Barasa v Republic (Criminal Appeal E072 of 2022)
[2023] KEHC 24200 (KLR) (26 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24200 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL E072 OF 2022

AC MRIMA, J

OCTOBER 26, 2023

BETWEEN

SUSAN NAMALWA BARASA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment, conviction and sentence of Hon. S. N. Makila, Principal Magistrate in Kitale Chief Magistrates Court Criminal Case No. 2487 of 2021 delivered on 31/05/ 2022)

JUDGMENT

1. Article 29(c) of *the Constitution* has a bearing in this appeal. The main article is on the right to freedom and security of the person. In part (c), the said Article provide as follows: -

> Every person has the right to freedom and security of the person, which includes the right not to be-
>
> (a) .....
>
> (b) .....
>
> (c) subjected to any form of violence from either public or private sources;

2. The Appellant herein, Susan Namalwa Barasa, was charged in the Chief Magistrates Court at Kitale in Criminal Case No. 2487 of 2021 with the offence of Grievous Harm contrary to Section 234 of the *Penal Code*, Cap. 63 of the Laws of Kenya.

3. The particulars of the offence were that on 5th day of June, 2021 at Sinoko village in Trans Nzoia East Sub-county within Trans Nzoia County the Appellant unlawfully did grievous harm to Benard Lumbasi Sikuku.

4. The Appellant denied the offence and she was tried, found guilty, convicted and sentenced 7 years imprisonment.

3. The prosecution availed a total of 5 witnesses in support of the charge of grievous harm. The complainant, Benard Lumbasi Sikuku, testified as PW1. PW2 was one Jackline Mulama who was an eye-witness as well as one Allan Wekesa who testified as PW3. PW4 was a Clinical Officer who worked at Cherangany Nursing Hospital in Trans Nzoia County who produced the complainant's treatment notes and P3 Form whereas PW5 was No. 235855 PC Samwel Wasile attached at Cherangany Police Station.

5. At the close of the prosecution's case, the Appellant was placed on her defence. She opted for an unsworn defence and did not call any witness.

6. In a judgment rendered on 31st May, 2022, the trial Court found the Appellant culpable as charged.

5. Being aggrieved by the conviction and sentence, the Appellant lodged the instant appeal. Her main contention in the Petition of Appeal dated 2nd November, 2022 (which was filed pursuant to the leave of the Court granted on 28th October, 2021 in High Court of Kenya at Kitale in Misc. Criminal Application No. 213 of 2022) was that the prosecution failed to prove its case and that her congent defence was not properly considered.

7. At the hearing of the appeal, the Appellant appeared, just like before the trial Court, appeared in person and filed detailed written submissions which were filed on 15th April, 2023. In her submissions, the Appellant raised the issue of identification, argued that the case was not proved as required in law and that the defence was not properly considered. She also relied on various decisions in buttressing her case.

8. The State strenuously opposed the appeal through its written submissions. It prayed for its dismissal.

9. This being the Appellant's first appeal, the role of this Court has, rightly so, been re-stated in many decisions. In Okemo vs. R (1977) EALR 32 and *Mark Oiruri Mose vs. R (2013)* eKLR, just to mention a few, it was held that this Court is duty bound to revisit the evidence tendered before the trial Court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter. However, this Court must always bear in mind that the trial Court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and should give allowance for that.

10. In discharging the said duty, this Court will address the three issues raised by the Appellant through her Petition of Appeal as well as the written submissions. In sum, the issues are on the identification of the assailant, whether the case was proved in law and the aspect of the defence.

11. On the identification of the perpetrator, there were three witnesses who attested to the identity of the wrong doer. They were PW1, PW2 and PW3. All of them were eye-witnesses. PW1 was the complainant, PW2 was an elder sister to the Appellant. Both lived in the same compound, but in different houses. PW3 had accompanied PW1 from an overnight funeral vigil. PW1 and PW3 were neighbours to PW2 and the Appellant.

