



REPUBLIC OF KENYA



KENYA LAW
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**Onyango v Republic (Criminal Appeal E098 of 2021)
[2022] KEHC 16067 (KLR) (Crim) (30 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 16067 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CRIMINAL

CRIMINAL APPEAL E098 OF 2021

LN MUTENDE, J

NOVEMBER 30, 2022

BETWEEN

BONIFACE OKONG'O ONYANGO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal arising from the original conviction and sentence
in Criminal Case 2448 of 2015 at the Chief Magistrates' Court
Makadara by Hon. H. M. Nyaga – CM on 8th October, 2021)*

JUDGMENT

1. Boniface Okong'o Onyango, the Appellant, was charged with the offence of causing grievous harm contrary to Section 234 of the [Penal Code](#). Particulars of the offence being that on the 27th day of July, 2015 at Soweto Area Kayole, Estate in Nairobi East District within Nairobi County, unlawfully did grievous harm to Douglas Karuga Ndegwa.
2. Having been taken through full trial, he was found guilty, convicted and sentenced to serve thirty (30) years imprisonment.
3. Aggrieved, the appellant appeals on twelve(12) grounds that can be condensed thus: The case was not proved beyond reasonable doubt; the burden of proof was shifted to the accused (appellant); relevant/irrelevant facts were taken into account; significant inconsistencies in evidence of the prosecution on the identity of the accused should have been resolved in favour of the accused (appellant); It was erroneous for the court to summarily dismiss the defence put up by the appellant; the court did not warn itself on the danger of convicting the appellant on evidence of a single witness that was not corroborated; the defence put up that the offence was committed at a public place in the presence of people who were not called to testify was disregarded; the conviction was based on hearsay evidence



that was inadmissible; and that the sentence imposed was excessive and in total disregard of appellant's mitigation.

4. To prove the case the Prosecution called four (4) witnesses. PW1 Douglas Karuga Ndegwa, the complainant, stated that on the July 27, 2015, at 5.00 am, he was at his shop arranging crates of milk that had been offloaded by Brookside delivery van when he saw the appellant, a person he knew very well approaching him while carrying a Jerrican and he had wrapped a jacket around his other hand. He continued arranging the crates without suspecting any mischief; only to be doused in the liquid. He felt a burning sensation, all over the body, and, all over a sudden he could not see. He ran blindly and fell into the ditch. People who moved to assist poured on him water. He stated that prior to the incident, the accused had threatened to burn him with acid for allegedly having an extramarital affair with his wife.
5. PW2 Lina Njoki Ngare, the wife of the complainant, was called only to find her husband having been injured. He was rushed to Mama Lucy Hospital and referred to Kenyatta National Hospital where he was admitted in the Intensive Care Unit (ICU). She alluded to the complainant having shown him a text message to the effect that he was having an extra-marital affair with the wife of the accused.
6. PW3 Dr Joseph Maundu, examined the complainant and found that he had extensive burns on the head following acid that was poured on his person. As a result of the burns on the orbital sockets, his eyes were completely closed such that he could not see. The complainant also had extensive burns on the nose such that the nostrils were closed, he could only breath through the mouth, and his lips had scars with a deviation of the mouth. The neck and chest wall had healed burned scars. The abdominal wall had scars. The left hand had scars. He classified the injuries as maim due to loss of vital organs. He concluded that corrosive liquid used was an acid.
7. With the consent of the defence, PW4 No xxxx Corporal Erickson Maganya adduced in evidence the Exhibit Memo Form and a Report from the Government Chemist pursuant to Section 77 of the *Evidence Act*. According to the report the liquid and clothes of the complainant were analysed. The liquid was found to contain sulphuric acid a corrosive liquid which was also detected on the clothes submitted.
8. Upon being placed on his defence, the appellant denied the charge. He admitted knowing the complainant but argued that he just learnt that the complainant had been injured after he opened his Chemist at 8.00 am, and, that he was at his home between 5.00 am – 6.00 am. That on the August 6, 2015 at 3:15 pm some three (3) Police Officers went to his Chemist and alleged that he had assisted a certain girl to procure an abortion. As a result, he had to accompany them to the Police Station. He denied allegations that he accused the complainant of having an affair with his wife or having threatened him through a short message service (SMS), as he did not report the threats or avail data from the service provider. He queried why he was not arrested at the outset, until August 6, 2015.
9. He called three(3) witnesses. DW2 Lilian Njoki, his wife, denied having engaged in any relationship with the complainant.
10. DW3 David Otieno Shirengo, alluded to have seen the complainant leaving the plot at 5.00 am while on duty as a Security Guard. Thereafter he heard screams and on rushing there he found John who did not have a shirt screaming. A Mr Mungai also arrived and when asked what happened, he said that he had been burnt by acid by some unknown person. That he ran to inform his wife as other people assisted the complainant and, good Samaritans took him to hospital.

