Kisang v Republic (Criminal Appeal E012 of 2022)
[2022] KEHC 17126 (KLR) (16 December 2022) (Judgment)

Neutral citation: [2022] KEHC 17126 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL E012 OF 2022

AC MRIMA, J

DECEMBER 16, 2022

BETWEEN

EDWIN KEMBOI KISANG ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising out of the conviction and sentence of Hon. V. Karanja (Principal Magistrate) in Kitale Chief Magistrate's Court Criminal Case No. E246 of 2021 delivered on 24th February, 2022)

JUDGMENT

Introduction:

1. The appellant herein, Edwin Kemboi Kisang, was charged with the offence of attempted murder contrary to section 220(a) of the *Penal Code*. The particulars of the offence were that on January 7, 2021 at 2200hours at Kipsero village, Marakwet West sub-county within Elgeyo Marakwet county, the appellant unlawfully attempted to cause the death of one Mercy Jepchirchir by cutting her using a panga on the back of her head, neck and also chopping off her left middle finger thereby occasioning her grievous harm.

2. When the appellant was arraigned before the trial court, he pleaded not guilty to the charge. After a full trial, the appellant was convicted as charged and sentenced to life imprisonment.

3. Being dissatisfied with both the conviction and sentence, the appellant preferred the instant appeal, hence this judgment.

The Appeal:

4. The appellant faulted the trial process for breaching the provisions of articles 27, 47, 48 and 50(2) (p) and (q) of the *Constitution*. He was emphatic that the prosecution failed to discharge its burden of proof to the required standard. He was of the view that section 77(1) and 78(1) of the *Evidence Act* had not been complied with as no expert report of the alleged blood and panga were produced in evidence. He maintained that since crucial witnesses were not called, the ultimate conviction and sentence breached the provisions set out in section 146 and 150 of the *Criminal Procedure Code*.

5. He urged that the trial court failed to furnish an interpreter during the hearing yet he did not understand the official languages of the court. He lamented that his defence was not considered yet it was cogent. He put forward that the charges were maliciously preferred against him to settle old scores. He also found that the sentence meted out was harsh and excessive.

6. In the premises, therefore, the appellant urged this court to allow the appeal, quash the conviction and set aside the sentence that was imposed on him and that he be set at liberty.

7. During the hearing of the appeal, parties relied on their written submissions. The appellant submitted that no evidence was tendered to place the appellant at the *locus in quo* when the alleged offence occurred. He further discounted the identification and recognition process by PW1 as unsatisfactory since she used a torch emanating from a phone to shed light on the perpetrator. The appellant found inconsistences in the testimonies of PW1 and PW6 and concluded that there was no iota of corroboration. He added that the omission of an expert report on the blood samples found at the crime scene and the failure to produce the panga as the weapon rendered the conviction unsafe. The appellant opined that the absence of calling crucial witness mentioned by the prosecution witnesses vitiated the strength of the prosecution's evidence. Finally, on his defence, the appellant maintained that his *alibi* defence was weighty and should not have been dismissed.

8. The appeal was opposed by the prosecution. It was submitted that all the elements to a charge of attempted murder had been proved to the required standard of proof. Learned counsel for the state submitted that the appellant inflicted injuries upon the complainant with motive knowing very well it could potentially cause the complainant's death.

9. On sentence, the prosecution observed that the sentence meted out was lawful. The prosecution, however, noted that the appellant stated that he was sorry in his mitigation. In that regard, the prosecution urged this court to reconsider the sentence with a view to reconciling the family.

Analysis:

10. This being a first appeal, it's the duty of this court to re-consider and re-evaluate the evidence adduced before the trial court and for this court to reach its own independent determination in the matter. In doing so, this court is required to take cognizance of the fact that it neither saw nor heard the witnesses testify and, therefore, give due regard in that respect.

11. As was stated in *Okeno v R* [1972] EA 32: -

    ...it is not the function of the 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 magistrate's 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 witness. See Peter v Sunday Post [1958] EA 424.

12. One of the paramount issues for determination in this appeal is whether the appellant was rightfully identified by recognition as the assailant. The identity of an assailant in criminal trials remains one of the most cardinal aspects of the justice system. It is, of course, premised on the fact that the person faced with the criminal offence denied committing the alleged offence.

13. Identification of assailants in law comes in many ways. In this case, the appellant was identified by way of recognition and by only one witness, PW1. The law relating to identification by a single witness is by now well settled.

14. The Court of Appeal in *Peter Mwangi Wanjiku v Republic* [2020] eKLR addressed the aspect of single identifying witness as follows: -

> 13. Section 143 of the *Evidence Act* provides that a court can convict on the evidence of a single witness. The said section reads, "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." Nonetheless, this does not remove the obligation of the trial court to test the evidence of a single witness. As was held in Mailanyi v Republic [1986] KLR 198:
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> 1. Although it is trite law that a fact may be proved by the testimony of a single witness, this 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.
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> 2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light, available conditions and whether the witness was able to make a true impression and description.
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> 3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.
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> 4. Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.
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> 14. It is clear from the record of appeal that the trial magistrate was alive to his obligation to carefully test the evidence of Solomon. The issue is whether this was actually done. In Mailanyi v Republic (supra), the court emphasized that:
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> What is being tested is primarily the impression received by the single witness at the time of the incident. Of course if there was no light at all, identification would have been impossible. As the strength of light improves to great brightness, so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. ....
>
> There is a second line of enquiry which ought to be made, and that is whether the complainant was able to give some description or identification of his or her assailants to those who came to the complainant's aid or to the police.

