MO v Republic (Criminal Appeal E033 of 2021) [2022] KEHC 11922 (KLR) (20 May 2022) (Judgment)

Neutral citation: [2022] KEHC 11922 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E033 OF 2021

JN KAMAU, J

MAY 20, 2022

BETWEEN

MO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

((Being an Appeal from the Judgment of Hon. C.N Oruo (SRM) delivered at Maseno in Principal Magistrate's Court in Criminal Case No 1868 of 2015 on 25th September 2019))

JUDGMENT

Introduction

1. The appellant herein was charged with the offence of grievous harm contrary to section 234 of the *Penal Code*.
2. He was tried and convicted by Hon C N Oruo (SRM) and sentenced to ten (10) years imprisonment.
3. Being dissatisfied with the said judgement, on July 29, 2021, he lodged the appeal herein. His petition of appeal was undated. He set out ten (10) grounds of appeal.
4. His undated written submissions were filed on October 21, 2021 while those of the respondent were dated February 2, 2022 and filed on February 3, 2022.
5. This judgment is based on the said written submissions which both parties relied upon in their entirety.

Legal Analysis

6. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

7. This was aptly stated in the case of *Selle & Another v Associated Motor Boat Co Ltd & others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.

8. Having looked at the grounds of appeal and the appellant's and respondent's respective written submissions, it appeared to this court that the appellant had only appealed on sentence as his written submissions only focused on his prayer for leniency on account of having been mentally unstable at the material time of the incident and suffering of his family due to his incarceration.

9. As the appellant admitted to having committed the offence only that he committed the same while he was mentally unstable, this court did not find it necessary to analyse the evidence that was adduced during trial and delved directly into ground of appeal No (10) to determine whether there was merit in setting him at liberty and/or reducing the sentence and/or putting him on probation to conclude his sentence.

10. He contended that he was the breadwinner of his family of five (5), his wife and three (3) children. He pointed out that he had elderly parents who relied on him. He pointed out that his family had been suffering due to his absence thus encountering challenges in attaining education, food, love and other essential items and services that a father can provide. He stated that being a first born in the family and as per african traditions and customs, he had a bigger role to play which he could not undertake while in prison.

11. He averred that he had undergone various reformation programs and had acquired diploma and degree in theology courses such as association of faith churches ministries by african international bible training centre as a result of which he acquired knowledge in spiritual matters, capable of transforming the society and boosting moral behaviour at large and enhance peace and harmony. He added that he was in a position to evangelise the word of god.

12. He further stated that he had also acquired courses on sustainable food security and self-reliance farming with Rodi Kenya. He added that the training had enabled him attain knowledge in both soil and crop management with view to increase productivity. He averred that he had learned of the use of inorganic manure and organic pesticides that are environment friendly and other advantages of agriculture hence if given a second chance, he would be self-employed.

13. He pointed out that while working with one of the Kenya power supply company, he was involved in a road accident in 1995 which caused him a mental problem. It was his averment that at the time of the commission of the alleged offence in 2015, he was still attending Mathare Hospital for mental treatment. In that regard, he prayed for the court's leniency on the ground that he could not have controlled himself.

14. He submitted that he was remorseful and promised to be a law-abiding citizen and interact fairly in the society and to help to build the nation if granted a second chance. He thus urged the court to exercise leniency and either set him at liberty, reduce the sentence to a lesser one or place him on probation.

15. On its part, the respondent submitted that the prosecution proved its case against him beyond reasonable doubt and that the trial court was satisfied that he inflicted the injuries on Joseph Ombewa (hereinafter referred to as "PW 1"), the complainant herein. It added that the trial court noted that PW 1 had visible scars that looked serious which was corroborated by medical evidence which showed that PW 1 suffered deep cuts and fractures which led to a deformed face.

16. It was emphatic that there were no inconsistencies in the prosecution's case. It further submitted that the sentence imposed on the appellant was too lenient considering that section 234 of the *Penal Code* provides for a mandatory life sentence. It submitted that the prosecution proved all the ingredients of the offence and added that his defence did not raise reasonable doubt. It therefore urged this court to dismiss the appeal herein for lack of merit and uphold his conviction and sentence.

