



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

Coram: D. K. Kemei - J

**CRIMINAL APPEAL NO 81 OF 2019**

**MARTIN MUTUA NZUKI .....APPELLANT**

**V E R S U S**

**REPUBLIC .....RESPONDENT**

*(Being an appeal against the conviction and sentence by Hon. E. Agade (SRM) in Kangundo S.P.M.C.Criminal Case No. 614 of 2018 delivered on 28.8.2019)*

**BETWEEN**

**REPUBLIC .....PROSECUTOR**

**V E R S U S**

**MARTIN MUTUA NZUKI.....ACCUSED**

**JUDGEMENT**

1. The appellant was charged with the offence of grievous harm contrary to section 234 of *The Penal Code*. It was alleged that the appellant on the 9<sup>th</sup> November, 2016 at Kaseve Market, Kathome Sub-location in Kangundo Sub County within Machakos County unlawfully did grievous harm to **Anthony Muli Kioko**.

2. The prosecution evidence in court was thus: **Pw1** was **Enoch Nzomo Makau** who told the court that on 9.11.2016 he went to a club called Kwa Kateiko where he saw the deceased with a girl called Sengeli who was in the company of Mrefu her boyfriend, the appellant and Kioko who was a boyfriend to one of the bar maids. He testified that the deceased was not impressed when the appellant bought a drink for Sengeli and a bitter exchange ensued and he saw the appellant pull the complainant outside but he did not follow them. He told the court that the deceased was found under a tree and was taken to Kathiani Hospital where he was in a coma that he recovered from in 2017 and it was then that the deceased informed Pw1 that when he left the club with the appellant, the appellant beat him on the head with a metal. He told the court that he did not witness the assault and that he received a call that the complainant had died. On reexamination, he told the court that the last person seen with the deceased was the appellant.

3. **Pw2** was **Aaron Ndunda Mbingo** who testified that he was at the scene on the material day where he witnessed an exchange of words between the appellant and the complainant and he witnessed the appellant grabbing the deceased and taking him outside the bar. It was his testimony that he heard that the deceased was beaten and sodomized and that he visited the deceased at his home and it was then that the deceased informed him that the appellant had beaten him on the forehead and had lost consciousness. He testified that the complainant died in 2019. He testified on cross examination that the post mortem report indicated that the deceased died of acute respiratory failure due to pneumonia; that the discharge summary indicated that the deceased was discharged in stable condition.

4. **Pw3** was **Angelina Nthambi Kioko** who testified that the complainant was her son and that on 10.11.2016, while on her way to buy milk she saw the body of the deceased on the ground and his forehead was swollen. She told the court that the deceased was taken to Kathiani Hospital and later to Kenyatta Hospital where he was in the ICU for 3 months. She testified that the deceased informed her that the appellant had pulled him out of the bar and while outside, the appellant hit him on the forehead and he became unconscious. She testified that the deceased was discharged but did not improve; he kept complaining of headache and pain in the legs. She told the court that she took him to Bishop Kioko Hospital in January 2018 where she was advised that the head operation messed the deceased's legs and he would not walk again. She told the court that she was told that the deceased contracted pneumonia while lying on the hospital bed and he died in April 2018. She tendered in court the discharge note from KNH, the scans and x-rays that were marked for identification. She tendered the P3 form that was issued at Kakuyuni Police station and filled at Bishop Kioko Hospital dated 11.10.2017 and stamped on 8.5.2018; it was marked for identification.

