REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 94 OF 2015

ISAAC MAINA NGUNIA…….APPELLANT

VERSUS

REPUBLIC……..…….....…….…….RESPONDENT

(Appeal against Conviction and Sentence imposed in Mukurweini Criminal Case No. 164 of 2015 by Hon. J. Munguti, SPM on 8.12.15)

JUDGMENT

The Trial

The Appellant herein **Isaac Maina Ngunia** has filed this appeal against conviction and sentence on a charge of grievous harm contrary to section 234 of the Penal Code Cap 63 Laws of Kenya. The particulars of the offence were that:-

> ***On 12.5.15 at Kiirungi village in Mukurweini Sub-County within Nyeri County jointly with anther not before court unlawfully did grievous harm to Jinalo Njagi Njure***

The prosecution called a total of six (6) witnesses in support of their case. PW1 the complainant stated that on 12.5.15 at about 10 .00 pm, he left Gikondi Corner Bar where he had been drinking alcohol with Stephen Kagethe and they proceeded home. That before they reached home, the appellant and his brother Wachira who are his neighbors attacked them and stabbed him with knives causing him grievous harm. He said he was able to identify his attackers using light from his phone torch.

PW2 Stephen Kangethe Gachuhi said that he was with complainant on the material date and that they were so drunk that they had difficulties walking. He stated that they met appellant and his brother who are his neighbors. That he went to his house and left complainant appellant and his brother. That after a short while, he heard complainant screaming. That he went to the scene with his mother and found complainant injured and did not find appellant and his brother at the scene. He said that his vision was impaired by drunkenness but that there was moonlight and he was able to recognize appellant and his brother. He confirmed he did not witness the attack on complainant.

PW3 Magdalene Gathoni Gachuhi, recalled that Kangethe who was too drunk to walk arrived home about 10.30 pm. That shortly thereafter, he heard complainant screaming and he went out to find complainant lying on the ground with serious injuries. She confirmed she did not witness the attack on complainant.

PW6 Dr. Gachara produced complainant's P3 form PEXH. 2 filled by Dr. Kimanthi which shows that complainant 2 healing lacerations on scalp, a healing 6 cm laceration on left lumbar region with surgical stitches and 5 cm healing laceration on left shoulder all caused by a blunt object. He confirmed that

complainant suffered grevious harm.

At the close of the prosecution case, the appellant was ruled to have a case to answer and was placed on his defence. Appellant opted to remain silent and wholly relied on his submissions on no case to answer filed on 1.10.15.

The learned trial magistrate considered the evidence and sentenced appellant to 7 years imprisonment.

The appeal

Aggrieved by this decision, the appellant lodged the instant appeal. In his Memorandum of Appeal filed on 17th December 2015, the appellant set out 4 grounds of appeal to wit:-

> ***1. The trial magistrate erred in law and fact by delivering judgment that was grossly against the weight of evidence***
>
> ***2. The trial magistrate erred in law and fact in shifting the burden of proof to the appellant***
>
> ***3. The trial magistrate erred in law and fact in relying on uncorroborated evidence***
>
> ***4. The sentence was harsh and excessive***

Mr. Kingori, learned counsel for the appellant faulted the trial magistrate for believing that the complainant had identified appellant using a torch light yet PW2 said complainant did not have a torch. He further faulted the trial magistrate for convicting on the uncorroborated evidence of complainant. He further submitted that complainant only stated that he was stabbed by Wachira and that there was no evidence that appellant participated in the attack. He stated the conditions for conviction on circumstantial evidence set out in the case of ***Sawe Vs Republic (2003) KLR*** were not met. He further submitted that the vision by complainant and PW2 who admitted to have been were chronically drunk was impaired and that the conditions for positive identification were therefore not favorable.

Mr. Nyamache, learned counsel for the state submitted that although both PW1 and PW2 were very drunk on the material night, they had identified appellant at the scene of crime and that PW1 had stated that that they are the ones that attacked him. He additionally submitted that complainant had a torch and the injuries occurred after he met appellant and his brother. Counsel also submitted that appellant had been placed at scene of crime and that the circumstantial evidence had not been rebutted. He finally submitted that the sentence of 7 years was far lawful since the charge attracted a sentence of up to life imprisonment.