17. Notably, section 234 of the *Penal Code* cap 63 (Laws of Kenya) provides that:-

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

18. A reading of the trial court's judgment showed that it took into consideration the case of Muruatetu (sic) on maximum sentences and sentenced the appellant to ten (10) years as opposed to the life imprisonment that was prescribed in the *Penal Code*.

19. Contrary to the trial court's pronouncement and respondent's submissions, the term "liable to imprisonment for life" does not mean that once a person is convicted, he or she must be sentenced to life imprisonment. Life imprisonment is the maximum sentence and a trial court can sentence the convicted from the minimum to the maximum applicable lawful sentence.

20. In the case of *Sajile Salemulu & Anor vs Republic* [1964] EA 3, the court therein held that where there is no prescribed minimum or maximum penalty, the court has absolute discretion as to what sentence it considers appropriate and where there is a prescribed maximum and minimum, the court's discretion to what is the appropriate sentence is limited to the range between the two extremes.

21. Although the appellant blamed his actions on his mental incapacity, this court found and held that the trial court did not err when it rejected his defence of mental instability. However, this court's reasoning was different from that of the trial court.

22. While the trial court gave the reason for rejection of the treatment notes from Mathare Hospital as lack of assessment by a certified medical practitioner to ascertain his mental condition, this court rejected the appellant's defence of insanity at the time of the commission of the offence on the ground that there were no treatment notes to show that he had ever been mentally unstable.

23. He had only tendered in evidence receipts and medical card from Mathare Hospital. This was, however, not unreasonable because outpatients are not normally furnished with any treatment notes. Proof of their illnesses can only be proved by medical reports signed by certified medical practitioners, a document the trial court opined the appellant ought to have produced at the time of plea taking to prove his mental state. Having said so, the medical report need not have been adduced at the time of taking the plea because at the time, the appellant may have been of sound mind but may have been of unsound mind at the time of commission of the offence. It suffices to state that the proof of his mental state at the material time of the incident ought to have been adduced during trial.

24. Notably, the only treatment note the appellant produced was from M P Shah Hospital. It was dated May 30, 1995 and the same showed that he had gone for the removal of stitches. It was not clear to this court whether the said removal related to the road accident in 1995 that he had alluded to.

25. Going further, this court noted that the receipts from Mathare Hospital were for 2010 and 2011. As the incident herein occurred in 2015, this court could not for a fact ascertain if the appellant had a mental illness at the material time. While this court could not for a fact say that he had never suffered any mental illness, in the absence of any documentary evidence that he was mentally sick, this court

was constrained not to accept his defence of insanity as the reason for having caused grievous harm to PW 1 at the material time.

26. The evidence that was adduced showed that he cut PW 1 with a panga on his legs even as he tried to flee. He also cut him on his face and neck causing him serious injuries that caused him to be admitted in hospital for almost four (4) months and lose his speech. The attack could only be said to have been gruesome. It was unprovoked, pre-meditated and malicious.

27. Although the appellant had undergone rehabilitative training programmes in prison and was remorseful for having caused grievous harm to PW 1, there was need to send a strong message to the society that violence against other persons is strongly condemned. It was thus the considered view of this court that the sentence of ten (10) years imprisonment was not harsh and/or excessive warranting any interference by this court.

28. In the premises, ground of appeal No (10) of the petition of appeal was not merited and the same be and is hereby dismissed.

Disposition

29. For the foregoing reasons, the upshot of this court's decision was that the appellant's appeal that was lodged on July 29, 2021 was not merited and the same be and is hereby dismissed. The appellant's conviction and sentence be and are hereby upheld as it was safe to do so.

30. The period that the appellant remained in custody if at all, before conviction, shall be taken into account while computing his sentence as contemplated in section 333(2) of the *Criminal Procedure Code* cap 75 (Laws of Kenya).

31. It is so ordered.

DATED and DELIVERED at KISUMU this 20th day of May 2022.

J. KAMAU

JUDGE