5. Pw4 was Patrick Kyalo Mutiso who testified that he witnessed the post mortem that was conducted on the deceased. He told the court that the deceased while in hospital informed him that the appellant had hit him on the head with a metal rod while they were at his club and he lost consciousness. On cross examination, he testified that the post mortem indicated that the deceased died due to respiratory failure caused by pneumonia.
6. Pw5 was Dr. Peter Kavoo Kionao, a doctor in private practice. He testified that he attended to the deceased in May 2018 and who had a history of head injury. It was his testimony that when the deceased came for treatment, he had pressure sores and his joints were not working well; he was shown the discharge summary from KNH and he stated that the sores were managed and there was surgery done on the joints; that the deceased had a scar on the head indicative of head surgery. He testified that there were CT scans done at KNH, at Machakos Medical Centre and at German Medical Centre. He testified that the complications that the deceased developed was as a result of loss of strength of the limbs occasioned by the pressure sores, He told the court that the deceased was put on physiotherapy, dressing of wounds and surgery that he responded to, however he developed renal failure that he succumbed to. It was his testimony that there was a direct link between the head injury and the renal failure; that the blood loss from the head injury led to renal failure. The discharge summary from KNH, the CT scans and P3 form were tendered in court as exhibits. On cross examination, he told the court that there was no evidence of the correlation between the head injury and the death save for the x-rays. He told the court that he filled the P3 form based on the discharge summary.
7. Pw6 was Pc Enoch Chirchir who received the report in respect of the instant case on 5.12.2016. He testified that Pw2 had reported that the deceased had been injured by an unknown person; that the deceased left for the bar on 9.11.2016 and did not return home but however on 10.11.2016, she saw the body of the deceased lying on the road near the market, when she was on her way to buy milk. It was reported that the deceased was taken to Kathiani Hospital then referred to Machakos Level 5 Hospital and later to KNH where the deceased was admitted for 10 months; it was reported that the deceased was discharged in August, 2017 when his condition had improved albeit his limbs had been disabled. He testified that in the course of investigation he visited the deceased who identified the appellant as his assailant having hit him on the head with a blunt object; that the deceased died a week after the appellant was arraigned in court. On cross examination, he testified that he did not witness the assault; that there was no evidence of limb paralysis. On re-examination, he testified that the evidence supported the fact that the appellant assaulted the deceased.
8. The prosecution closed its case and the court found that the appellant had a case to answer. Section 211 of the Penal code was explained to him and he opted to give sworn evidence on his defence and called 4 witnesses.
9. The appellant denied assaulting the deceased but stated that on the material day he was at work at his bar but he saw the deceased drink and leave with a friend. He testified that he heard that the deceased was injured and he received summons in respect of the same; he denied assaulting the deceased. On cross examination, he told the court that he did not know the woman he was said to have fought over; he denied pulling the deceased out of the bar and that he was summoned because the bar was his and because the deceased was seen in his bar.
10. Dw2, Eunice Mutindi Muni told the court that on 9.11.2016 she saw the deceased come to the bar where she worked and he drunk then left. She told the court that the appellant did not assault the deceased. On cross examination, she testified that there was no fracas in the bar and she denied helping her employer in this case.
11. DW3, Michael Kioko Nthenge testified that he did not know why the appellant was accused of assaulting the deceased and that there was no fracas in the bar. He told the court in cross examination that he did not witness the deceased being assaulted by the appellant.
12. DW4, Richard Katiwa Mutua told the court that he was summoned by the Chief to give information regarding an assault on the deceased. He told the court that the appellant denied commission of the offence and on cross examination, he testified that he did not know how the deceased was injured.
13. Dw5, Mutinda Kitumbi testified that he heard that someone was injured but did not know how. He told the court in cross examination that he did not know when the deceased died.
14. The trial magistrate in her judgement found that the deceased's statement was not a dying declaration; that there was circumstantial evidence on the injury occasioned on the deceased. She found that the circumstances of a quarrel with the deceased by the appellant and his removal are consistent with an assault; that the P3 form indicated that the deceased had a head injury and that the defence evidence created no doubt in the prosecution case. The appellant was convicted of the offence. After considering the mitigation, the appellant was sentenced to 25 years imprisonment.
15. The appellant was dissatisfied with the decision and appealed to this court where he challenged his conviction based on contradictory and doubtful evidence; challenged the dismissal of his defence. In his supplementary grounds, he averred that he was not positively identified and that the trial court did not consider the element of intoxication.
16. The appellant vide his submissions challenged his conviction for being based on a defective charge sheet; that the trial court did not follow the plea taking process as per Article 50 of the Constitution. The appellant challenged the non-production of vital witnesses and reliance was placed on the case of **Donald Majiwa Achilwa & 2 Others v R (2009) eKLR**. It was submitted that the court did not consider intoxication and provocation as well as the reliance on hearsay evidence. The appellant further submitted that there was no positive identification of himself as well as that his defence of alibi was not considered. Reliance was placed on the case of **Kiarie v R (1984) KLR 739**.
17. Learned counsel for the state vide undated submissions filed on 7.7.2020 submitted that the deceased was injured; that the injuries were serious and caused permanent injury as per the evidence of Pw5. It was submitted that the appellant was identified by the testimony of Pw1 and Pw2; that the 25 year sentence was proper.

18. This being a first appeal, this court is under a duty to reappraise the evidence, subject it to an exhaustive scrutiny and draw its own inferences of fact, to facilitate its coming to its own independent conclusion, as to whether or not, the decision of the trial court can be sustained. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination, (see **Pandya v. Republic [1957] EA. 336**) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (see **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 court's finding and conclusion; 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. For the appellant to be convicted of the offence of doing grievous harm C/s 234 of *The Penal Code*, the prosecution had to prove each of the following essential ingredients beyond reasonable doubt;

- a) The victim sustained grievous harm.
- b) The harm was caused unlawfully.
- c) The accused caused or participated in causing the grievous harm.

