



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 215 OF 2019

JOHN KHISA WANGA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Appeal against the original conviction and sentence in Criminal Case No. 1707 of 2018 at Chief Magistrates Court Bungoma by (Hon. S.W.Githogori – RM on 20th December 2019)

J U D G M E N T

1. **John Khisa Wanga**, 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 24th day of December, 2018 at around 0000hrs at Musese village in Bungoma Central Sub-County within Bungoma County, unlawfully did grievous harm to **Joshua Weyao**.

2. Having denied the charge, he was taken through full trial, found guilty, convicted and sentenced to serve five (5) years imprisonment.

3. Aggrieved, the Appellant appeals on grounds that the trial court convicted him in the absence of proper investigations; It failed to consider that the incident occurred at the same time, but, at a different destination with a similar offence linked to the Appellant; Identification was not proved to the required standard. That the alibi defence that was watertight was rejected; Mitigation factors were not considered and the sentence was harsh.

4. The prosecution's case was that **PW1 Joshua Weyao**, the Complainant, was from his father's funeral, and as he walked from Chwele going to Sesi he encountered the Appellant who was in company of about ten (10) people. The Appellant who was shirtless, carried a metal bar. They attacked the complainant and injured him. **PW2-Elisha Juma Wekesa** who was at the Makuti Inn Club, heard noise as soon as the Appellant who had been at the club went out with some other people. He went out to check on what was happening only to find the Appellant with other individuals assaulting PW1.

He saw the Appellant in particular hitting PW1 with the metal bar as the others kicked and hit him with blows. The gang wanted to beat him (PW2) but the Appellant deterred them alleging that he was one of them.

5. The intervention of people who went to the scene, a watchman inclusive, enabled the complainant to escape. He went to the house of **PW3 Samwel Masiwa Namulala**, his cousin and a nephew of the Appellant who attempted to administer on him first aid but on noting that he was bleeding profusely he went to call his family members who took him to hospital. **PW4 John Wairemba**, a clinician at Chwele Sub-County Hospital examined the complainant and found him having sustained a cut on the forehead that was bleeding, bruises on the head, arms that were swollen. His right lower limb had a cut and was bleeding, Following the X-ray and CT Scan done, it was established that the left zygomatic bone had a fracture. As a result, he concluded that the complainant sustained grievous harm.

6. The report to the police was made by the complainant's sister. **PW5 No. 57067 Corporal Daniel Chacha** investigated the case and arrested the Appellant who was subsequently charged.

7. Upon being put on his defence the Appellant stated that on 22nd December, 2018 he was at their home situated at Mukweya village where he had an argument with his brother, over land and his brother reported to the Administration Police at Mukweya. Consequently, he was arrested on the same day and held in custody until 24th December, 2018 when he was released after his brother withdrew the case .

8. That on 25th December, 2018 he was at home when he was summoned to go to Chwele police station. He went there and was arrested by Corporal Chacha following allegations that he had assaulted someone. He was held in custody until 27th December, 2018 when he was arraigned in court. He denied the allegations.

9. **DW2, Fred Simiyu Wanga**, his brother, stated that he fought the Appellant over land on 22nd December, 2018. That he took him to

Mukhweya AP and the Appellant was arrested; but, following intervention by their kin, he withdrew the complaint and the Appellant was released on 24th December, 2018 at 4:00pm.

10. **DW3 No.209609 Senior Sergeant Clarence Murunga** of Kapchai Division Bungoma County, stated that the Appellant was in custody from 22nd December,2018 at 11:00am following a complaint by his brother that he chased him following a land dispute and was released on 23rd December,2018 at 4.00pm. On cross examination, he was emphatic that the Appellant was not in custody on the night of 23rd December, 2018.

11. **DW4 No. 2005006881 Corporal Christopher Kisongochi Opicho** from Chwele Police Station had poor memory, a fact noted by the court. However, he alluded to the Appellant having been arrested after he fought with his brother and both of them were arrested on 29th December,2018, but, he could not remember when they were released.