DW4 Harrisa Mayere, testified that on the fateful date the complainant passed him while riding a bicycle. They even exchanged pleasantries. After a while he heard screams and rushed to the scene where



he found the complainant who was injured screaming and three (3) men fled from the scene. That the appellant a person well known to him was not at the scene.

11. The trial court considered evidence adduced and concluded that the complainant was in the best mental and emotional state when he identified the perpetrator of the offence. It found that the appellant had a motive that made him attack the complainant. It also found that the appellant committed the offence in issue, hence, the conviction that followed.
12. The appeal was canvassed through written submissions. It was urged by the appellant through Wanjohi and Wawuda Advocates that there was no proper testing of the evidence of identification by the trial court which led to a conviction based on improper identification. That the source of light at the scene of crime was not within the measurable margins to be safely depended on to sustain a conviction. That though there were electricity security lights, the intensity was not stated. That a passing glance by the complainant of the assailant, as he arranged crates of milk could not make the court conclude that the visual identification of the complainant was sufficient. In this regard the appellant relied on the case of [*Paul Etole & Another Vs Republic*](#) (2001) where the court of appeal stated that:

“..... It is true that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the Court should remind itself that mistakes in recognition of close relatives and friends are sometimes made.In the present case, neither of the two Courts below demonstrated any caution. This is a serious nondirection on their part. Nor did they examine the circumstances in which the identification was made. There was no inquiry as to the nature of the alleged moonlight or its brightness or otherwise or whether it was a full moon or not or its intensity. It was essential that there should have been an inquiry as to the nature of the light available which assisted the witnesses in making recognition. What sort of light, its size, and its position vis a vis the accused would be relevant..... In these circumstances, we have no doubt that the second appellant’s conviction was both unsafe and unsatisfactory...”

13. Emphasizing the danger of relying on a single identifying witness he cited the case of [*John Mwangi Kamau Vs Republic*](#) (2014) eKLR where the Court of Appeal state that:

“Time and time again this Court has emphasized that evidence of visual identification in criminal cases can cause a miscarriage of justice if not carefully tested. In the case of R –vs- Turnbull and others (1976) 3 All ER 549, an English case, Lord Widgery CJ had this to say:-
“First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, 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 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 between 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 the actual appearance?”

14. That the perpetrator did not speak to the complainant, therefore, an attempt to allude to voice identification while in the dock could not make the trial court arrive at a conclusion that the appellant was identified beyond reasonable doubt.
15. That the defence established that there were many people at the scene who could have identified the perpetrator. That the Prosecution should have tendered evidence of an independent witness as held by Wendo J in *Halkano Mata Bagaja Vs Republic* (2015) eKLR where the learned Judge stated that:

“It was clear that PW1 was not alone at the scene but there were other people like Halake who allegedly intervened. No reason was given why none of the people that were present at the scene were called as witnesses. This is necessitated by the fact that PW1 and the appellant were not on good terms. The prosecution should have endeavored to call any other independent witnesses to allay any fears of there being an attempt to frame or fix the other. The prosecution should have called Halake or any other independent witness, but not necessarily all who were present at the occurrence.”
16. Citing the provisions of Article 50(2) (j) of the *Constitution* in regard to fair trial, it was argued that the trial court relied on nonexistent provisions of law in allowing the Exhibit Memo Form and the Government Chemist Report to be produced. That Section 33 and 77 of the *Evidence Act* must be considered separately as held in the case of *Richard Walley Vs Republic* (2015) eKLR that:

