Kitheka & another v Republic (Criminal Appeal E042 of 2022)
[2023] KEHC 24083 (KLR) (26 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24083 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL APPEAL E042 OF 2022

AK NDUNG'U, J

OCTOBER 26, 2023

BETWEEN

SAFARI KITHEKA ..... 1ST APPELLANT

SABABU KITHEKA ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from original conviction and Sentence in Mariakani PM Criminal Case No E011 of 2021 – S.K Ngii, PM)

JUDGMENT

1. The Appellants herein, Safari Kitheka (1st Accused during trial) and Sababu Kitheka (2nd Accused), were convicted after trial of grievous harm contrary to section 234 of the Penal Code. The particulars of the offence were that on 29/12/2020 at about 21 hrs at Silaloni Sub-Location, Chengoni Location Kinango Sub-County in Kwale County jointly with another not before court willfully and unlawfully did grievous harm to Mtsanga Karisa. On 06/06/2022, they were sentenced to seven (7) years imprisonment.

2. The Appellants through their counsel appealed to this court challenging the conviction and the sentence. The Appellants' counsel filed a memorandum of appeal dated 14/06/2022 raising the following grounds;

    i. The trial magistrate erred by failing to notice that essential ingredients of the offence were not proved.

    ii. The learned magistrate erred relying on inconsistent testimonies of the prosecution witnesses.

    iii. The learned magistrate erred by ignoring the Appellants' testimony and submissions.

iv. The learned magistrate erred by issuing a sentence that was harsh and excessive.

v. The learned magistrate erred by shifting the burden of proof to the Appellants.

vi. That the prosecution case was inconsistent and full of contradictions and was insufficient to sustain a conviction.

vii. The learned magistrate failed to evaluate defence evidence.

3. The appeal was canvassed by way of written submissions. Counsel for the Appellants argued that the prosecution evidence was marred with contradictions and inconsistencies which were material as they touched on the element of identification of the Appellants which goes to the root of the matter. That the Appellants in their defence testified that they were not at the scene and given the contradictions, this court should find that their defence was credible. He further submitted that it beats logic how the complainant whose both hands were cut was able to hold a torch and illuminate it on the Accused and identify them.

4. It was further submitted that the injuries did not support the offence charged with since the P3 form classified the injuries as harm. On the sentence, counsel submitted that the same was manifestly excessive in the circumstances of the case.

5. The Respondent counsel on the other hand opposed the appeal. It is submitted that the essential elements of the offence were clearly laid down by the trial court which considered the evidence adduced vis a viz the essential elements of the charge. Counsel submitted that there were no contradictions in the testimony of prosecution witnesses. Further, that the Appellants and their witnesses did not bring out any inconsistencies or contradictions in the evidence against them. That the trial court considered the defence evidence and rightly rejected it for it did not dislodge or controvert the prosecution evidence. That the trial court did not shift the burden to the Appellant.

6. As to the sentence, counsel filed notice of enhancement of the sentence and urged this court to enhance the sentence on account that the trial court failed to take regard of the gravity of the offence viz a vis the statutory provisions and sentencing guidelines. That the sentence of 7 years was unproportionate to the injuries that the complainant sustained. That the trial court misapplied the law in sentencing the Appellants to a lesser sentence hence the need to set aside the sentence of 7 years and enhance the same to life imprisonment as the law provides based on the fact that there were aggravating factors in that the injuries suffered were severe according to the complainant and PW4, there was no grudge between the victim and the Appellants, the attack was unprovoked and that there was malice aforethought.

7. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See Okeno v Republic [1972] EA 32.

8. I have in that regard considered the evidence as recorded by the trial court, the rival submissions filed and case law cited. I have given due allowance that I neither saw nor heard the witnesses testify.

9. In support of its case, the prosecution called four witnesses. The complainant testified as PW1. He testified that on the material night, he was sleeping outside guarding his cattle and at around 9:00pm, he was suddenly cut on the left hand near the shoulder. When he turned, he was cut on the right shoulder. As he reached for his torch, he was cut on the right hand. When he got hold of his torch, he was able to recognize the Appellants who were his nephews, his brother's sons. He did not identify other assailants. He aimed the torch directly on their faces. As he tried to defend himself, he was cut on the face. The assailants ran away after he told them that they will finish each other.

10. He stated that after the assailants left, his children came out from the make shift structure where they were sleeping and they ran back home to report the matter. He was taken to hospital by the area Chief where he was admitted for three days. He reported the matter to the police where he named the people who attacked him. He stated that there was no personal difference between him and the Appellants.