12. At the time the incident took place, which around midnight, the said three witnesses were inside the house of PW2. PW1 and PW2 had gone to see PW3. They managed to wake her up and she opened the door for them. They entered into her house and sat at the verandah. The house was well lit by electricity. As they discussed, a child stepped out for a short-call. On return, the child was accompanied by the Appellant.

13. The Appellant was armed with a stool. All the three witnesses affirmed as much. The Appellant confronted PW1 and wanted to know why PW1 had reported her husband and her father to the police for illicit brewing. The Appellant then hit PW1 with the stool on the head and PW1 fell unconscious.

14. Sensing danger, PW2 and PW3 ran out of the house for their lives through the rear door. PW2 described the Appellant (her younger sister) as a very violent person who did not relate well with people, generally. Her house and that of the Appellant were next to each other. Whereas PW3 proceeded to his home, PW2 spend the rest of the night in the farm for fear of a ferocious attack by the dreaded Appellant.

15. PW1 later regained consciousness and walked home. He reported the matter to the police where he readily gave the name of the Appellant as the assailant. PW2 and PW3 also recorded statements with the police and corroborated the testimony of PW1 on the Appellant being the culprit.

16. With such a background, this Court readily asks itself whether the circumstances favoured a positive identification by way of recognition of the attacker.

17. In R -vs- Turnbull & Others (1973) 3 ALL ER 549, which English decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court rendered thus: -

> ... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

18. Unlike in the above case, there were three identifying witnesses in this instant case. All knew the Appellant well. PW1 and PW3 were close neighbours whereas PW2 was a sister to the Appellant. The house in which PW1 was attacked was well lit with electricity. When the Appellant walked into the house, she first talked to PW1. All saw and heard her talking. Then the attack followed.

19. This Court does not foresee any difficulty in finding that the Appellant was rightly recognized as the attacker. The evidence was direct, consistent and well corroborated.

20. Next is whether the case was proved. The fact that PW1 was injured was well settled by way of both witness and medical evidence. PW1, PW2 and PW3 testified on the manner the injuries were inflicted on PW1. PW4 confirmed that the injuries sustained were classified as 'grievous harm'. PW5 also attested to the injuries. The evidence was duly tested and withstood cross-examination. The medical evidence was not challenged in any way whatsoever.

21. The Appellant gave her unsworn defence. Despite such evidence being of low probative value, if any, as it is not subjected to cross-examination, it raised the issue of bad blood between the Appellant and PW2. The Appellant alleged that PW2 had colluded with PW1 to settle scores with the Appellant. Important as the issue may have been, it was only raised at the very tail-end of the proceedings and had nothing to do with PW3. Without shifting the incidence of proof to the Appellant, this Court is at a

loss as to how else PW1 and PW2 would have responded to the issue without it being formally raised. The trial Court, rightly so, dismissed the defence.

22. On the basis of the foregoing, this Court finds and hold that the prosecution proved that PW1 suffered grievous harm due to the unwarranted attack by the Appellant. Therefore, the prosecution case was properly proved in law.

23. The upshot is, hence, that the Appellant was rightly found guilty and convicted. The appeal against the conviction fails.

24. On the sentence, the Appellant was sentenced to 7 years imprisonment. The Appellant tendered mitigations and were duly considered by the sentencing Court. The Court also called for a Pre-Sentence Report whose recommendations were not approved of for reasons given.

25. The Court in Wanjema v. Republic (1971) EA 493 laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it considered an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

26. There is no doubt the offence is serious and indeed inhumane. It was also committed against an innocent person who had not even confronted the Appellant. The Appellant harbored a grudge against PW1. There is nothing placed before this Court to the effect that sentencing Court did not consider a relevant fact or that it considered an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive.

27. The sentence is lawful and fair in the circumstances. As a result, the appeal on sentence equally fails and is hereby dismissed.

28. Drawing from the above considerations, the appeal is wholly unsuccessful and is hereby dismissed.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 26TH DAY OF OCTOBER, 2023.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Susan Namalwa Barasa, the Appellant in person.

Miss Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Regina/Chemutai – Court Assistants.