“With respect, I think that Section 77 of the Evidence Act must be considered separately from section 33 of the Evidence Act. Conflating the two in my humble view appears to place a more onerous burden on the prosecution than intended by Section 77 for purposes of this case. Section 33 is contained as in Chapter I Part IV of the Evidence Act entitled: “Statements by persons who cannot be called as witnesses.” These include statements made by deceased persons, or in the course of business. Section 77 falls under Chapter III entitled - “Proof” and is in part III thereof, entitled: “Documentary Evidence.” Section 77 specifically provides for “Reports by Government analysts and Geologists.” It reads:-.....”
17. That the trial court acted on irrelevant facts, rumors and inadmissible hearsay evidence. That the court relied on evidence of PW2 that the appellant was the perpetrator despite the witness having not witnessed the act.
18. On the question of sentence, it was urged that the trial court erred in imposing an excessive sentence as no Probation Officer’s report was produced and mitigating factors were not considered.
19. The State/Respondent opposed the appeal. It was submitted that the appellant was convicted for the offence of grievous harm. That identification of the perpetrator was proper without errors. It relied on the provisions of Section 143 of the *Evidence Act* in regard to calling of witnesses. That evidence of PW1 proved the case and the sentence meted out was prescribed by the law.
20. This being a first appellate court, I must examine and analyze evidence adduced at trial afresh and reach independent conclusions bearing in mind that I had no opportunity of seeing and hearing witnesses



who testified. This duty of the court on a first appeal was stated by the court in *Okeno -vs- Republic* [1972] EA 32 as follows:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R* [1957] E A 336) and to the appellate courts own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions - *Shantilal M Ruwala v R* [1957] EA 570. 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 courts’ 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 - See *Peters v Sunday Post* [1958] EA 424”.

21. In the case of *John Oketch Abongo Vs Republic* (2000) eKLR, the Court of Appeal was of the view 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.”

22. Section 4 of the *Penal Code* defines grievous harm as:

“Any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense;”

23. Section 234 of the *Penal Code* provides that:

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

24. From the provision of law above, the Prosecution was required to prove beyond reasonable doubt essential elements of the offence which are:

- i. Proof that the victim sustained grievous harm.
- ii. The harm was caused unlawfully.
- iii. The accused was the perpetrator of the harm occasioned.

25. This is a case where both the Prosecution and Defence witnesses are in agreement that the complainant was injured as a result of some substance/liquid having been poured on him. He was rushed to hospital and admitted. Ultimately, he was examined by the Police Doctor, PW3, who found him having suffered serious injuries that have permanently injured his health to an extent that he has been disfigured. The Doctor concluded that the injuries were caused by corrosive liquid and classified the degree of injury as maim which amounts to grievous harm.



26. The main contention is the question of identification of the assailant. In this regard the appellant faults the trial court to have not cautioned itself while accepting evidence of a single witness and also failing to consider that the Prosecution failed to call evidence of crucial witnesses to support that of the complainant.
27. Section 143 of the *Evidence Act* provides that:
- "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."
28. In the case of *Sabali Omar Versus Republic* (2017) eKLR, the Court of Appeal stated that:
- "The prosecution reserves the right to decide which witness to call. Should it fail to call witnesses otherwise crucial to the case, then the court has the mandate to summon those witnesses. But should the said witnesses fail to testify and the hitherto adduced evidence turn out to be insufficient, only then shall the court draw an adverse inference against the prosecution. This is because the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt."
29. This is how the trial court delivered itself:
- "It is an established principle that there is a special need for caution before accepting identification evidence. In *Charles O Maitanyi Vs Republic* (1988-92) 2 KAR, it was held inter alia that it is necessary to test the evidence of a single witness respecting to identification, and that great care should be exercised and absence of collaboration should be treated with great care.
- In *Roria Vs Republic* (1967) EA 583, at page 584 letter G the court had this to say on identification by a single witness.
- "Subject to certain well-known exceptions it is trite law that a fact may be proved by the 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 possibility of error."
- This principle was treated with approval in *Abdalla Bin Wendo & another vs R* (supra)
- "I am alive to the fact that it is necessary to test the evidence of a single witness respecting to identification, and take great care and caution to ascertain whether the surrounding circumstances were favourable to facilitate proper identification. These in my view include light, time spent with the assailant, clothes or any item that the witness may positively identify and whether the accused was known to the complainant." (Emphasis mine).
30. It is apparent that the learned magistrate warned himself of the danger of relying on evidence of a single witness.



31. This was a case of recognition. Both the complainant and appellant were previously known to each other. In the case of *Anjononi & Others Vs Republic* (1989) KLR the court held 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...”

