Gavihi v Republic (Criminal Appeal 96 of 2019)
[2022] KEHC 16912 (KLR) (23 December 2022) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL 96 OF 2019

WM MUSYOKA, J

DECEMBER 23, 2022

BETWEEN

PHOSTERS ISABWA GAVIHI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From Original Conviction and Sentence, in Kakamega CMCCRC No. Criminal Case No. 906 of 2014, by H. Wandere, Senior Principal Magistrate, of 11th February 2019)

JUDGMENT

1. The appellant was convicted of causing grievous contrary to section 234 of the *Penal Code*, Cap 63, Laws of Kenya, and was sentenced to 20 years imprisonment. The particulars of the charge against the appellant were that on March 23, 2018, at Sichirai Sub-Location, within Lurambi Division, Kakamega Central in Kakamega County, he unlawfully and intentionally did grievous harm on Jacinta Mutola. He had pleaded not guilty to the charges before the trial court, which compelled the primary court had to conduct a full trial. The prosecution called 5 witnesses.

2. PW1 was the complainant, Jacinta Mutula Shitambasi. She described how the appellant came to her house on the evening of the material night, and broke a door to her house using a big stone, entered the hose while armed with an axe, and cut her with it twice on the head and once on the palm. A group of people came to his rescue. He thereafter reported the matter to the police, who took him to hospital. PW2, Melvin Akonya, was a daughter of PW1. She was with PW1 when the appellant struck, and she saw him attack her with the axe. She said that he also threw a cutlass at her, PW2, as she ran away. PW3, Vincent Shikombe Andala, and PW4, Julias Bulimu Yeswa, responded to the distress call by PW1 and PW2, rushed to the scene, saw the injuries, and was informed that the appellant was the assailant. PW4, Patrick Mambili, was the clinical officer who testified on behalf of the clinician who had attended to PW1. He said that she was brought in unconscious, and he described her injuries as a cut wound on the head, which received 8 stitches, and the left arm had been fractured in 3 parts, and was stitched.

She also had an injury on the palm, 4 inches long, which was also stitched. An implant was fixed on the fractured hand. Her injury was classified as maim, being an injury that could lead to death. The appellant was put on his defence. He gave a sworn statement, where he denied assaulting PW1, and said that he had been framed by his uncle over a land dispute. After reviewing the evidence, the trial court convicted him of the charge of causing grievous harm, contrary to section 234 of the *Penal Code*, and sentenced him to ten 20 years imprisonment.

3. The appellant being dissatisfied with the conviction and sentence appealed to this court and raised five (5) grounds of appeal, namely:

    a. That voice identification was not done;

    b. That the prevailing circumstances were not favourable for positive identification;

    c. That there was contradiction between the charge sheet and the medical evidence;

    d. That the alleged exhibits were not produced in court; and

    e. That the case poorly investigated.

4. Being the first appellate court, I have re-evaluated all the evidence on record. I have drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The Court of Appeal's decision in the case of *Okeno v Republic* (1972) EA 32 (Sir William Duffus P, Law & Lutta JJA) has consistently been cited in criminal appeals on this issue. In its pertinent part, the decision is to the effect that:

> "An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. 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 court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can 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."

5. The appeal was canvassed by way of written submissions that the appellant has placed on record. The respondent did not file written submissions. In the written submissions, the appellant addressed 7 issues: his arrest and plea taking, unfair trial, identification and recognition, determination, degree of injury and exhibit. I will consider the matter following the arguments made in the written submissions, which largely address the grounds set out in the petition of appeal.