12. The trial Court considered evidence presented and concluded that the evidence adduced by the prosecution was overwhelming.

13. The appeal was canvassed by way of written submissions. The Appellant urged that the charge sheet was defective for failing to indicate the type of weapon used to cause grievous harm, that such particulars are necessary in the charge sheet. That the witnesses gave contradicting evidence. That PW1 stated that the accused was known as *Juba*; he did not know him and they had no relations, while PW3 stated that the accused was the complainant's cousin and that he would be lying if he said he did not know him. That while PW3 alleged that the PW1 did not say who assaulted him, PW2 stated that he informed the family. That PW1 referred to the Appellant as "Juba" while PW2 called him "Chopper" referring to different people. That the time indicated when the offence was allegedly committed by PW1, PW2, and PW3 was contradictory.

14. He argued that he could not have committed the offence as he was in custody at the time of the alleged act. On the P3 form presented, he argued that it was not useful, as the complainant was examined on 26th December, 2018 and the injuries having been four (4) days old meant that the offence was committed on 22nd December, 2018 before the Appellant was released.

15. That investigations were not conclusive as people mentioned by PW1 and PW2 were not availed as witnesses to clear doubts. That the complainant was attacked on 23rd December, 2018 at 0000hrs before the accused was released and that it was dark such that PW1 could not have seen the Appellant as the only source of lighting was moonlight.

16. The Respondent / State opposed the appeal. It was argued that on seeing the Complainant, the Appellant alerted his group that he was the one, therefore, the light he used to see the complainant was the same one that enabled the complainant to recognize him while shirtless and armed with a metal bar. That the trial court rightly rejected the alibi defence put up since the offence was committed on 24th December, 2018, at midnight after the Appellant had been released from custody.

17. That the Appellant did not establish the allegation that he was charged with another offence as alleged and the sentence imposed was not harsh as the penalty provided for the offence is life imprisonment.

18. This being a first appeal this court's function is to reassess the record and analyse the evidence before the lower court and arrive at its own conclusions, bearing in mind that unlike the trial court, it did not see and hear the witnesses. In the case of **Okeno Vs Republic [1972] EA 32** at 36 the East Africa Court of Appeal stated as follows on the duty of the Court on a first appeal:

"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 court's 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] E.A. 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 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 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] E. A. 424."

19. It is argued that the charge is defective for want of including particulars of the weapon used. **Section 4** of the Penal Code provides thus:

"Grievous harm" means 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;

20. **Section 134** of the Criminal Procedure Code provides as follows:

Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

21. A charge will be fatally defective if it does not allege essential ingredients of the offence (See **Sigilani Vs. Republic (2004) 2KLR480**). Secondly, a charge will also be defective if it does not accord with evidence adduced at trial or if it gives a misdescription of the alleged offence in its particulars (See **Yongo Vs. Republic (1983) KLR**)

22. Looking at the charge as drawn, it indicates what nature of harm the complainant was alleged to have suffered. Ingredients of the

offence are included. The information presented was understood by the Appellant and was sufficient to enable him prepare for his defence. To prove the offence of grievous harm, it is not a requirement for the weapon used to be produced in evidence, what is crucial is to prove ingredients of the offence.

23. It is not in doubt that the complainant was injured of the fateful day. PW2 was one of the individuals who saw him being assaulted, and when he managed to escape he went to PW3's house where he was assisted. Subsequently he was escorted to hospital for treatment. Injuries sustained were confirmed by PW4 and after a CT Scan was done, the degree of injury sustained was assessed as grievous harm.

24. The question to be answered is therefore; whether the Appellant was the perpetrator as he has raised the question of identification. His argument being that he was not at the scene of the incident having been incarcerated at the time of the alleged offence. This was a case of recognition. Courts have been cautioned to test such evidence with care lest it results in a miscarriage of justice. In the case of **Wamunga Vs Republic (1989) KLR 426** the Court of Appeal stated as follows:

“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.”