32. It is admitted by the appellant as stated by the complainant, that there were electricity lights at the place of the incident. The lighting condition must, therefore, have enabled the complainant to see despite being early in the morning. The complainant vividly remembered his attacker. He carried a jerrican and he had wrapped a jacket around his other hand. He walked in a cautious and surreptitious manner so as not to be seen but he recognized him. Considering evidence of PW2, DW2, DW3 and DW4, none of the witnesses saw the act being committed. They ran to the scene after the act, therefore, they did not see the culprit. Therefore, it was only the evidence of the complainant that would prove who the culprit was.

33. According to evidence of the complainant, there seem to have been a disagreement between the two (2) of them following an allegation that the complainant was having an extra-marital relationship with the appellant’s wife. This, though vehemently denied by the appellant may have been a motive for committing the heinous act.

34. The complainant stated that when the appellant approached, he stopped what he was doing, stood and faced his attacker, therefore, he saw the person properly. In this regard, the trial court which gave reasons why it believed the complainant did not fall into error in believing that the appellant was the perpetrator of the act.

35. The act committed was contrary to the law as it did not conform to the law, therefore, was an unlawful act.

36. The court is also faulted for not complying with the law in accepting the Exhibit Memo Form and the Report from the Government Chemist. An explanation was given as to why the initial Investigation Officer could not produce the Exhibit Memo Form and the Report by the Government Analyst. He had passed on. Therefore, an application was made for the documents to be produced pursuant to Section 33 and 77 of the *Evidence Act*, which was unopposed. The alluded to provisions of the law provide thus:

"33 Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—

(b) made inin the discharge of professional duty;.....

77 In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.

(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and



qualifications which he professed to hold at the time when he signed it.

- (3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof."

37. It is presumed that such documents are authentic having been made by persons who could not be found by the Prosecution to be available in court. The question this court should grapple with is whether the appellant was prejudiced in the circumstances. This is a case where the appellant was represented by learned counsel Mr Wanjohi at trial. When the application was made he did not object to the document being adduced in evidence. Had the expert evidence been unsatisfactory to the court, such evidence should have been adduced by another expert, but, this having not been the case, the error alluded to was curable under Section 382 of the Criminal Procedure Code(CPC) which provide thus:

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

Evidence on the document was to prove that the substance/liquid that was poured on the complainant was sulphuric acid, a corrosive liquid. If the court were to disregard the evidence, there is evidence of the fact of the complainant having been maimed. Therefore, that fact per se cannot result into the appeal being allowed."

38. On the question of sentence; The objective is basically to interalia rehabilitate the offender, by removing him from the society so that he does not commit another offence.

39. In the case of *Wanjema Vs Republic* (197) EA 493, Trevelyan J stated that:

"An appellate Court should not interfere with the discretion which a trial Court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case."

40. The sentence provided for the offence herein is up to life imprisonment. In meting out the sentence the trial court took note of mitigating factors where the appellant expressed remorse. However, the court considered circumstances of the victim and his family. It took into account aggravating circumstances as well. The learned trial magistrate is faulted for not calling for a Probation Report. A Probation order is ordinarily ordered in view of incarceration. It is a sentence just like a fine or imprisonment. Failure to call for the report was not prejudicial.



41. Section 216 of the [CPC](#) provides that:

"The court may, before passing sentence or making an order against an accused person under section 215, receive such evidence as it thinks fit in order to inform itself as to the sentence or order properly to be passed or made."

42. It is discretionary for the court to receive evidence that guides it in reaching the sentence to mete out, which it did through mitigation by the accused who opted to do it through his Counsel.

43. The victim impact statement was presented to the court, but, the Prosecutor did not tell the court whether or not the appellant was a first offender. In the circumstances I find the sentence having been manifestly excessive. In the premises, it is set aside and substituted with a sentence of twenty-five (25) years imprisonment, to be effective from the date of sentencing, the October 8, 2021.

44. It is so ordered.

WRITTEN, DATED AND SIGNED BY HON. LADY JUSTICE L. N. MUTENDE, THIS 21ST DAY OF NOVEMBER, 2022.

L. N. MUTENDE

JUDGE

JUDGMENT DELIVERED BY HON. JUSTICE D.O.

OGEMBO ON THIS 30TH DAY OF NOVEMBER, 2022.

D. O. OGEMBO

JUDGE

