



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 29 OF 2017

SIMON MWASAKA MWANDOE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 590 of 2016 in the Senior Principal Magistrate's Court at Wundanyi delivered by Hon N.N. Njagi (SPM) on 6th February 2017)

JUDGMENT

1. The Appellant herein, Simon Mwaisaka Mwandoe, was charged with two (2) counts. On Count I, he was charged with the offence of grievous harm contrary to Section 234 of the Penal Code, Cap 63 Laws of Kenya. The particulars were that on the 4th day of October 2016 at around 9.30pm at Kungu Shopping Centre in Wundanyi location within Taita Taveta County, he wilfully and unlawfully did grievous harm to Mathias Kalela Mwadime (hereinafter referred to as "PW 1").
2. In Count II, he was charged with the offence of malicious damage to property contrary to Section 339 (1) of the Penal Code. The particulars of this charge were that on the aforesaid date and place, he wilfully and unlawfully damaged a Motor Cycle Registration Number KMDQ 706 Q make Haojin valued at Kshs 95,000/=PW 1's property.
3. The Learned Trial Magistrate Hon.N. N. Njagi, Senior Principal Magistrate convicted him on both counts and sentenced him to serve seven (7) years imprisonment for Count I, and three (3) years imprisonment for Count II. Both sentences were to run consecutively.
4. Being dissatisfied with the said judgment, on 20th April 2017, he filed a Notice of Motion application seeking leave to file his Petition of Appeal which application was granted and deemed to have been duly filed and served. He relied on five (5) Grounds of Appeal. He filed his Written Submissions and Further Written Submissions on 9th August 2017 and 13th December 2017 respectively. The Respondent's Written Submissions were dated 13th November 2017 and filed on 14th November 2017.
5. When the matter came up on 13th December 2017, both the Appellant and the State asked the court to deliver its judgment based on their respective written submissions. The judgment is therefore based on the said written submissions.

LEGAL ANALYSIS

6. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”.

7. After perusing the Appellant's and the State's Written Submissions, this court was of the view that the issues that had been placed before it for determination were as follows;

- 1. Whether the prosecution proved its case beyond reasonable doubt;**
- 2. Was the medical evidence properly produced;**
- 3. Was the sentence merited.**

8. Although the 1st and 2nd issues hereinabove related to the question of whether or not the Prosecution had proved its case against the Appellant herein, this court nonetheless deemed it prudent to consider the question of whether or not the medical evidence was properly produced in court as a preliminary issue as this went to the root of the Prosecution's case and thus had an overall effect on its case.

I. PROOF OF THE PROSECUTION'S CASE

A. PRODUCTION OF THE MEDICAL EVIDENCE

9. The Appellant submitted that the P3 form and the treatment notes were crucial documents to the trial and ought to have been produced by a doctor and not a police officer. He submitted that No 234891 Christopher Langat (hereinafter referred to as "PW 4") did not have the requisite qualification to testify on the same.

10. On its part, the State submitted that during the trial, the Prosecution had sought adjournments on two (2) occasions due to the fact that medical officers were unavailable as a result of a strike and it was uncertain when the strike would end and thus attendance of a medical officer could not have been procured without undue delay. It pointed out that the P3 form was public document bearing the necessary reference number and duly stamped thus the maker did not need to be called to testify.

11. It further pointed out that the document was produced by PW 4, who was the Deputy Officer Commanding Station (OCS), Wundanyi Police Station, the secondary custodian of all the documents, after the OCS. It relied on Section 77 of the Evidence Act Cap 80 (Laws of Kenya) and the case of **Chaol Rotil Angela vs Republic [2001] eKLR** where the Court of Appeal held that a post mortem report was properly produced by the investigating officer in the trial therein as it was prepared in the course of a professional duty.

12. Section 77 of the Evidence Act provides as follows:-

"(1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.

(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.

(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof."

13. Section 33 (b) of the Evidence Act provides as follows:-

"Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—

when the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him;"

14. In the case of **Gathonjia Hiram vs Republic [2014] eKLR**, Emukule J (as he then was) held as follows:-

"Firstly, these were forms which were filled by a medical officer in the course and discharge of his professional duty (S. 33(a)). Secondly, the reports were made by a Medical Practitioner (77(1)), and under Section 77(2) the court is called upon to presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it. Thirdly the court has the discretion to summon such medical practitioner and examine him as to the subject matter.

Again it is clear to me unless the court deems it necessary (although it is always good practice to do so), failure to call and examine such medical practitioner as to his report is not fatal to the prosecution's case as suggested by some authorities, and the appellant. That is the effect of the proviso to Section 124 of the Evidence Act."

But even if the medical evidence were excluded, (and there is no legitimate reason to do so), the evidence adduced by the prosecution of the circumstances of the offence are clear that it was committed by the Appellant."

15. This court therefore agreed with the holding of the court in the **Gathonjia Hiram vs Republic**(Supra)that since the P3 form was a public document that, it was not necessary that its maker had to be called to tender the same in evidence. Having said so, it was clear from the holding in the case of **Chaol Rotil Angela vs Republic** (Supra) that certain prerequisites had to be met before such a document was produced by another person.

16. These were that the written or oral statements or electronically recorded made by **a person who was dead, or who could not be found,**

or who had become incapable of giving evidence or whose attendance could not be procured without an amount of delay or expense could be produced by another person other than the maker of the said document or statement (emphasis court).

17. In that case of **Chaol Rotil Angela vs Republic** (Supra), the Court of Appeal noted that the case had been adjourned several times on account of the absence of the doctor. In fact, the court record had indicated that the doctor who conducted the post mortem examination had been untraceable.

18. While the Learned Trial Magistrate in the matter herein allowed the tendering of the P3 Form by PW 4 due to the prolonged strike by the medical practitioners and the Appellant was in custody at the time, this court found that one (1) adjournment from 11th January 2017 to 25th January 2017 was not sufficient to have caused this case to have fallen under the special conditions of Section 33(b) of the Evidence Act. This could not be said to have been prolonged delay or that the doctor could not be availed before court to adduce his evidence.

19. Appreciably, both the treatments notes and the P3 Form ought to have been produced by a medical expert by virtue of the provisions of Section 48 of the Evidence Act. The said Section provides as follows:-

“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 fingerprint or other impressions.”

20. Evidently, PW 4 was not skilled in medical matters. He did not lead evidence to demonstrate that he knew the signature of the doctor or that the doctor was the one who signed the said P3 Form or that he was well versed in medical matters.

21. In the case of **Julius Karisa Charo vs Republic** (Supra), Ouko J also expressed similar reservations about police officers tendering in evidence P 3 Forms because they should only restrain themselves to tendering documents that would fall in their docket. He stated as follows:-

“To my mind police officers role in the production of documentary evidence ought to be restricted to police abstracts and other non-technical documents. For the reasons stated I find and direct that PC Sang cannot produce the post-mortem report on behalf of Dr. Olumbe who has relocated at Australia and the efforts made in trying to procure his attendance, from what I have stated above, there must be pathologists who are conversant with his writing and signature.”

22. Having analysed the evidence of the case herein, this court therefore formed the opinion that the circumstances of this case were distinguishable from the facts in the case of **Chaol Rotil Angela vs Republic** (Supra) as aforesaid.

23. Appreciably, although the Appellant raised the issue in respect of the tendering of the P3 Form by PW 4 for the first time during the Appeal herein, this court nonetheless found that it was in the interest of justice that he be given an opportunity to Cross-examine witnesses in its respect as this was a case of grievous harm.

24. It was the considered view of this court that this case did not really fall under the provisions of Section 33(b) of the Evidence Act. This is because the Prosecution did not demonstrate that it could not procure the attendance of a doctor to tender in evidence the P3 Form only after one (1) court attendance. Secondly, the Appellant was a layman in matters of law and may not have understood the implications of having not objected to the application by PW 4 to adduce the P3 Form under the provisions of Section 33(b) of the Evidence Act.

25. It was thus the considered view of this court that justice could only be done to the Appellant herein through a re-trial. However, a re-trial is not ordered as a matter of course. It depends on the particular circumstances of a case and it must not prejudice an appellant, which this court found would prejudice the appellant if he did not enjoy the benefit accorded to him by provisions of Section 48 of the Evidence Act.

26. In this regard, this court fully associated itself with the holdings in the cases of **Ahmedi Ali Dharamsi Sumar vs Republic [1964] E.A. 481** and re-stated in **Fatehaji Manji vs Republic [1966] E.A. 343** that Mutende and Thurani Jaden JJ cited in the case of **Jackson Mutunga Matheka vs Republic [2015] eKLR** where it was stated as follows:-

“... a retrial will only be ordered when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution fill up gaps in its evidence at the first trial, even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered, each case must depend on particular facts and circumstances and an order for retrial should only be made where the interest of justice required it and not ordered where it is likely to cause an injustice to the accused.”

CONCLUSION

27. As this court found that a re-trial would be in the interest of justice in the case herein, it did not therefore address its mind to the remaining Amended Grounds of Appeal to give an opportunity to the new trial court to hear and determine the issues herein.

DISPOSITION

28. The upshot of this court's decision was that the Appellant's Petition of Appeal that was lodged on 20th October 2017 was successful. It would therefore be unsafe to allow his conviction to stand. The same is hereby quashed. Consequently, the sentence is also hereby set aside.

29. However, in view of the fact that an offence was alleged to have been committed, it is hereby directed and ordered that there shall be a Re-trial of the Appellant herein so that the matter can be heard on its own merits. The Appellant shall be arraigned afresh before a different magistrate at the Wundanyi Law Courts to hear and determine this matter.

30. In this regard, it is hereby directed and ordered that the Appellant remain in custody for production before the Senior Principal Magistrate Wundanyi Law Courts on 6th March 2018 for allocation to a different trial court for purposes of taking a plea and further hearing of this matter. It is the expectation of this court that the new trial court will proceed to hear and determine this matter expeditiously in view of the fact that the Appellant has been in custody since 6th February 2017.

31. It is so ordered.

DATED and DELIVERED at VOI this 27th day of February 2018.

J. KAMAU

JUDGE

In the presence of:-

Simon Mwaisaka Matata - Appellant

Miss Anyumba - for State

Susan Sarikoki-- Court Clerk