REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 11 OF 2017

STEPHEN SWAI WAIRI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(AN APPEAL FROM THE ORIGINAL CONVICTION AND SENTENCE IN THE CHIEF MAGISTRATE'S COURT AT KIBERA CR. CASE NO. 3508 OF 2016 DELIVERED BY HON. J. KAMAU, RM ON 8TH DECEMBER 2016).

JUDGMENT

Background

Stephen Swai Wairi, the Appellant herein was charged with the offence of grievous harm contrary to **Section 234 of the Penal Code**. The particulars of the charge were that on 31st March, 2014 at the Maasai Lodge Area in Kajiado North District within Kajiado County, unlawfully did grievous harm to Victor Manoti Aosa.

The Appellant was arraigned before court and after the trial he was found guilty and sentenced to life imprisonment. He was dissatisfied with the decision of the court and has filed this appeal against both the conviction and sentence. He set out his grounds of appeal in the Petition of Appeal dated 7th February, 2017. They were, inter alia, that his right to a fair trial was violated, that the evidence of the prosecution was marked by contradictions and inconsistencies, that his identification was flawed, that the evidence was not competently adduced, that his defence was not considered and that the sentence imposed was harsh and excessive in the circumstances.

Submissions

On violation of his right to fair trial, the Appellant submitted that the trial court did not accord him an opportunity to secure the services of an advocate to represent him yet he had made the request. The court also declined to grant him an adjournment when he informed it that he was unwell. This implied that he was not accorded adequate opportunity and facility to conduct his defence. On contradictions of evidence, he submitted that the prosecution witnesses were not consistent on where the complainant suffered injuries. He pointed out that PW1 testified that he was stubbed on the chest whereas PW2 and PW6, the latter being the police doctor testified that PW1 sustained a stub wound on the right side of the abdomen with a residue surgical scar. It was the Appellant's view that the prosecution was not consistent on who called PW1's brother after the incidence.

On identification, he faulted the failure by the investigator to conduct an identification parade. He justified the same on ground that after PW1 was stubbed, members of the public milled around the scene wanting to lynch the Appellant. There was therefore a possibility that PW1 could have been stabbed by any of the members of the public. The Appellant then faulted the production of expert evidence by the investigating officer which did not accord with the evidence Act. He pointed to the treatment notes, a discharge summary, medical attendance cards and hospital payment receipts which ought to have been produced by a medical officer. Further, he submitted that there was no prove that a knife was used to stub PW1 for its non-production as evidence. He thus could not be linked to the offence. Furthermore, such a weapon should have been dusted for fingerprints so as to link the Appellant to the offence.

The Appellant also submitted that his defence was not considered by the trial court which if the court had considered it a guilty verdict could not have been arrived at. Finally, he was of the view that the sentence imposed was harsh and excessive. Amongst the case law cited were to buttress the submission were; **Erick Otieno Arum vs Republic [2006] eKLR, R vs Tunbull and Anor [1977] 1QB 224 Simiyu and Anor vs Republic [2005] KLR 95 and R vs Julius Khalisa Kyalo [2005] eKLR.** In sum, the Appellant submitted that the case was not proved beyond a reasonable doubt and urged that he be set free.

The Respondent through learned State Counsel Miss Sigei filed written submission on 12th July, 2017. Counsel opposed the appeal. Her submission was that the case was proved beyond a reasonable doubt and that the evidence against the Appellant was direct. In this regard, she submitted that the Appellant was arrested almost immediately after the incident at a time that there were many members of the public around. It was the members of the public who arrested him and handed him over to the police and so the issue of mistaken identity could not therefore arise. . She urged the court to take into account the behavior of the Appellant after he was aligned in court. That is to say that he absconded the proceedings upon being granted bail. Such a behavior led to the inference that the Appellant knew that he was guilty. On production of the exhibits, counsel submitted that although the investigating officer was not an expert in the medical field, he adduced the exhibits without objection from the Appellant. On sentence, counsel submitted that the same was legal and accorded with Section 34 of the Penal Code. Furthermore, the provision is couched in mandatory terms and the court could not impose a sentence than the law provided. It was her prayer that the appeal be dismissed.

Before I summarize the evidence as is required of this court, it is important that I address myself to the issue on whether the Appellant's right to a fair trial was violated. Should the court uphold the submission by the Appellant, the likely outcome is to order a re-trial. But of course this is based on consideration of factors to be looked into before a retrial can be ordered.

According to the Appellant, the trial court declined to accord him an opportunity to seek the services of an advocate after making the request. The first issue was raised by the Appellant and related to two adjournment applications he made during the trial. He made the first application in order to obtain legal representation while the second application was based on his inability to follow proceedings as he was not feeling well. The latter application was made on 23rd November, 2015. The Appellant informed the court that he was not feeling well and urged the court to adjourn the proceedings, an application the prosecution opposed on the grounds that the Appellant always sought adjournments in the matter. The court ruled that the Appellant "**does not look ill"** and set the matter for hearing at 1130hrs. At 1145hrs the Appellant made a similar application which the prosecution again opposed. The court allowed the adjournment even though the Appellant did not appear ill.

