



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 100 OF 2017

EVANS KIBET SULO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment of the Senior Principal Magistrate Honourable H.M Nyaberi in Iten Senior Principal Magistrate's court Criminal Case No. 1549 of 2014 dated 2nd October, 2017)

JUDGMENT

EVANS KIBET SULO was charged with, tried, convicted and sentenced for the offence of attempted Murder, contrary to *Section 220* of the *Penal Code*.

The particulars of this offence are that on the 13th day of November 2014 at Kiptingo village in Keiyo North District, within Elgeyo Marakwet County, the appellant herein attempted unlawfully to cause death of *Kiplangat Mutai Tisia* by stabbing him seven times using a knife on his body.

The prosecution case is that *Mercy Jebet*, the PW-6 in this case, has a child with the appellant. The complainant in this case (PW-1) is from Bomet but lives in Rochester in New York. He is an athlete. On 13th November, 2014 at about 6.30 p.m he was at Iten, Mwisho wa Lami Training camp. He received a phone call from PW-6, who was his friend. She wanted to meet him. He was reluctant as he was tired but since she insisted he agreed to meet her at the gate of Iten hospital. PW-6 while in company of another female friend met him at the said gate. They walked towards Iten town and Iten police station. The female friend to PW-6 excused herself and left allegedly to pick her phone near Equity Bank. The complainant also wanted to leave as he was tired. They picked a Boda boda jointly to drop PW-6 at her house gate within Kiptingo village. They got to the place and as they were talking outside the gate they heard of a person approaching from inside the house compound. The complainant peeped to see who it was and a stone was thrown which hit the droppers of the fence. He sensed danger and took on to his heels. PW-6 asked him what was wrong. Complainant stopped and saw a person jumping over the fence. The person picked a stone and pursued the complainant. The complainant held him up.

The assailant had a knife and stabbed the complainant on one left shoulder and twice on the face. The complainant was further stabbed by the assailant on the back of the head, left thigh and left hip joint. He managed to free himself and ran away. The assailant pursued him and caught up with him at the junction to Kamariny stadium. He stabbed the complainant on the right buttock muscle. PW-6 followed them there on a motorcycle. She picked the complainant and rushed him to Iten County Hospital for treatment. He was admitted there for 3 days.

According to the P3 form filled on 17th November 2014, when the complainant was taken to the hospital he was in clothes soaked with blood and had tears on parts related to the wounds. He suffered deep wounds on the head (frontal) occipital, posterior chest, back and the left lower limb, - suggestive of sharp object. He was in much pain and feeling dizzy. There was generalized body aches. The wounds were sutured and dressed.

The degree of injury was classified as grievous harm. The P-3 form and discharge abstract were produced as exhibits by PW-4.

The appellant was arrested on 15th November, 2014 by PW-5 who was in company of some other police officers. The appellant had organized to be locked in his own house from outside. The police broke the padlock and asked him to surrender. He surrendered himself to them. The house was searched and under a Manila table cloth they recovered a small blood stained kitchen knife. The police collected it as an exhibit. Complainant's blood sample was extracted and together with the knife were forwarded to the Government chemist Nairobi for DNA analysis. PW-3 did the analysis and the extracted blood and blood stains on the knife were found to be of the same DNA profile. The appellant was then charged with the offence.

The appellant offered unsworn testimony in his defence. He said he is a sportsman and PW-6 (*Mercy Jebet*) is his wife. On 13th November, 2014 at about lunch hour he was at Iten Town. He went to his wife's shop and did not find her. He called her and she said she was on her

way there. When she arrived she spoke to him rudely. He left to see a friend near Kenya Power. At 7.30 p.m while in company of *Joel* and *Kibet* at Saviko, a man approached them running very fast. He knelt down and said he was not a thief but was found with a woman. Shortly PW-6 arrived on a motor cycle. She told him to jump on to the motorcycle. The complainant did so and they sped off. The appellant went home. The wife called him telling him he had assaulted someone and should leave. He however closed the door and slept. The following day police went to the house and arrested him. They searched the house and took a knife which had been used to cut vegetables. At the police station he found PW-6 recording her statement. He came to learn she had a relationship with the complainant who had promised to marry her. He was fixed to get out of their marriage plans.

The trial magistrate weighed the evidence and found the offence proved against the appellant beyond reasonable doubt. He was convicted of it and sentenced to serve 15 years imprisonment.

The appellant dissatisfied with the said conviction and sentence appealed to this court on the grounds that:-

- (1) The appellant was not supplied with witness statements and copies of exhibits during trial.
- (2) The withdrawal by the appellant's advocate was not recorded and neither was he, the appellant, given a chance to hire another.
- (3) The produced exhibits were not identified to the court by the complainant.
- (4) No identification parade was conducted.
- (5) The evidence of complainant and that of PW-6 was totally at variance.
- (6) The evidence was wrongly analyzed leading to a wrong decision.
- (7) The accused defence was not properly weighed.
- (8) The court did not appreciate that the appellant acted in self defence and under extreme provocation in his own compound in an incident involving his wife of 7 years.
- (9) The charge sheet and the tendered evidence were at variance.