6. On his arrest, the appellant argues that he was not taken to court within 24 hours. He submits that PW4 said that he was arrested on March 23, 2019, which contradicted the charge sheet, which indicated that he was arrested on March 27, 2018. The police officers who arrested the appellant and investigated the case did not testify, and, therefore, there is no police record of when the arrest was effected. PW4 was a member of nyumba kumi or village vigilante. He testified that he was present when the appellant was arrested by the police. However, his testimony was unclear as to when that arrest was effected. The charge sheet indicates the date of arrest to be March 27, 2018. When the appellant testified, he did not state definitively when he was arrested, and he did not complain that he was held in custody for more than 24 hours before being arraigned. As there was no evidence recorded from the individuals who testified, on the exact date of the arrest of the appellant, I am only left with the date indicated on the charge sheet. It shows an arrest on March 27, 2018, and arraignment on March 28, 2018. That would mean that the appellant was presented in court within the 24 hours allowed in law. in any case,

issues around the time spent in pre-arraignment custody are of little consequence to a trial, unless the arrestee is held in custody for a prolonged period in excess of 6 months. Any violation of the rights under Article 49 of the *Constitution* mainly attracts compensation, by way of damages, rather than a declaration that a trial was unfair.

7. His second ground is that the trial was unfair, on 2 accounts. One, he was not informed and given substantial documents to allow him prepare his defence. Two, a witness was introduced, who had not been listed in the charge sheet as a witness. Three, the arresting and investigating officers should have been called to testify. On advance disclosure of evidence, the record is silent on when the same were furnished to the appellant. The first time the issue came up was on July 12, 2018, when the court ordered that the same be supplied to the appellant. On July 16, 2018, the appellant said he was ready for trial, but he said that he needed copies of the witness statements, but then again said that he had the statements, and the proceedings began. The record is clear, that the appellant indicated to court that he was ready to proceed with the matter, on July 16, 2018, as he had been furnished with what he needed to proceed with the hearing. The witness he says was not listed in the charge sheet is PW2, which is true. However, the appellant had previously said that he had been supplied with statements of the witnesses, and when PW2 was presented on August 20, 2018, he did not raise any issue, and he proceeded to cross-examine her at length, suggesting that he was not prejudiced. On the arresting and investigating officers not being presented as witnesses, it is trite that the failure or omission to call them is not fatal to the prosecution. The fact of the arrest of the appellant was not in issue, and whatever issues that might arise over it could not vitiate the trial. The investigating officer largely gives a narration of the steps in the investigation of the matter, and a summary of the prosecution case. Failure to give such a narration of the investigative steps and of the summary of the case should not be injurious to the case. The critical witnesses would be the persons who witnessed the occurrence of the events, and who can give firsthand information on what transpired. The testimony by an investigating officer is essentially secondary or secondhand, a mere rehash of what the principal witnesses would have told the court.

8. His third ground is on identification and recognition. He raises issue with the testimony by PW1 that he had been her husband for 2 years, then they parted ways. His argument was that if he had been her husband, then PW3 and PW4 who were her neighbours, and PW2, who was her daughter, ought not have testified that they did not know him. I believe that there should no issue that the appellant was well-known to PW1. She said that he was her lover after her husband died, and that they cohabited for 2 years. PW2, her daughter, testified that she knew the appellant, as he used to visit PW1 at home, and that he used to play with her and her brother, and that she knew his voice well. He lurched on the statement at cross-examination, that she only saw in that day. That is a misapprehension of the testimony, it can only mean that he was the only person she saw in that incident that night, as her testimony is very clear that she knew him previous, from the days he used to visit her mother and to play with her. The appellant was not officially married to PW1, he was only a lover after her husband died. PW2, her daughter, identified him as a person who used to visit PW1. It would not be strange, therefore, that the neighbours did not know him. Having been a lover of PW1 and a frequent visitor to her house, no doubt, PW1 and PW2 knew him very well, and they could identify him by voice as well as under unfavorable circumstances. Indeed, the case of recognition applies him, for a person so well-known to the 2 witnesses. He pointed at some inconsistencies in the evidence, regarding whether he was armed with a panga or an axe. PW1 was hit with an axe, and was badly injured. It would appear that she had no time to note anything that the appellant was carrying. PW2 was not hurt, and had the presence of mind to note that the appellant was armed with an axe and a panga. She described how he carried the panga. He also had a torch, according to her. She was emphatic that the appellant used the axe to injure PW1, and threw a panga at her, PW2, as she fled from him. He argues that the other child should have been called as a witness. The response to that is that not every person who knows

something or other about the matters in controversy should be presented as a witness. The prosecution is obliged to call enough witnesses to establish its case, and not to call every person who has some information about the matter.