11. On cross examination he testified that he held the torch with his left hand since his right hand had been injured. He stated that he recognized the Appellants and one Hamisi who had not been arrested.

12. PW2 the complainant's grandson testified that they were guarding the cows and at 9.00pm, Sababu the 2nd Appellant came armed with a panga and a hammer in company of another person whom he did not recognize. He saw the two assailants by the aid of the minimal light from the moon. He stated that the 2nd Appellant is his uncle. That the 2nd Appellant threw a hammer at him hitting him on the right leg. After that, in company of Said, they ran home to report. They ran back to the scene where they found PW1 had been injured and he was taken to hospital by the Chief.

13. On cross examination by the 2nd Appellant, he testified that he saw two people and the moonlight assisted him in identifying the 2nd Appellant.

14. PW3, complainant's son, testified that on the material night, he was with PW1 and PW2 guarding the cows. They were asleep when they were invaded by some people armed with a panga. The three people were Hamisi, 1st Appellant and 2nd Appellant who were his cousins. When they saw them, they ran away. It was dark but there was moonlight. They ran home and reported and when they returned, they found the complainant had been cut and the Appellants had left. He stated that the 1st Appellant was the one who was carrying a panga.

15. On cross examination by the 2nd Appellant, he testified that he was still awake at the time of the attack and he was not present when the complainant was cut. He stated that they were seated in the make shift structure with PW2 and a hammer was thrown at them tearing the papers and rags that acted as wall to the make shift structure and the moonlight illuminated inside the structure and at that point, he saw the 2nd Appellant approaching.

16. PW4 was the Clinical Officer. He testified that he treated the complainant on the material date and filled his P3 Form. He stated that the complainant had a wound on the head, on the face, right hand and left hand. His clothes were blood stained and he looked weak and frail due to loss of blood. The wound on the hand was 10cm long and had affected the tendons and had injured the nerves. The hand was also fractured. The wound on the elbow was 5cm x 3cm and had sharp edges, he stitched the wounds and applied the elastic bandage to the broken hand. He produced the treatment notes (x-ray report, x-ray films and treatment booklet) as Pexhibit1, and P3 Form as Pexhibit2. He stated that the injuries were inflicted by a sharp and blunt object and that the degree of injuries suffered was grievous harm.

17. The Appellants gave sworn testimony and called two witnesses. The 1st Appellant testified that he was a casual labourer and denied committing the offence. He stated that he was framed and did not offend the complainant.

18. The 2nd Appellant in his sworn defence testified that he was a business man and on the material day and time, he was at his work place and was surprised when they were summoned by a police officer. He stated that he had nothing to do with the allegations.

19. DW3 was the Appellants' sister. She stated that the complainant was his uncle and the incident brought enmity between the two families. She stated that she overheard that it was the Appellants who attacked his uncle which came as a shock to her.

20. DW4 was the Appellants' mother. She stated that on a date she could not remember, the Appellants spent the night at home and on the following day, they were informed that the complainant had been attacked by the Appellants. She testified on cross examination that she lived in the same house with the Appellants but they slept in separate houses. That on the material night, they parted at 11:00pm to go to sleep. That at the time of the incident, she was at home with the Appellants.

21. That was the totality of evidence before the trial court. To succeed in a charge of grievous harm, prosecution has a duty to prove the following ingredients as was held in the case of Pius Mutua Mbuvi Vs Republic (2021) eKLR;

    a) That the victim sustained grievous harm

    b) The accused caused or participated in causing the grievous harm

    c) The harm was caused unlawfully.

22. On whether the victim sustained grievous harm, section 4 of the Penal Code defines grievous harm as follows;

> " grievous harm means any harm which amounts to maim or dangerous harm or seriously and permanently injures health, or which is likely so to injure health, or which extends to the permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense."

23. The Court of Appeal in John Oketch Abongo v Republic [2000] eKLR had this to say as to what constitute grievous harm;

> " The definition contains several ingredients of what constitutes grievous harm. We are of the opinion that the presence of any one of these ingredients would suffice to disclose grievous harm. Here, we are satisfied that the complainant's injury did amount to dangerous or serious injury to health both of which are ingredients contained in the definition."

24. The court above went ahead and stated that;

> " Whether or not grievous harm or any other form of harm is disclosed must be a matter for the court to find from the evidence led and guided by the definition in the Penal Code. A court will be assisted by medical evidence given in coming to the conclusion on the nature and classification of the injury. In many cases the courts have accepted and gone by the findings and opinions in the medical evidence. 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."

