REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

HIGH COURT CRIMINAL APPEAL NO.33 OF 2018

BETWEEN:

DALMAS KIVUNGA MANGI ....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

Being an Appeal from the Decision of Hon N.N. Njagi delivered on 31st May 2018 in **Criminal Case No 571 of 2017**)

J U D G M E N T

1. The Appellant was tried in the SPM's Court in Wundanyi and found guilty of the offence of causing grievous harm. His Co-Accused was found not guilty. The Appellant was found guilty on 31st May 2018 and sentenced to imprisonment for a term of 35 years. The Appellant now appeals against conviction as well as sentence.

2. The Appellant was charged with the offence of "Grievous harm contrary to Section 234 of the Penal Code". The Particulars of the Offence as contained in the Charge Sheet were that Dalmas Kivunga and Augostine Mwadime: On 16th day of December 2017 at 2230 at Kizingo Village Maktau Location within Taita Taveta County, jointly with others not before court, unlawfully did grievous hard to "ROBERT MWACHI". The Appellant was arrested on 18th December 2017 and brought to Court the next day.

3. The case against the Accused in the Lower Court was that he with others not before the Court attacked the home of the Complainant who was the sub-Chief for Godana and the acting chief for Maktau Location. The Court heard the evidence of the Complainant. He was clear and coherent. He said he heard some people trying to break into his home. He warned them that he had an axe, so nobody came into the house the somehow a window became fully opened. When the Complainant reached out to close the window he was cut on his forearm with a machete (panga).

4. In his decision the Learned Trial Magistrate set out the following: "All in all it is my humble finding that after evaluating all the evidence against the accused 1, my finding is that he is guilty as charged. The evidence is overwhelming. In regard to the accused 2 the court makes a finding that the accused 2 is not guilty as charged. I shall accordingly acquit the accused 2 as there a doubts with the evidence before the court. Accused 2 is not guilty and I shall acquit him under section 215 of the criminal procedure code. Accused 2, is at liberty unless otherwise lawfully held. The accused 1, is guilty and shall stands convicted. Others accordingly.".

5. The Appellant filed his Petition and Grounds of Appeal on 17th August 2018. Subsequently, they were amended. The Grounds of Appeal and Submissions now relied upon are:

> "Amended supplementary Grounds of Appeal and Submissions
>
> With the leave of this honourable court, and upon persuing the entire proceedings, I the appellant now begs to set forth the main grounds in both mixed law and facts, complying with section 350 C.P.C. as follows:-
>
> 1. THAT, the learned trial magistrate erred in law and facts in admitting the identification evidence of Pw-1 pw2 AND pw-3 pw-4 pw-5 Count – which;-
>
> i. Was not free from honest mistake

ii. Evidence on scene contradictory

iii. Wasnt source of light can not identification accused by outside

iv. Foot path couldn't not link me at scene cause it is path for villagers through their residence.

2. THAT, the learned trial magistrate erred in law and facts by failing to note that nothing was recovered, amongst the exhibits in my exclusive sphere of control

3. THAT, the learned trial magistrate erred in law and facts to hold that the prosecution case was proved beyond doubts, besides the inconsistencies, and essential witnesses PW-4 not testified.

4. THAT, the learned trial magistrate erred inl aw and facts to believe evidence of alleged leading to co-accused arrest, without the police complying with JUDGES RULE – 3 as entitled.

5. THAT, the learned magistrate rejected of my defence impeached section – 169 (i) C.P.C. upon evaluating the time and place of arrest, thus prejudiced and erred in law and facts.

REASONS WHEREFORE:-

May this appeal be allowed conviction quashed and the imposed death sentence be set aside.

My LORDS, I am convicted on identification and remotely connecting circumstantial evidence in the nature of exhibits recovery, and alleged leading to co-accuseds, acquitted in count belong. Its my respective submissions that the tabled prosecution evidence as vested on 5 witnesses, was not water-tight to support conviction.

6. The Appellant asks the Court to allow the Appeal and set aside his conviction and sentence from the Lower Court.

7. The Respondent (the State) Responds to the Appellant's submissions thus:

"We submit that the appellant was properly identified by the prosecution witnesses. that the appellant was properly identified by pw1. Though the offence occurred at around 22.30 hours there was sufficient light illuminated by the sport light that enabled him to identify his perpetrators. He pointed out that his window was opened and he saw light illuminating from outside inside the room he called for the intruders to enter but non e did and when he went to close the window he saw the appellant who was next to the window and who cut him with a panga. He also informed court that he had known the appellant for 22 years. His identification was by recognition.

