Makundi v Republic (Criminal Appeal E021 of 2022)
[2022] KEHC 15685 (KLR) (28 November 2022) (Judgment)

Neutral citation: [2022] KEHC 15685 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL E021 OF 2022

GMA DULU, J

NOVEMBER 28, 2022

BETWEEN

MARTIN NDINI MAKUNDI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original judgment of Hon. C.A Mayamba in Kilungu Principal Magistrate's Court PM Case No.415 of 2018 pronounced on 21st June 2018)

JUDGMENT

1. The appellant was charged in the magistrate's court with grievous harm contrary to section 234 of the *Penal Code*. The particulars of offence were that on October 19, 2014 at Wautu Sub-location, Ilima Location, Mukaa Sub-Location in Makueni County unlawfully did grievous harm to John Musau Musyoka by cutting his penis using a sharp object.
2. He denied the charge. After a full trial, he was convicted of the offence and sentenced to ten (10) years imprisonment.
3. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal on the following grounds –
    1. That the learned trial magistrate erred in law and in fact when he never considered it was the appellant or any other Person who assaulted the complainant.
    2. That the learned magistrate erred both in law and facts when he failed to thoroughly re-evaluate and re-weigh both the evidence from the prosecution and the accused person to see whether there was proof beyond reasonable doubt.

3. The learned trial magistrate erred both in law and facts when he convicted and sentenced the accused on evidence whereby the prosecution side did not avail any exhibits to the court to make the court reach a decision which would be of mere suspicion. (sic)

4. The learned trial magistrate erred both in law and facts by not considering whether the complainant was assaulted in a clear circumstance.

5. The learned trial magistrate erred both in law and in fact when he failed to consider clearly if the appellant had committed the offence in the instant case.

6. The learned trial magistrate erred both in law and facts when he ruled in a case whereby it had inconsistencies, contradictions and untruths.

4. The appeal was canvassed through filing of written submissions. In this regard, I have perused and considered the submissions filed by the appellant as well as those filed by the Director of Public Prosecutions.

5. This being a first appeal, I begin by reminding myself that I am duty bound to evaluate all the evidence on record, and come to my own independent conclusions and inferences – see *Okeno v Republic* (1972) E.A 32.

6. I have evaluated the evidence on record. In support of their case, the prosecution called five (5) witnesses. On his part, the appellant gave unsworn testimony and did not call any additional witness.

7. From the evidence on record, the complainant Pw1 John Mwau Musyoka was injured on his penis. He testified so. His mother Pw2 Catherine Mutuo Musyoka confirmed that she saw the injury when the complainant arrived back home in the morning of 20/10/2014 and took him to hospital for treatment. The injury suffered was also seen by a neighbour Pw3 Julius Mwangangi Makosi.

8. Pw5 Dr. Charles Mwendwa Mutisya testified and confirmed that the injury suffered by the complainant was grievous harm, after medically examining the complainant.

9. I thus agree with the finding of the trial magistrate that the prosecution proved beyond any reasonable doubt that the complainant suffered grievous bodily harm through the injury inflicted to his penis to the degree defined under section 4 of the *Penal Code*.

10. Was the injury caused by the appellant? The evidence on this aspect is that of the complainant Pw1 alone. The appellant denied causing the injury on the appellant and put forward a defence of alibi, that on the day in question he was away in Nairobi.

11. From the evidence of Pw1 on record the incident occurred at night, around 8 pm. He was headed home from Mwangini market and met the appellant on the way, and according to him the appellant hit him with a stick, and when he fell down helpless, dragged him to Wautu river and cut his penis. He stated that at the place of the incident, there was electricity light. In cross examination, he said that the appellant actually talked to him before hitting him on the head.

12. It is trite that where an alleged criminal offence occurs in circumstances which are unfavorable for positive identification, the court has to warn itself of the possible danger of mistaken identification, and to ensure that the evidence on record establishes positive identification of an accused person before the court can convict. There is a chain of cases on this principle. In my view, it will suffice if I cite only

the English case of *Regina v Turnbull & others* (1976) 3 ALL ER 549 which was cited in *Mwaura v Republic* (1987) KLR 645 wherein the Court of Appeal stated that –

> " in cases of visual identification by one or more witnesses a reference to the circumstances usually requires a Judge to deal with such matters as the length of the time the witness had for seeing who was doing what as alleged, the position from the accused and the quality of light".

13. I have also to bear in mind that mistaken identity can occur even with close relative see *Kiarie v Republic* (1984) KLR 739 wherein the Court of Appeal stated that –

> " it is possible for a witness to be honest but mistaken and for a number of witnesses to be all mistaken".

14. Having considered the evidence on record herein, I agree with the magistrate that the appellant was positively identified as the culprit, in that Pw1 was consistent from the beginning that the appellant was the culprit. He knew him before. He said that there was electricity light. The appellant did not contest that evidence in cross examination, only to come up later to talk of an alibi claiming that he was in Nairobi on that day, while all the evidence of the prosecution witnesses on record which he did not contest, was that before the incident he lived in the same home with the complainant.

15. In my view, from the evidence on record, the complainant Pw1 positively identified the appellant as the culprit both visually and by voice. I will thus uphold the conviction.

16. With regard to sentence, the maximum sentence for the offence of grievous harm is life imprisonment. I note that in mitigation the appellant said that he did not have a problem at all and that he did not have a wife and children, which had nothing to do with asking for leniency. In the circumstances of the case, and with the injury suffered by the complainant, I find that the sentence of 10 years imprisonment imposed was neither harsh nor excessive.

17. Consequently and for the above reasons, I find no merits in the appeal. I dismiss the appeal and uphold both the conviction and sentence of the trial court.

Right of appeal explained.

DELIVERED, SIGNED & DATED THIS 28TH DAY OF NOVEMBER 2022, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE