Gitari v Republic (Criminal Appeal 14 of 2018)
[2019] KEHC 12499 (KLR) (31 October 2019) (Judgment)

Neutral citation: [2019] KEHC 12499 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CRIMINAL APPEAL 14 OF 2018

LW GITARI, J

OCTOBER 31, 2019

BETWEEN

JOSPHAT KITHANO GITARI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant Josphat Kithano Gitari (to be referred to as the appellant) was convicted of the offence of Grievous Harm Contrary to Section 234 of the *Penal Code* and sentenced to imprisonment for 15 years by S. Ngii Resident Magistrate Wang'uru.

2. The appellant was dissatisfied with the conviction and sentenced and filed this appeal. He has raised the following grounds of appeal.

    1. That the trial magistrate erred in both law and fact by relying on contradictory and un collaborative evidence to convict the appellant.

    2. That the learned magistrate erred in law and fact in relying on evidence that did not support the charge against the appellant.

    3. That the learned magistrate erred in law and fact in failing to find that the prosecution's evidence lacked corroboration and was not sufficient to sustain a conviction.

    4. That trial magistrate erred in law and fact by ignoring the fact that the complainant had a grudge with the appellant.

    5. That the learned magistrate erred in law and in fact in failing to consider the defence evidence whish was credible.

    6. That the learned erred in law and fact by giving a harsh and excessive sentence.

3. These grounds can be collapsed into the following:

1. Relying on contradictory and uncorroborated evidence which did not support the charge against the appellant.

2. Failing to consider that there was a grudge between the complainant and the appellant.

3. Failure to consider the defence.

4. Harsh and excessive sentence.

5. The appeal was opposed by the state in their submissions filed by Mr. Geoffrey Obiri, Assistant Director of Public Prosecutions. He urged that the appeal has no iota of merit and should be dismissed.

6. The parties agreed to canvass the appeal by way of written submissions. For the appellant submissions were filed by R. Muthike Makworo Advocate.

7. The appellant was charged with Grievous Harm Contrary to Section 234 of the *Penal Code*. It was alleged that on 13.1.2014 at Kibuthere village (Kutus Location) in Mwea East within Kirinyaga County. The accused maimed Esther Micere Nyumu.

8. The brief facts of the case are that the appellant is a grandson of the complainant. They are in the same compound but in different houses.

On 13.1.2014 at around 8.00 pm the complainant Esther Micere Nyumu (PW-1) was in her main house and walked out to go to the kitchen. Before she reached the kitchen, she met the appellant who abused her and likened her to a cow. The appellant kicked her on the right ribs and she fell down. The appellant continued to attack her using a stick.

9. The complainant pleaded with the appellant but he accused her of sending people to her with interior motives. The appellant eventually stopped beating her.

10. The complainant sustained injuries and she therefore sent a boy to call somebody to take her to hospital. One Gitari a vetinary doctor went and took the complainant to hospital Mount Kenya Hospital. She was then transferred to Nairobi for treatment. The complainant sustained injuries which were summarized by Dr. Ogoyi Mandaraka (PW-7) as follows:-

· Cut wound on the occipital and parietal region of the head.

· Ecchymosis and hematoma which is internal bleeding and accumulation of blood within the right side of the chest.

· Ecchymosis and large hematoma on the right thigh.

· Laceration and cut would on the right thigh.

The complainant was walking with a limping gait.

11. He classified the degree of injuries as harm.

12. The appellant was then arrested and charged.

13. This is a 1st appeal. The duty of the first appellate court is to analyze the evidence, evaluate it afresh and come up with its own independent finding. This is in line with the holding in Okeno v Republic 1972 E.A 32

The court has to consider that unlike the trial magistrate it did not see the witnesses when they testified and leave room for that.

14. I have considered the appeal, the submissions and the proceedings before the trial court. I will first consider the grounds. As I have stated above the first ground is whether the evidence tendered was sufficient to base a conviction which is raised in ground 1, 2 & 3.

15. The counsel for the appellant submits that during the hearing the witnesses gave contradictory evidence which the court erroneously relied on.

16. She submits that the complainant PW-1 told the court that Anthony Macharia found her lying down on the ground. That Macharia is alleged to have called doctor Gitari. That Anthony Macharia said he saw the appellant beating the complainant. That this contradicts her evidence as she had maintained that Macharia came after the appellant had finished beating her. I have considered the submissions.

    Page 11 of the proceedings is the evidence of Anthony Macharia (PW-3) and he stated he witnessed the appellant beating the complainant. It is strange for the appellant to submit that PW-3 did not witness the fight.

    The submissions is misconceived as the evidence is clear on the record.

17. In any case, contradictions in the evidence of witnesses will only be fatal to the prosecution case when considered will cast doubt in the prosecution case. The court will ignore minor contradictions which do not raise doubts in the case. The Court of Appeal in the case of Daniel Njoroge Mbugua v Republic [2014] eKLR the court held:

    > " From the record we find that the evidence of PW-1 and PW-2 was consisted and their testimonies corroborative. Any discrepancies or inconsistencies in the evidence adduced by the prosecution were minor and did not weaken the probative value of the evidence on record".

    The evidence of PW-1 and PW-3 is cogent as to who assaulted the complainant in this case. The contradiction provided out are not even supported by the record.

18. At Page -6- of the record PW-1 testified on how the appellant beat her which I have analysed above.

    PW-3 Anthony Macharia at Page 11 of the record stated as follows:

    > " When Esther left for a while her met the accused holding a stick. He asked her why he had been sending people to finish him.
    >
    > He kicked her, she fell down and continued to beat her....."

    The evidence of PW-4 and PW3 is corroborative as to who was beating the complainant. The trial magistrate considered the evidence and cannot be faulted. The evidence was reliable and she could safely base a conviction on it as she did. The evidence placed the appellant at the scene as the person who assaulted the complainant.

19. The appellant submits that the complainant had muddy clothes which were not produced in court as exhibits. PW-2 said the complainant had fallen on muddy water. Failure to produce the clothes does not shake the prosecution case. The evidence tendered was sufficient to support the charge even in the absence of production of the muddy clothes.

20. The appellant submits that the evidence of the doctor who attended the complainant immediately after the alleged assault was very crucial in the matter. Discharge summaries from all hospital that the complainant attended ought to have been produced in court during the trial to support the evidence of the prosecution.

21. In this case medical evidence was adduced by Dr. Ogoyi who is a medical officer at Kerugoya Hospital. She filled a P.3 form and had an outpatient card. She testified that the patient had undergone treatment prior to examination. The degree of injury was maim. The P3 form and treatment notes were produced as exhibit 1 and 2.

The appellant has not alleged any prejudice he suffered by failure of prosecution to call all the doctors who examined the complainant. It is trite that no particular number of witness are required to prove a fact. Section 143 of the *Evidence Act*, Cap 80 Laws of Kenya provides: -

> 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.

22. Medical evidence is expert evidence which is supposed to assist the court to form all opinion. Section 48 of the *Evidence Act* (Supra) provides:

(1)) When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger or other impressions.

(2) Such persons are called experts.

23. PW-7 examined the complainant and formed an opinion. He evidence was sufficient and admissible.

24. The appellant was not prejudiced. The court would only uphold the submission if the omission prejudiced the appellant where it has not, it is cured under Section 382 of the *Criminal Procedure Code*. My view is that in this case there was no omission as the prosecution did avail an expert witness to produce medical evidence.

25. The appellant submits that the medical records were not sufficient to prove that the injuries were grievous harm. The doctor (PW-7) testified that – page 19

> I classified the injuries as maim in the basis that the complainant being elderly would contract osteoarthritis in future in the affected right parts of the leg.
>
> Hematoma is an internal swelling caused by blunt trauma. This occurs when there is injury of the blood veins internally causing bleeding and agglutination of blood internally.

