Ogwendi & another v Republic (Criminal Appeal 45 of 2019)
[2022] KEHC 11989 (KLR) (22 June 2022) (Judgment)

Neutral citation: [2022] KEHC 11989 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL 45 OF 2019

KW KIARIE, J

JUNE 22, 2022

BETWEEN

DENNIS OTIENO OGWENDI ..... 1ST APPELLANT

VICTOR OCHIENG OGWENDI ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the original conviction and sentence in Criminal case No. 210 of 2019 of the Principal Magistrate's Court at Ndhiwa by Hon. V.K Kiplagat– Resident Magistrate)

JUDGMENT

1. Dennis Otieno Ogwendi and Victor Ochieng Ogwendi, the appellants, were convicted of the offence of grievous harm contrary to section 234 of the *Penal code*.

2. The particulars of the offence were that on January 6, 2016 at Pala Koguta location, Ndhiwa sub county of Homa Bay county, jointly did grievous harm to Markphas Otieno Midada.

3. They were sentenced to serve forty years imprisonment. They have appealed against both conviction and the sentence. They raised the following grounds of appeal:

    a) That the learned trial magistrate erred in law by failing to find that the key witness Nicholas Odhiambo whom the trial court relied upon is a brother to the complainant who could not testify against him and at the same time was not an eye witness hence the court relied on hearsays.

    b) That the learned trial magistrate failed in law by not finding that the case was not properly investigated because the officer did not visit the alleged scene of crime.

c) That the trial court erred in law by failing to find that the admissibility of the blood stained clothes as exhibits was a violation of the law since the investigating officer did not identify them in court as required by law.

4. The state opposed the appeal through Mr Ochengo Justus, the learned counsel. The following were grounds of opposition:

a) That there was overwhelming evidence against the appellants.

b) The appellant's actions of running away after committing the offence were inconsistent with their innocence.

c) The appellants' further actions of absconding court and trying to escape to the neighboring state of Uganda during trial was inconsistent to their innocence.

d) This was a case of recognition, the offence happened in broad day light, there was no mistaken identity.

e) The medical officer who examined the victim concluded that the degree of injury as grievous harm. He further testified that the injuries were permanent and affected the normal operation of the complainant.

f) In cross examination the appellants alluded to the fact that they were never consulted in the money that had been lent to their mother and hence the victim was not supposed to ask about the money. Impliedly they were justifying their actions attacking the victim. Their actions cannot be justified for the mere reason that they were not involved when their mother was loaned the money.

g) The maximum penalty for grievous harm is life imprisonment. The sentence of 40 years considering the circumstances under which the offence was committed is proper or in case of interference of the sentence, it should be enhanced to life imprisonment.

h) The conviction is proper. The sentence should be enhanced to life imprisonment.

i) The appeal should be dismissed for lack of merit.

6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of *Okeno vs Republic* [1972] EA 32.

7. It is erroneous for the appellants to allege that the learned trial court relied solely on the evidence of Nicholas Odhiambo Midada (PW2). Certainly this was a witness who went to the scene after the fact and testified as to what he saw and what the complainant told him had happened. This witness testified that when the complainant called him on phone and told him what had transpired, he ran fast and on reaching near the complainant's home, he saw the appellants who were near the home.

8. The complainant (PW1) in his evidence testified that when he was discussing with the mother of the appellants how she was going to pay back a debt she owed him, a disagreement arose. This is when the two attacked him with a machete among other things. He fainted and did not know how he reached his home. When he regained consciousness, he called his brother Nicholas Odhiambo Midada (PW2) on phone. He was taken to hospital thereafter.

9. It is settled law that a fact can be proved by the evidence of one witness. In *Kiilu & Another v Republic* [2005] 1 KLR 174 the Court of Appeal held:

> Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error.

In the instant case the offence complained of took place during day time and these were people known to each other. I therefore find that there was overwhelming evidence against the appellants.

10. Section 234 of the *Penal Code* provides as follows:

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

11. It is trite law of practice that an appellate court can only interfere with the sentence meted out by the trial court upon satisfaction of some circumstances as were spelled out in the case of *Nilsson vs Republic* [1970] EA 599,601 as follows:

> The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in *James v Rex* (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor! To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. *R v Shershewsity* (1912) CCA 28 TLR 364.

12. I have evaluated the evidence on record. The appellants were first offenders. Though their action was uncalled for, I find that the sentence was on the higher side. I am persuaded to interfere with the sentence meted out. I set aside the sentence of 40 years imprisonment and substitute it with a sentence of 20 years imprisonment. This is the extent to which their appeal succeed.

Delivered and signed at Homa Bay this 22nd day of June, 2022

KIARIE WAWERU KIARIE

JUDGE