Notwithstanding the fact that the adjournment was allowed, it is sad to note that the court took it upon itself to determine whether the accused person was ailing or suffering an illness based purely on how he looked. It is common knowledge that one may be extremely ill yet he does not look as ill as illnesses are not solely manifested by the physical appearance of a person. It was outside the expertise of the court's power to conclude that the accused was ill based on his appearance. Furthermore, on humanitarian ground alone, since the Appellant had made such an application for the first time, the court ought to have allowed it.

The application for an adjournment to enable him to retain legal representation was first made on 16th

September, 2015. This was made after PW1 was stood down and the hearing set to continue on 25th September, 2015. When the matter came up for hearing on 25th September, 2015 the Appellant again made an application to be granted time to look for a lawyer. The court made a ruling, inter alia, that it had noted that the accused had time since 17th August, 2015 to get an advocate and had not done so. Further that his right to legal representation was equally as important as the right of the complainant to get justice and that "moreover" the Appellant had been supplied with statements and that the matter could proceed.

From the above chronology, it is clear that the Appellant brought up the issue that he required an adjournment on 16th September, 2015 when he requested that PW1 be stood down. The witness had just completed the evidence in chief. The case was adjourned to the 25th September but not at the behest of the Appellant but of the prosecution. On this date, the Appellant informed the court that he had still not secured the services of an advocate and requested for an adjournment. Only seven days had passed between 16th and 25th September which in my view was not a sufficient period for the Appellant to have secured the services of an advocate. In declining to accede to the Appellant's application, the court failed to take into account that the Appellant had not contributed in any way to the delay of the case. Further, the court also failed to consider that since the commencement of the trial to the 25th September, 2015, was not a period that could be deemed unreasonable in contributing in the delay of the case thereby occasioning prejudice to the prosecution witnesses. The case had been going on for only a period of one month. It ought to have been borne in the mind of the court that the services of an advocate have monetary implications. The Appellant required time to prepare himself in this regard. In declining to give the Appellant the time he needed to look for an advocate implied that the court was unreasonable and violated the Appellant's right to a fair trial contrary to **Article 50(2)(g)** which provides "**that every accused person has a right to a fair trial which includes the right to choose, to be represented by, an advocate and to be informed of this right promptly."** Under **Article 25(c)** the right to a fair trial is one of those rights under the Bill of Rights that is non-derogable. Accordingly, I hold and find that the Appellant's right to a fair trial having been infringed, the only option available is to order a retrial.

In ordering a retrial, the court must take into consideration several factors as were set out in the case of **Mwangi vs Republic [1983] KLR 522** as follows:

> ***"That a retrial should not be considered unless the appellate court is of the opinion that, on a proper consideration of the admissible evidence, or potentially admissible evidence a conviction might result; Braganza vs Republic[1957] E.A 152(CA) 469; Pyarwa Bussam vs Republic[1960] E.A 854***
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> ***Several factors have therefore to be considered. These include:***
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> ***1. When the original trial was illegal or defective a retrial will be ordered.***
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> ***2. A retrial will not be ordered if the conviction was set aside because of insufficient evidence.***
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> ***3. A retrial should not be ordered to enable the prosecution to fill up the gaps in its evidence at the first trial.***
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> ***4. A retrial should not be ordered where it is likely to cause an injustice to the accused person.***
>
> ***5. A retrial should be ordered where the interest of justice so demand.***
>
> ***6. Each case should be decided on its own merits.***
>
> ***7. Whether there is evidence to support the conviction."***

The prime consideration herein is whether if a retrial is conducted is likely to result in a conviction. In total the prosecution called seven witnesses. PW1 Victor Manoti was the complainant. He gave a vivid account of how the Appellant confronted him wielding a knife and without any provocation stabbed him.

Prior to this, the Appellant and another had approached PW1's Mpesa services shop requesting to transact. As events unfolded, the Appellant's hand was trapped in a wire mesh in an adjacent shop. PW1 screamed attracting a crowd to the scene. That is when after the Appellant bolted from the shop, he confronted PW1 and stabbed him. The events at this hour were recounted by PW2 and indeed other persons who went to the scene were PW3, 4 and 5. Both PW3 and 5 were eye witnesses. In addition, medical report confirmed the extent of the injuries. There existed direct evidence against the Appellant. The minor contradictions on the actual point of stabbing, in my view, were minor and may not vitiate the fact that the Appellant committed the offence.

It is also trite to note that under Section 234 of the Penal Code, the penalty provided for grievous harm is life imprisonment. The Appellant was only sentenced on 13th December, 2016 and has therefore been in remand for less than one year. No prejudice would be occasioned to him if a retrial is conducted. Furthermore, the complainant is awaiting justice to be done. The same can only be achieved if a fair and objective trial is conducted. It is in the interest of justice therefore that the court orders that a retrial be conducted.

In the end, the appeal partially succeeds. I quash the conviction and set aside the sentence. I order that a retrial be conducted. The Appellant shall be escorted to Ongata Rongai Police Station not later than 10th August, 2017 for purposes of preparation of a fresh charge sheet and thereafter take plea within the period stipulated by the law. It is so ordered.

Dated And Delivered at Nairobi this 31st Day of July, 2017.

G. W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. Mr. Machira h/b Mr. Magetto for the Appellant

2. M/s Ndamu for the Respondent.