Analysis and Determination

This is the first appellant court and as such I am guided by the principles set out in the case **David Njuguna Wairimu V Republic [2010] eKLR** where the Court of Appeal stated:

> ***"The duty of the first appellate court is to analyse the re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."***

The trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and this court is in dealing with this appeal obligated to give allowance for that.

As submitted by the learned counsel Mr. Kingori, for the appellant, the prosecution did not present direct

evidence connecting the appellant and the attack on the complainant. What the prosecution relied upon was circumstantial evidence.

With above in mind I will consider the prosecution's evidence. In a nutshell the prosecution's case is that appellant and his brother Wachira attacked and injured complainant on 12th May 2015 about 10.30 pm. Complainant said he used his phone torch to identify the appellant and Wachira. PW2 who left the scene before complainant was attacked stated that he recognized appellant and Wachira using moonlight.

From the evidence on record, there is no doubt that the offence was committed at night and it is imperative on the trial court to test the evidence of identification and recognition with the greatest care.

In the case of ***Maitanyi –vs- Republic (1986) KLR 198*** the Court of Appeal stated:-

> ***"That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into. In days gone by, there would have been a careful inquiry into these matters, by the committing magistrate, state counsel and defence counsel. In the absence of all these safeguards, it now becomes the great burden of senior magistrates trying cases of capital robbery to make these enquiries themselves."***

In the recent case of ***John Muriithi Nyagah v Republic [2014] eKLR***, the Court of Appeal held:-

> ***"in testing the reliability of the evidence of identification at night, it is essential to make an inquiry of the relevant circumstances such as the nature of the light, the strength of the light, its size, its position relative to the suspects etc."***

The evidence on record shows that the court did not make an inquiry of the relevant circumstances such as the nature of the light, the strength of the light, its size and its position relative to the appellant. The fact that both complainant and PW2 conceded that they were so drunk so much so that they had difficulty walking and their vision was impaired by drunkenness ought to have sowed the seed of doubt on the mind of the learned trial magistrate concerning the recognition of the appellant by PW1. Such doubt should have benefited the appellant herein.

In light of the above, it is clear that the evidence of recognition by PWI could not be safely relied on and the learned trial magistrate erred in convicting the appellant on such uncorroborated evidence.

It was submitted by the state that circumstantial evidence against appellant was strong to sustain a conviction. There are very clear parameters that a prosecution should meet when relying on circumstantial evidence. Those parameters were the subject of discussion in the case of **R. vs Kipkering Arap Koske & Another 16 EACA 135** *where it was inter alia held that:"*

> ***"In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt."***

It is important to state that suspicion cannot suffice to infer guilt. The Court of Appeal in the case **Joan Chebichii Sawe v Republic Crim. App. No. 2 of 2002** had this say about suspicion in a criminal case:

> ***"The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this court made clear in the case of* Mary Wanjiku Gichira vs Republic (Criminal Appeal No. 17 of 1998 *(unreported), suspicion however strong cannot provide a basis for inferring guilty which must be proved by evidence."***

The prosecution has to prove its case beyond reasonable doubt. What is reasonable doubt? *Denning J in the case of* ***Millier v Minister of Pensions [1947]*** explained what reasonable doubt is. He stated:

> ***"It need not reach certainty, but it must carry a high degree of probability, proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable." the case is proved beyond reasonable doubt, but nothing short of that will suffice."***

Bearing the above in mind, I am convinced that complainant suffered serious injuries but the prosecution has failed to prove beyond reasonable doubt that the injuries were occasioned by the appellant.

Decision

In the end; I hereby reach a conclusion that the case against the appellant was not proved beyond any reasonable doubt rendering the conviction unsafe. Accordingly, the conviction is hereby quashed and the sentence set aside. The appellant is set at liberty unless otherwise lawfully held. It is hereby so ordered.

DATED THIS *18th* DAY OF *July* 2017

T. W. CHERERE

JUDGE

DELIVERED ON THIS 27TH DAY OF JULY 2017

BY: -

Ngaah J

JUDGE

In the presence of-

Court Assistant -

Appellant -

Counsel for the appellant -

For the State -