15. In *R v Turnbull & others* (1973) 3 ALL ER 549, which decision has been generally accepted and greatly used in our judicial system, the court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The court stated thus: -

> ... 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 with the accused under observation? At what distance? In what light? Was the observation impeded in any way...? 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 the 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 his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

16. In *Wamunga v Republic* (1989) KLR 426 the Court of Appeal stated as under: -

.... It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.

17. In *Anil Phukan v State of Assam* (1993) AIR 1462 the court held as follows: -

> A conviction can be based on the testimony of a single-eye witness and there is no rule of law or evidence which says to the contrary provided the sole eye witness passed the test of reliability in basing conviction on his testimony alone.

18. The identifying witness in this matter was the complainant, PW1. She had been married to the appellant for 4 years, but separated around 5 months prior to the incident. They lived in separate homes.

19. It was PW1's testimony that on the fateful night, the appellant visited her home at 2230hours. He announced his arrival by kicking the door open where he found PW1 alone. PW1 identified the appellant who was dawned in a yellow jumper, white shirt, black trouser and slippers. She used the torch light emanating from the phone in recognizing her estranged husband. PW1 asked the appellant why he kicked the door. Instead of issuing a verbal response, the appellant descended upon the complainant. Using a panga, the appellant cut the complainant on her neck and both hands.

20. Following this ordeal, PW1 screamed. This caused the appellant to flee away from the scene. Thereafter, PW1's neighbour one, Reuben Rotich, PW4, upon hearing the screams went to the complainant's home.

21. Other neighbours similarly heard the screams. This included PW2 Boaz Kiprono, PW1's sister and PW3, William Kibowen, the PW1's father. They all went to the complainant's house and found her bleeding from injuries sustained on her head, neck and hands. The complainant was rushed to health clinic where she was seen by PW5, Haron Kimaiyo, a clinician.

22. PW5 observed that the complainant had deep cut wounds on the temporal region of the skull left side. She had cut wounds on the neck and both hands. He observed that the complainant's left-hand finger had been chopped off. The x-ray conducted did show fractures of the 3rd and 4th fingers. She suffered

excessive bleeding. He then treated her and referred her to Cherangani nursing home. Thereafter, the complainant was admitted at Moi Teaching and Referral Hospital in Eldoret on January 11, 2021 and was discharged on the following day.

23. PW1 was emphatic that the attack on her was unprovoked and could not thus understand why her estranged husband had done so.

24. The matter was reported at Kapcherop police station. PW6, No 11967 PC Duncan Macheso, led the investigations. While in company of other officers, PW6 proceeded to the crime scene where they found a large crowd. PW6 took photographs of the scene. On January 12, 2021, the appellant was arrested and later charged.

25. After close of the prosecution's case, the trial court found that the appellant had a case to answer and was placed on his defence.

26. His *alibi* sworn testimony was that he was at a party on that fateful night at their home and as such he was not the one who attacked PW1. While partying, the appellant got drunk and found himself at the police station. He was then informed that he had attacked his wife. He confirmed that the complainant was his wife but denied that they had separated before the incident. He in fact stated that he lived with the complainant.

27. On whether the appellant was rightly so recognized as the assailant, this court is duty bound to re-evaluate the circumstances surrounding the recognition of the assailant. The court will do so.

28. First, the court notes that PW1 did not state whether he was asleep or awake when the door was banged and she was eventually attacked. If, for instance, she was asleep then it is obvious that it took her time to wake up, come to her full senses, look for her phone and switch on the phone torch. If she was awake, it was important to ascertain what she was engaged in by then.

29. Second, there was no mention of the strength of the phone torch as well as the distance between PW1 and the assailant. Third, the attacker did not utter any word during the ordeal. Fourth, the period the incident took was not given.

30. Fifth, PW1 gave a description of how the attacker was dressed. She averred that the attacker was dawned in a yellow jumper, white shirt, black trouser and slippers. PW1 must have carefully observed the attacker to see the manner he was dressed. One stunning question arises: If the attacker was dressed in a yellow jumper, how did PW1 see the white shirt which was inside the jumper?

31. Sixth, there was the issue of bad blood between PW1 and the appellant that led to their separation. The aspect was never investigated to ascertain if it had any bearing in the matter. Such an issue ought to have been carefully looked into to eradicate the possibility of PW1 using the attack to settle scores with the appellant.

32. A closer scrutiny of the circumstances in this case does not support a recognition of the assailant without any possibility of error. It is doubtful that PW1 recognized the assailant as the appellant.

33. Having so found, a consideration of the rest of the grounds of appeal would be an academic exercise. In the interest of time, the court opts to end this discussion at this point.

34. In the end, the following final orders hereby issue: -

    a. The appeal against both the conviction and sentence is hereby allowed.

    b. The conviction is hereby quashed and the sentence of life imprisonment is hereby set-aside.

c. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 16TH DAY OF DECEMBER, 2022.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

No appearance for Edwin Kemboi Kisang, the Appellant in person.

Miss Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Regina/Kirong – Court Assistants.