The trial magistrate at page 32 of the record from line 11 to 23 stated:

> The assault occasioned grievous harm to complainant bearing in mind that grievous harm is defined to include maim under Section 4 of the *Penal Code* and the injuries suffered by the complainant have been classified as maim.
>
> Maim per se, is defined as the destruction or permanent disabling of any external or internal organ or sense.
>
> Be that as it may, I am satisfied that the injuries suffered by the complainant which largely included internal bleeding and accumulation of blood internally in the affected areas, cut would on the head and foot were serious injuries to the complainant's health. It was also feared by the doctor that some of the affected may develop osteoarthritis in due course bearing in mind the advanced age.

There was no doubt that the degree of injury was grievous harm.

Section 4 of the *Penal Code* defines grievous harm as follows: -

"Grievous harm means any harm which amounts to maim or dangerous harm or seriously or permanently injuries, health, or which exceeds to permanent disfigurement or to any permanent or serious injury to any external or internal organ membrane or sense"

The key word here is assault what determines whether it is assault causing actual bodily harm and grievous harm is the extent of injury and the nature where it permanently injures health, cause permanent disfigurement or serious to external or internal organ it is maim.

The doctor laid enough material before the trial magistrate to prove that the injuries were grievous harm. The trial magistrate was right in finding that the charge was proved beyond any reasonable doubts.

26. The appellant submits that the trial magistrate erred in ignoring the fact that the complainant had a grudge with the appellant. At Page 33 of the record the trial magistrate found that the appellant had no justification for assaulting the complainant, the assault and the resultant grievous harm were on all forms unlawful. The trial magistrate considered the defence from page 30 to 31 of the record.

27. The complainant had told the court that he did not know why the appellant assaulted her. When she was cross-examined, the appellant never put it to her that there was an existing grudge. As if confirming this unfortunate incident of assaulting her helpless and elderly grandmother for no reason, the appellant in unsworn defence stated that the complainant found him on the material day 13.1.14 discussing issues with is parents. After the meeting the complainant called her. He further stated that they had resolved the issues. He could not understand the genesis of the case.

He did not make any allegation that the saw was out of a grudge. It was therefore proper for the trial magistrate to hold that the appellant had no reason of justification to assault the complainant.

The defence was a mere denial. The ground is a sham.

28. Finally, the appellant submits that the sentence was harsh and excessive. It is trite that sentencing is the discretion of the trial magistrate. A court sitting on appeal will not easily interfere with the sentence. In the case of Ogola v Republic [1954] E.A C. A 21 270 it was held:

> " The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are firmly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless, as was said in James V R, (1950) 18 E.A.C.A.147:"
>
> "It is evident that the Judge has acted upon some wrong principle or overlooked some material factor".
>
> To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case R v Sher shewky, [1912] C.C.A. 28 T.L.R. 364"

29. I have considered the authority. It lays down the principles upon which the curt will interfere with the sentence.

In the case the appellant was charged with assaulting his aged grandmother. For no good reason. The offence of Grievous Harm under Section 234 of the *Penal Code* which the appellant was charged with provides for a maximum sentence of life imprisonment.

30. The trial magistrate had ordered for a Probation Officers report. The report was presented in court but was not favourable. The trial magistrate did not act on wrong principles nor did she overlook some material factors.

Considering on the manner in which this offence was committed and the finding by the trial magistrate that the appellant was not remorseful and he conducts himself criminally within family circles, the sentence imposed was not manifestly excessive. I find that I have no reason to interfere with the sentence.

31. In conclusion

Having evaluated the evidence and upon considering the grounds of appeal, I find that the conviction was proper. I have no reason to interfere with the findings by the trial magistrate.

I order that:

a) The appeal lacks merits.

b) The appeal is dismissed

DATED AT KERUGOYA THIS 31ST DAY OF OCTOBER, 2019

L.W. GITARI

JUDGE