Appeal had occasion to address this issue recently in *Phillip Nzaka Watu vs. R* (2016) e KLR, where it expressed;

> "However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, it has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and couching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

24. As observed above evidence of Pw 1 was corroborated by evidence of pw2 who saw and recognized the accused who was running from the scene while the complainant lay down injured and the injuries

were confirmed by Pw3 the clinical officer. I do not see any material inconsistency in evidence adduced and discrepancies if any, did not prejudice the appellant's fair trial or go to the root of the charge.

iii.Whether the appellant's defence was considered by the trial court.

25. The appellant argue that his defence was not fully considered by the trial court. A perusal of the judgment of the court shows that the evidence of the appellants was fully considered and was found to be without merit. The trial court stated as follows:-

> " the accused defence is mere denial; his alibi is displaced by prosecution evidence. I have no doubt that he was at the scene of crime. I dismiss the defence and find that the prosecution proved their case beyond reasonable doubt. To that extend his defence was considered and a finding made thereon."

26. From the foregoing, it is clear that accused's defence was considered and properly rejected. This ground of appeal therefore fail.

ii.Whether sentence imposed was harsh and excessive

27. I note that the accused was sentenced to 15years imprisonment. The offence herein attracts sentence of life imprisonment. In my view the sentence imposed by the trial magistrate was lenient and I will not interfere

28. Having found above that prosecution proved its case beyond reasonable doubt and the sentence was lawful and lenient, I see no merit in the appeal against conviction and sentence.

29. Final Orders: -

    1. Appeal on conviction and sentence is hereby dismissed.
    2. Period served in remand from the date of arrest to be reduced from sentence.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KABARNET

This 27th Day of **July** 2023.

.....

RACHEL NGETICH

JUDGE

In the presence of:

Mr. Kemboi - Court Assistant.

Ms Ratemo for state.

Appellant present.