I have well considered the charge, the evidence adduced, the trial procedure, the judgment, sentence passed, grounds of the appeal and submissions by both sides.

On quality and adequacy of the evidence adduced by the prosecution side there are no issues emerging worthy of evaluation on appeal. Ground 8 of the appeal appreciates this fact as the appellant himself concedes involvement in the incident leading to the preferred charge but raises the defence of provocation and self defence.

However the issue which deserves consideration is whether the appellant's right to a fair trial, under Article 50 of the Constitution of Kenya 2010 was infringed.

The lower court proceedings shows that on 4th May 2015 the appellant applied for witness statements and the court ordered that they be supplied on the mention date. OCS Iten was tasked to comply. There is no indication that they were supplied on the mention date or even thereafter. On 29th May 2016 *Mr. Maiyo* got on record for the appellant. The complainant who had allegedly travelled from USA was heard. He was cross examined by the said advocate. The advocate thereafter applied to be supplied with witness statements and any documentary evidence the prosecution was to rely on. Given that this application was made after PW-1 had been called as a witness, it implies that the court order of 4th May, 2015 had not been complied with. On this date, 29th June 2016, the court made no order regarding the said application.

On 19th September 2017 which was the next indicated hearing date, the appellant's advocate was not present. There is no record as to his position in the matter. PW-2 was just called and the appellant from then upto the end, proceeded in person.

Article 50 (2) of the Constitution states that every accused person has the right to a fair trial, which includes the right –

50(2) (c) – to have adequate time and facilities to prepare a defence;

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

The court has a duty to ensure that every accused person appearing before it is accorded a fair hearing as provided for under Article 50 of the Constitution of Kenya 2010. The accused needs not move the court in order to ensure realization of those rights; it is mandatory they be accorded to him or her. Where such a right is infringed, it is useless to argue that the trial was fair as the accused slept on his right. In

Ndegwa V Republic (1985) KLR 535 the court observed that:-

“...No rule of natural justice, no rule of statutory protection, no rule of evidence and no rule of common sense is to be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject. He is the most sacrosanct individual in the system of our legal administration...”

The trial magistrate should therefore on 19th September, 2017, when the accused advocate did not attend the hearing, have informed the accused of his right to representation under *Article 50 (2) (g)* and sought his clarification as to whether the previous Advocate was still representing him, needed time to hire another or to proceed on his own. Without such indication, him having proceeded on his own while he had an advocate on record and who had partly represented him, was an outright infringement of his right to fair hearing under the said Article.

Despite the appellant having applied for witnesses' statement and his advocate later reiterating the said application, there is no evidence that they were ever supplied. This infringes his right to fair hearing under *Article 50 (2) (c) and (j)*.

In Musembi Kuli –V- Republic [2013] eKLR the Court of Appeal held that:-

“True it is that since it is the state that brought the appellant to court and was prosecuting him on a criminal charge, the onus was on the prosecution to avail the statements to him. Much as it may be the practice, as was pointed out to us by Mr. Kamula, the learned Senior Assistant Director of Public Prosecutions, that accused persons normally pay the photocopying charges, we do not see why it should be so. The accused has a right to receive, and the prosecution bears the concomitant duty to supply, all the materials it intends to rely on so that the accused is not hampered in the preparation of his defence. The witness statements are an integral part of those materials. The prosecution ought to be able to discharge that burden without requiring the monetary input of the accused.”

Similarly, the issue was later considered in Nyeri by the court in the case of Simon Kithaka Malombe –vs- Republic [2015] eKLR where it held that:-

“It is the prosecution that assembles and retains custody of evidence against an accused person. The duty to disclosure lies with the prosecution and not with the court. In the face of clear constitutional provisions, it is not a responsibility that the office of the Director of Public Prosecutions can shirk. Whenever an accused person indicates inability to make copies, the duty must lie with the state, which the prosecutor represents, to avail copies at state expense. It is for that office to make proper budgetary allocation for that item. Then only can the constitutional guarantee in Article 50 (2) (c) and (j) be real.”

It is therefore explicit that the prosecution to be on the safe side, before the trial, should supply the accused with witness statements and other facilities necessary in preparation of a defence. The court should also ensure that such is met before the evidence is called. It is also relevant to have evidence of the compliance to avoid an accused person later taking advantage for lack of such, during the appeal.

The bottom line here is that the appellant's right to fair trial was infringed and the said trial is therefore a nullity. He was however charged with a serious charge of attempted murder. For purposes of meeting the ends of justice, a retrial is appropriate. I do order a retrial before a different magistrate.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 26th Day of March, 2019

In the presence of:-

The appellant

Ms Mumu for state

Mr. Mwelem - Court Assistant

Court:

Deputy Registrar to give a mention date before the Chief Magistrate's court.

SIGNED

S.M GITHINJI

JUDGE