20. Concerning the first element, bodily "harm" means any bodily hurt, disease or disorder whether permanent or temporary. The nature of grievous harm is defined by section 4 of *The Penal Code* 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 a permanent or serious injury to any external or internal organ, membrane or sense.

21. The specificities of "grievous harm" therefore are; (1) in the case of grievous harm, the injury to health must be permanent or likely to be permanent, whereas, to amount to bodily harm, the injury to health need not be permanent (2) a mental injury may amount to grievous harm but not to bodily harm (3) the injury must be "of such a nature as to cause or be likely to cause" permanent injury to health.

22. In **Tranby [1991] 52 A Crim R 228**, the Court of Criminal Appeal (Queensland) had occasion to consider the meaning of the word "health" as it appears in the definition of "grievous bodily harm" contained in section 1 of *The Criminal Code* (with similar wording to section 4 of *The Penal Code Act*). The facts were that the appellant bit the complainant's left ear, severing a substantial portion of the lobe. He was convicted of doing grievous bodily harm. The severance did not affect the complainant's capacity to hear, and the only residual effect was a permanent cosmetic disability. The question arose as to whether that injury should be regarded as an injury to health, there being no question that the injury was not permanent. By a majority it was held that such an injury was not an injury to health. The ordinary sense of the term health focuses on the functioning of the body, which of course may often be impaired by disease or illness but also by deliberately inflicted injury. An injury that has no consequence upon the functioning of the body does not involve impairment of "health."

23. In the instant case, it was the testimony of Pw5 that when the deceased came for treatment, he had pressure sores and his joints were not working well; he was shown the discharge summary from KNH and the sores were managed and there was surgery done on the joints; that the deceased had a scar on the head indicative of head surgery. He testified that there were CT scans done at KNH, at Machakos Medical Centre and at German Medical Centre. He testified that the complications that the deceased developed was as a result of loss of strength of the limbs occasioned by the pressure sores, He told the court that the deceased was put on physiotherapy, dressing of wounds and surgery that he responded to, however he developed renal failure that he succumbed to. It was his testimony that there was a direct link between the head injury and the renal failure; that the blood loss from the head injury led to renal failure. These findings were all reflected in the P3 form by which the injury was classified as "grievous harm" and the CT scans as well as the discharge summary that were tendered in evidence and marked as Pex1, 2, 3, 4, 5, 6, 7 and 8. This evidence was not impeached in cross-examination nor controverted by the defence. Considering that as a result of the injury the complainant was stated to have been unconscious (See Pexh 1), he was hospitalized for a number of months; was in the ICU, it is safe to conclude that the injury did interfere with his health and therefore did result in grievous bodily harm within the meaning of section 4 of *The Penal Code*.

24. The second element required proof that the injury sustained by the complainant was caused unlawfully. This means that the same was without legal justification or excuse. I find that the evidence of the appellant fails to raise any defence so as to absolve him of the offence and I have no reservation in finding that the averment that his defence was not considered by the trial court lacks merit. He merely denied commission of the offence and in his submissions in support of the appeal belatedly raised the defence of intoxication and provocation in a manner that seems to suggest that he was involved in the act. I have also come to that conclusion that the prosecution proved beyond reasonable doubt that the injury sustained by the complainant was caused unlawfully.

25. On the aspect of participation of the appellant, there is credible circumstantial evidence of Pw1 to Pw3 placing the appellant at the scene of the crime as an active participant in the commission of the offence. In addition, the appellant's evidence did not controvert the evidence that he was seen at the scene. Though he seemed to challenge the failure to call essential witnesses, there is no magic in having a multitude of witnesses yet there is evidence that proved beyond reasonable doubt that the appellant was the perpetrator. I see no reason to doubt the evidence of Pw1 to Pw3 where it was stated that the deceased identified the appellant as the person who attacked him and based on the doctrine of last seen with and I agree with the satisfaction of the trial court with the evidence on identification of the appellant.