25. In our instant case, the complainant testified that he was cut on the right shoulder and on the left hand near the shoulder. As he tried to reach for his torch, his right hand was cut. As he tried to defend himself, he was cut on the face across the right ear. He testified that he was admitted at Mewa hospital for three days.

26. PW4, the Clinical Officer testified that when the complainant was taken to hospital, his clothes were blood soiled, he appeared frail due to blood loss. Upon examination, the complainant had a wound on the head, on the face, right hand and left hand. The wound on the hand was 10cm long and had affected the tendons and had injured the nerves. The hand was also fractured. The wound on the elbow was 5cm x 3cm and had sharp edges, he stitched the wounds and applied the elastic bandage to the

broken hand. He classified the injuries sustained as grievous harm. His findings were well captured in the P3 Form that classified the degree of injuries as grievous harm and not harm as the Appellants' counsel submitted.

27. Given the above findings, am satisfied that the complainant's injury did amount to dangerous or serious injury to health both of which are ingredients contained in the definition contained in Section 4 of the Penal Code. The first limb of the offence is thus proved.

28. The evidence on the record also revealed that the attack was unprovoked. The complainant was sleeping and he was suddenly attacked. It therefore follows that the harm was unlawfully inflicted on the complainant.

29. On whether the Appellant caused or participated in causing the grievous harm, the Appellants in their defence denied committing the offence. Counsel for the Appellants also submitted that the prosecution case was marred with contradictions and inconsistencies which were material as they touched on the identification of the Appellant.

30. It is submitted that PW1's testimony was that the Appellants were in company of other people whereas PW2 stated that he only saw the 2nd Appellant ruling out the presence of the 1st Appellant. PW2 further testified that there were two attackers and he could not identify the person who was holding a panga. That PW1 was able to identify the 2nd Appellant through the torch light whereas PW2 stated that the moonlight assisted him to identify the 2nd Appellant. That PW1 did not mention whether there was moonlight. That PW2 testified that the 2nd Appellant was holding a panga whereas PW3 stated that the 1st Appellant was holding a panga. That PW2 stated that he saw the 2nd Appellant in company of another person that he could not identify whereas PW3 testified that he saw both the Appellants. That the complainant did not state who attacked him or who cut his hand.

31. When it comes to contradictions, it is trite law as set out in numerous authorities that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case. (See Erick Onyango Ondeng' v Republic [2014] eKLR, where the Court of Appeal cited Twehangane Alfred v Uganda, (Crim. App. No 139 of 2001, [2003] UGCA, 6,).

32. The question is whether the prosecution case was riddled with material contradictions and inconsistencies of the magnitude that would make the conviction of the Appellants unsafe. It is well settled that not all inconsistencies and contradictions will lead to an acquittal. The inconsistencies must be so grave as to lead to a conclusion that the witness was not truthful.

33. I have re -evaluated the evidence at trial. The inconsistencies complained of are not material. PW1 was alone when attacked with PW2 and PW3 in a makeshift structure nearby. It would not be expected that the witnesses would have an identical perception of the facts from their different positions. Any attempt to apply mathematical precision in evaluation of evidence is a sure path to miscarriage of justice. As held by Mativo J (as he then was) in MTG v Republic (Criminal Appeal E067 of 2021) [2022] KEHC 189 (KLR) (15 March 2022) ;

> "The correct approach is to read the evidence tendered holistically. It is only when inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court that they can necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from."

34. In our instant case what is clear is that the 3 witnesses were able to identify the assailants from their different location, PW1 using torch light while PW2 and PW3 were aided by moonlight.

35. The uncontroverted evidence before the trial court was that the complainant and the Appellants were relatives. The complainant testified that the Appellants were his nephews. This was therefore evidence of recognition and not identification of a stranger. Madan J.A in Anjononi & 2 Others v Republic [1980] eKLR stated that;

> "...recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya Vs. The Republic (unreported.)"

36. Even though this was the evidence of recognition, it must pass the test of proper visual recognition as was held in the case of Cleophas Otieno Wamunga v Republic [1989] eKLR, thus;

> " It is trite law that where the only evidence against a defendant is evidence of identification of recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction"

37. The Court of Appeal in the case of Joseph Muchangi Nyaga & another v Republic [2013] eKLR also stated that before acting on evidence of visual recognition, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him subsequently. This was also echoed in R vs Turnbull [1976] 3 ALL ER 549 that;

> "...the judge should direct the jury to examine closely the circumstances in which identification by each witness came to be made. How long did the witness have the accused under observation" At what distance" In what light" Was the observation impeded in any way, as for example by passing traffic or a press of people" 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 (sic) 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"(emphasis added).