25. It should be emphasized that chances of any mistake having been made must be ruled out. In the case of **Anjononi –vs- Republic (1980) KLR 59**, which was a case of recognition of the perpetrator, the court stated thus:

“... 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 ...” But the evidence....at night must be absolutely watertight to justify conviction (See Kiarie vs Republic (1984) KLR 739)

26. Indeed, It was stated that the Appellant was in police custody on 22nd day of December, 2018 per the testimony of DW3, the Sergeant in charge of Kapchai Division. What he did not avail for the court's inspection was evidence of an occurrence book to prove that fact. That notwithstanding, he alluded to have released him on 23rd December, 2018 at 4.00pm. The offence is stated to have been committed on 24th December, 2018 at midnight a few meters away from the bar and there was full moonlight. The Appellant was well known to the complainant. He heard him give instructions to members of his gang, PW2 who had seen the Appellant inside the club and even exchanged pleasantries with him later saw him in the act of assaulting the complainant. He was related to the Appellant hence could not be mistaken as to his identity. It was his testimony that other than moonlight, there was light from nearby shops that enabled them to see clearly. Evidence of recognition in the circumstances was watertight.

27. The Appellant faults the court to have acted on contradictory evidence. The question of contradiction arises because of evidence of the complainant that he called the Appellant by a nickname “Juba” and he had carried him on a motorcycle, while PW3 on the other hand said that the Complainant and the Appellant were relatives as the complainant was his cousin while the Appellant was his uncle.

28. PW2 stated that he saw the Appellant at the club, who left in the company of others, and when he heard noise and went out to find out what was happening, he saw him and his gang beating the complainant. That they also attempted to attack him but the Appellant stopped them. In the case of **Phillip Nzaka Watu Vs. Republic (2016) eKLR**, the court of Appeal stated as follows:

“However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomenon exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.”

27. The inconsistencies alluded to by the Appellant were inconsequential to the prosecution's case since evidence adduced by PW2 which was not disputed through cross examination may have been solely within the knowledge of the witness.

28. On the question of failure to call important witnesses. **Section 143** of the evidence Act provides thus:

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.

29. In the case of **Keter vs. Republic (2007)1 EA 135**, it was held that:

“The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt.”

30. In the case of **Daniel Muhia Gicheru vs. Republic, Criminal Appeal No. 90 of 2007(UR)** the court delivered itself thus:

“The often trodden principle of law is that the prosecution is obliged to prove its case against an accused person beyond any reasonable doubt. How many witnesses is it expected to call to satisfy that burden? In Bukonya and Others Vs. Uganda [1972] EA 349 the Court of Appeal for Eastern Africa held that the prosecution has the discretion to decide as to who are the material witnesses..”

Following evidence adduced by eye witnesses, no inference could be drawn that witnesses who were not called that the Appellant was not specific about would have adduced evidence that was unfavourable to the prosecution's case.

31. The Appellant also faults the court for rejecting his alibi defence. The Appellant alleged that it was impossible for him to have committed the offence because he was in custody at the time the incident occurred. From the record, the court took note of the evidence and cross examination. The trial magistrate noted that DW3 the police officer testified that the Appellant was released on 23rd December 2018, the inference drawn by the magistrate was the Appellant's whereabouts on the nights of 23rd and 24th were unknown hence the question of an alibi did not arise.

32. The upshot of the matter is that the trial court reached a correct finding, therefore, I affirm the conviction. On sentence, principles of interfering with sentence by an appellate court is settled. The Court of Appeal, on its part, in **Bernard Kimani Gacheru vs. Republic [2002] eKLR** restated that:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.”

33. The penalty provided for the offence is up to life imprisonment. The trial court sentenced the Appellant to five (5) years imprisonment. It noted that that the Appellant did not show any remorse. Considering the injuries inflicted on the person of the Complainant, I have absolutely no reason to interfere with the sentence meted out. Therefore, the appeal fails and is dismissed.

34. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 15TH DAY OF OCTOBER, 2021.

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

COURT ASSISTANT – BRENDA

MS. MUKANGU FOR ODPP

APPELLANT.