26. The Supreme Court of Nigeria sitting at Abuja in **Tajudeen Iliyasu v The State SC 241 of 2013 (2015) LCN 4388 SC** stated that [the last seen doctrine]

**“.....creates a rebuttable presumption to the effect that the person last seen with a deceased person bears full responsibility for his or her death....Thus where an accused person was the last person to be seen in the company of the deceased person, they have the duty to give an explanation relating to how the latter met his or her death. In the absence of such explanation, a trial court .....will be justified in drawing the inference that the accused person killed the deceased person”.**

27. The last seen doctrine cannot be applied when the accused was the last person to be seen with the accused but there is no other circumstantial evidence. See **Rabi Ismail v The State (2011) MSJC 20, 77, (2011) 17 NWLR (PT.1277) 601** quoted in **Criminal Evidence in Nigeria by Jide Bodede 2<sup>nd</sup> Edition.**

28. In this regard, the deceased is reported to have made a dying declaration stating that it is the appellant who attacked him and all Pw1 to Pw3 confirmed it. The deceased told them that the appellant attacked him and hit him on the head and he became unconscious. This story was consistent with Pexh 1 where the deceased was unconscious when brought into hospital. It is imperative to determine whether what was allegedly said by the deceased amounts to a dying declaration in Law.

29. The Black's Law Dictionary, 6th Edition defines a Dying Declaration as;

***“a statement made by a person who believes he is about to die in reference to the manner in which he received the injuries of which he is dying, or other immediate cause of his death, and in reference to the person who inflicted such injuries or the connection with such injuries of a person who is charged or suspected of having caused them.”***

30. Under section 33(a) of the Evidence Act, a statement made by a deceased person relating to his cause of death is admissible in evidence:

***“When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.”***

31. In **Philip Nzaka Watu v Republic [2016] eKLR**, the Court of Appeal stated the following on admission and reliance on a dying declaration:

***“Under section 33(a) of the Evidence Act, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements. .... While it is not the rule of law that a dying declaration must be corroborated to found a conviction, nevertheless, the trial court must proceed with caution and (sic) to get the necessary assurance that a conviction founded on a death declaration is indeed safe.”***

32. From the evidence of Pw1 to Pw3, the deceased in this case was clear about the injury on his head and how it was caused by the appellant through hitting him. He was consistent in naming the appellant to Pw1 to Pw3 who visited him when he was bedridden. His statements fit within the definition of a dying declaration stated above. I wish to note however that evidence of a dying declaration per se cannot form a basis for a conviction unless it is satisfactorily corroborated with other independent evidence.

33. The independent evidence would be the last seen doctrine and the circumstances that the deceased was said to have parted ways with Pw3. The court has formed an opinion that the witnesses Pw1 to Pw3 were truthful witnesses and that the appellant as well as his Dw2 and Dw3 were not truthful in their accounts of events that occurred on the material day that led to the injury on the appellant.

34. In this regard, I find the conviction arrived at by the learned trial magistrate was quite safe and I see no reason to interfere with it. The appellant's evidence did not at all shake the evidence of the prosecution which was overwhelming against him. The trial magistrate carefully noted the demeanor of the defence witnesses and established that they had come with a stratagem choreographed with the sole aim of getting the appellant off the hook. My own analysis leads me to the same conclusion reached by the learned trial magistrate. It transpired from the evidence that the appellant had an altercation with the complainant while inside the appellant's bar over a certain woman the two had an interest in and whom the appellant bought some alcohol and from the version of Pw1, Pw2 it was the appellant who yanked and dragged the complainant out of the bar and closed the door as he assaulted him. The appellant was the last person seen with the complainant until he was found lying unconscious outside the appellant's bar. There was thus motive on the part of the appellant to injure the complainant after he had confronted him about the appellant's conduct in buying alcohol to a woman both were eyeing and further by the complainant's allegation that the appellant was ailing from a certain disease so as to sway the said woman's affection from the appellant to the complainant. The learned trial magistrate did visit the scene where the complainant was reported to have been found lying unconscious and that the learned magistrate established that the complainant had been found lying unconscious a short distance from the appellant's bar contrary to the appellant's assertion that it was far away from his premises.

35. The offence of grievous harm contrary to Section 234 of *the Penal Code* is a felony attracting a maximum punishment of life imprisonment. The appellant was sentenced to a sentence of 25 years imprisonment which was by all standards lenient; the appellant deserved a harsher sentence than what was meted upon him since his subsequent demise was as a result of the injuries inflicted on him by the appellant as confirmed by the doctor (Pw5). Under Section 382 of the Criminal Procedure Code, this court has no power to alter the sentence of the trial court unless the same was illegal. I see no illegality or error of principle in the sentence that was passed by the trial court. The appellant's sentence is maintained.

36. For the foretasted reasons, I find the appellant's appeal lacks merit. The same is dismissed. The conviction and sentence by the trial court is upheld.

It is so ordered.

**Dated and delivered at Machakos this 28<sup>th</sup> day of September, 2020.**

**D.K. Kemei**

**Judge**