38. Applying the above tests in our instant case, the circumstances surrounding identification, indeed recognition of the Appellants, were favourable for a positive recognition of the assailants whom the 3 witnesses knew very well, they being their relatives. PW1 testified that he reached out to his torch and he directed the light of the torch to the assailants and he was able to identify both the Appellants. He gave out the names of his attackers to the police in his first report. His evidence on recognition of the assailants is corroborated by PW2 and PW3.

39. Turning to the rebuttal evidence tendered in defence, it is trite law that the burden of proof lies with the prosecution throughout the trial. However, once the primary facts are established, the accused bears the evidential burden. This burden does not relieve the prosecution of their duty of proving its case to the required standard. That explanation need only be plausible. (See Kelvin Nyongesa & 2 Others vs Republic (2017) Eklr and Malingi vsRepublic[1988] KLR 225).

40. So what is the defence evidence in our instant suit? The 1st Appellant testified that he never did what was alleged. He was framed. They never offended the complainant and they do not know why he sued them. The 2nd Appellant stated that at the time of the alleged offence, he was at his work place. He was surprised to be summoned by police officers. DW3 did not know what happened at the complainant's. The mother to the Appellants stated that on a date she could not recall the Appellants spent night (sic) at home and woke up there at. At 9.00 am next day, they learnt that the complainant had been attacked and later it was alleged it is her children who had attacked him.

41. A cursory look at the defence evidence readily shows serious material contradictions between the evidence of the Appellants and their mother DW4. Their attempted alibi evidence is shattered by DW4 who says they were with her contrary to their own statements.

42. From the totality of the evidence on record, am satisfied that the defence evidence fails to displace or controvert the prosecution evidence tendered. I make a finding that the prosecution through its evidence proved all the ingredients of the offence herein. The conviction by the trial court is upheld.

43. The Appellants challenge the sentence as harsh and manifestly excessive given the circumstances of the case. In rejoinder, the Respondent's counsel urged this court to enhance the sentence to life imprisonment as the law provides. Counsel filed a notice for enhancement of the sentence. The Appellant's counsel did not respond directly to the Notice in the submissions despite acknowledging that the Respondent's counsel had filed it.

44. Grievous harm is a serious offence that carries a maximum sentence of life imprisonment as provided under section 234 of the Penal Code which states;

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

45. The trial court while sentencing the Appellants considered the aggravating factors in that the injuries were severe to the extent that the complainant's right hand was deformed and could no longer make meaningful use of the same. The trial court further noted that the Appellants were not remorseful.

46. It is trite law that sentencing is at the discretion of the trial court and an appellate court will not easily interfere with the discretion of the trial court on sentence unless it is shown that in exercising its discretion, the court acted on a wrong principle; failed to take into account relevant matters; took into account irrelevant considerations; imposed an illegal sentence; acted capriciously or that the sentence imposed was harsh and excessive. (Ogolla S/o Owuor v R {1954} EACA 270). The Appellant did not demonstrate any of the above factors.

47. The positions taken by the parties are, on the part of the Appellants that the sentence was manifestly excessive while the State on its part seeks enhancement of the sentence to life imprisonment.

48. In its remarks at sentencing, the trial court stated;

> " The accused persons were tried and convicted for the offence of doing grievous for which they are liable to life imprisonment. Nevertheless, considering that the accused persons are first offenders, I shall desist from sentencing them to the possible maximum sentence of life imprisonment and consider a lesser sentence guided by the circumstances of this case.
>
> There's no doubt that the complainant suffered severe bodily injuries in the hand of the accused persons which left his right hand deformed to extent that, the complainant no longer make meaningful use of the same any more. I have also noted from the PSR that the

accused persons have not made any efforts to reconcile and or compensate the complainant for the injury. Similarly no remorse has been exhibited by the two. Thus, in order to that the accused persons may learn a lesson from their unlawful act and also serve as an example to the like-minded members of society and in order to echo the position of the law in protection of personal security and safety, I shall and I hereby sentence each of the accused persons for imprisonment for seven (7) years with Right of Appeal within 14 days."

49. From the foregoing, it is clear that the trial court in exercise of its discretion in sentencing considered the law, the gravity of the offence, the need for deterrence and the fact that the Appellants were first offenders. I find no basis upon which to interfere with the sentence either by way of reduction or enhancement.

50. With the result that the Appeal herein is without merit and is dismissed in its entirety.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 26TH DAY OF OCTOBER 2023

A.K. NDUNG'U

JUDGE