In **Kiilu & another v Republic,** (2005) 1 KLR 174, the Court of Appeal (Tunoi, Waki & Onyango Otieno JJA) reiterated the position as follows:

Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule 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 condictions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error."

Though the appellant contends that there was discrepancies on the scene he did not expound on this point but we submit that the inconsistencies in the prosecution case if any were minor and made curable by dint of section 382 of the criminal procedure.

Furthermore under section 143 of the Evidence Act the prosecution is given discretion on the number of witnesses it may call during trial in support of their case. That the appellant has not clearly demonstrated which witness the prosecution failed to call and the detrimental effect on his case

8. As this Court is the first avenue of appeal this Court must re-consider all the evidence before the Trial Court. The Appellant alongside another was charged with causing grievous harm to the Complainant Robert Mwamachi on 16th December 2017. The First Prosecution Witness was the Complanant. He gave evidence that he was at home on 16th December 2017 and at about 10:00 pm he was ready to retire for the night. He heard intruders. The window of the room in which he was at the time, was forced open. He said that he shouted out that he had an axe so any intruder who was man enough should enter. No-one did. He then reached out to close the window. One of the intruders then using a machete/panga sliced through his forearm. He shouted out in pain and some people came to his aid and the intruders ran away. As to whether or not an offence occurred or injury occasioned to PW-1, his evidence is corroborated by the medical evidence. Both the P3 Form and the medical/Treatment Notes (Exhibit 1 and Exhibit 2) set out that he was injured with a sharp implement. As a consequence an artery was severed and muscle tissue was cut open. The wound was 10 cm long. I was on his left forearm. Dr Mjumwa categorized the injury as "GRIEVOUS HARM". Having established that an injury did occur (as alleged), the Court must establish how it occurred and if anyone was at fault.

9. The Complainant gave evidence that he saw the assailant. The time of the alleged offence suggests that it was during the hours of darkness. The Complainant told the Court that although it was late at night there were two light sources, and a spotlight. He said he was able to see his assailant by torch light. He identified his assailant as the first accused. The assailant was also a person he had known for

about 22 years so he recognized him. The next morning, the Village Elder and a neighboring farmer went to the Complainant's House to see what had happened. Outside the Complainant's house they saw foot prints. When they followed the footprints, the footprints led to the home of the Accused (Appellant). As a consequence, the Appellant was arrested. At the Appellant's home the Village Elder PW-2 says he found a torch, a bloodstained panga which had a march on it which was distinctive, showing that it had been used to cut a metal object eg a nail.

10. The Investigating Officer also visited the home of the Complainant where he found a bloodstained leso and bloodstains in the sitting room and bedroom. He also followed the footprints from the Complainant's home and they led him to the Appellant's home. At the Appellant's home he recovered a panga and akala shoes/slippers. He also discovered that the footprints matched the shoes.

11. In his Defence, the Appellant chose to give an unsworn statement. His Defence amounts to a bare denial. However, he does not deny ownership of the panga. He also denies that the blood was from PW-1's wound.

12. As a consequence of hearing the above evidence, the Learned Trial Magistrate found that the evidence against the First Accused was overwhelming. That is a finding that this Court must agree with. The Appellant's contention that there were others present who have not been caught and punished does not in any way weaken the case against hime. It serves only to corroborate the evidence of PW-1. As a consequence the Appeal against conviction is dismissed.

13. In relation to the question of sentence, the Appellant argues that a sentence of 35 years is manifestly excessive. However, from the evidence of PW-1 it is clear that the assailants were intending to rob him and/or his home. The facts therefore could equally amount to attempted robbery with violence which is an offence potentially carrying the death penalty. However, this Court is cognizant with changes in thinking and consequently in sentencing guidelines leading to a more modern approach not favouring undetermined and interminable sentences of imprisonment.

14. For that reason, this matter must be remitted back to the Lower Court for re-sentencing. However, this Court is cognizant of the fact that the Magistrate's Court in Wundanyi comprises only a Resident Magistrate. It is therefore Ordered and Directed that the file be remitted to the Principal Magistrate's Court in Taveta for re-sentencing. This Court feels that approach provides better access to the Courts as the facts and matters arising took place in the Maktau area.

Order accordingly,

Farah S. M. Amin

JUDGE

Delivered, signed and dated in Voi on this the 30th day of September 2019

In the Presence of:

Court Assistant:

Appellant: In Person

Respondent: Ms Mukangu