9. The fourth ground is about the case being a frame-up on account of the alleged visit by PW1 to the appellant in prison to have the case withdrawn, and the pendency of other proceedings where PW1 had been assaulted by her in-laws. The issue of the withdrawal of the case arose at the trial. The appellant cross-examined PW1 about it, and she denied promising that she would withdraw the case. The fact that the charges were not withdrawn brought that issue to a close. The issue of the other suit is of no relevance. It never arose before the trial court, and it cannot arise on appeal in the circumstances.

10. The fifth ground is about an inconsistency between the charge sheet and the medical records on the nature of the injury sustained by PW1. He argues that the charge sheet alleges grievous harm, while the medical records allege assault. It is true, that the charge sheet alleges that the injury sustained was grievous harm. However, it is not true that the medical records classify it as assault. The principal medical record is the P3 form, as it is prepared specifically for criminal proceedings. The treatment notes are only put in evidence to augment and authenticate the P3 Form, as proof that indeed the victim sustained injury, and was sought medical intervention. The P3 is a summary of the contents of the treatment notes. The one on record, signed by the Medical Superintendent, Kakamega County General Hospital, on April 4, 2018, classifies the injury sustained as "maim." Maim is a consequence of an assault.

11. The offences relating to assaults whether or not causing harms of varying degrees are provided for in sections 234, 250, 251, 252 and 253 of the *Penal Code*. Common assault is provided for in section 250, it essentially refers to an assault that leads to no injury or harm. Section 251 provides for assaults that cause actual bodily injury or harm. Both are misdemeanours, attracting a maximum penalty of five years imprisonment. Where the offence is more serious, and may be described as grievous or maim, the same is charged under section 234, and attracts a maximum penalty of life imprisonment. The interpretation to these terms is given in section 4 of the *Penal Code*. "Harm" is defined as any bodily hurt or disease or disorder whether temporary or permanent. "Grievous harm" is defined as harm which amounts to maim or dangerous harm, or which seriously or permanently injures health; is likely to so injure health. It also refers to permanent disfigurement or any permanent serious injury to any external or internal organ, membrane or sense. "Dangerous harm" is said to refer to endangering life, while "maim" means destruction or permanent disabling of any external or internal organ or membrane or sense.

12. The sixth ground is about production of an exhibit. The appellant is vague about this ground, for it is not clear what it is that he is complaining about. PW4 produced 4 medical records, being a P3 Form, treatment notes and an x-ray report, marked as P Exhibits No 1A, B, C and D.

13. On the sentence being excessive, according to section 234 of the *Penal Code*, the maximum penalty for the offence is life in prison. The court considers the circumstances of the offence, the effect that it has had on the victim, and the attitude of the offender. The trial court considered all these factors. The victim was attacked at her own home, while sleeping with her children of tender years. The appellant broke her door with a huge stone, to gain access. The choice of weapon, an axe, aimed at her head. The injuries sustained are permanent, and would affect the victim for the rest of her life. Her ability to provide for her children, who are still at tender age, has been impaired. She could have died, given the gravity of the injuries, leaving the 2 minors total orphans, as their father is dead. The offender, the appellant herein, was not remorseful. He told the court that he had nothing to say in mitigation, and pointedly invited the court to do whatever it pleased. Am not persuaded that the sentence was unreasonable or excessive, in the circumstances, and I shall not interfere with it.

14. Having considered all the issues raised in the appeal, I am of the considered view that the conviction of the appellant in Kakamega CMCCRC No 906 of 2018 was safe. I shall accordingly disallow the appeal, affirm the conviction of the appellant, and confirm the sentence imposed on him of 20 years imprisonment.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 23RD DAY OF DECEMBER 2022

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Phosters Isabwa Gavihi, the appellant, in person.

Ms. Kagai, instructed by the Director of Public Prosecutions, for the Respondent.