REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 20 OF 2015

(From original conviction and sentence in Criminal Case No. 56 of 2014 of the RM Magistrate's Court at Mwingi) – N. M. Nyaberi Ag.SPM)

KIVONDO KWOKO.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant Kivondo Kwoko was charged in the subordinate court at Mwingi with grievous harm Contrary to Section 234 of the Penal Code. The particulars of the offence were that on 27th June 2014 at Thokoa Trading Centre in Migwani District of Kitui County jointly with others not before Court unlawfully did grievous harm to Mutemi Muthengi. He denied the charge. After a full trial he was convicted by the trial court and sentenced to serve 5 years imprisonment.

Dissatisfied with the decision of the trial court the appellant has come to this court on appeal against both conviction and sentence on the following grounds:-

1. That the magistrate erred in admitting and convicting him on the prosecution evidence which was contradictory.
2. The learned magistrate erred in convicting and sentencing him relying on prosecution evidence of members of the same family, that is the complainant and his brother as key witnesses.
3. The learned magistrate erred in convicting him though exhibits which were mentioned were not brought before the court.
4. The learned magistrate erred by not considering Judges Rule No. 4 in that the police officer who arrested him was also the investigating officer, as shown in the evidence in the case.
5. The trial magistrate erred in convicting and sentencing him while the person who presented the P3 form was not qualified to do so and as such the P3 form was fake and unreliable.
6. The learned magistrate erred by convicting and sentencing him severely without considering that he was a first offender and a young man and should have shown leniency.
7. The learned magistrate erred in failing to consider his defence.

During the hearing of the appeal, the appellant made oral submissions. He submitted that he was arrested on 4th July 2014, taken to the police station on a complaint that he stole money, only to be charged later with assault. He stated that the evidence of prosecution witnesses was not corroborative in that though PWI testified in court that he only recognized him, the police OB extract showed that the same witness mentioned the names a total of five people in his first report. He also complained that the time was 10.00 Pm and the complainant PWI was unconscious, and as such there were favourable circumstances for identification. Though PWI and PW2 said that they knew him for 20 years it was not

easy to recognize him. He emphasized that he was arrested by PW3 a police officer for another allegation, not the assault allegation in this case.

He also submitted that he was denied prosecution witness statement for and did not know what he was being charged for.

Learned Prosecuting counsel Mr. Orwa opposed the appeal. Counsel submitted that there was no record that the complainant PW1 talked of 10 people. He also said that there was no evidence of an existing grudge between PWI the appellant. Counsel submitted that the record showed the reason why the appellant was not charged with the allegation of stolen money, as the complainant on that complaint, did not wish to pursue the issue.

Counsel submitted that the OB entries showed four suspects including that of the appellant, who was a prime suspect. His complaint was thus not tenable.

Counsel emphasized that no law prohibited members of the same family from testifying in the same criminal case. Counsel submitted further that the money, telephone and the knife were not recovered, and emphasized that an arresting officer in a criminal case would also be an Investigating Officer.

On ground five, counsel submitted that a Clinical Officer was a qualified person to produce a P3 form, and closed that the defence of the appellant was considered as well as his mitigation.

In response to the prosecuting counsel's submissions, the appellant submitted that the prosecuting counsel was not present during the trial.

In brief the facts of the case are as follows. On the night of 27th June 2014, the complainant PWI Mutemi Muthengi was heading home at 10.00 Pm from Thokoa market. He was alone. On the way, he met a group of people who attacked him. One of those people was Kivondo Kovoko the appellant. His evidence was that there was moonlight that night and that the appellant tripped his leg and he lost balance. The appellant then removed a knife stabbed him on his forehead and upper lip and he lost consciousness.

He gained his consciousness at 1.00 am only to find that his cash Kshs 7,000/= and Nokia Mobile phone make 1280 valued at Kshs 2,000/= were missing. He then proceeded home and informed his wife about the incident proceeded to Migwani Police station and later was also treated at Migwani Hospital. A P3 form was later filled for him by PW4 Thomas Gichangi a Clinical Officer and the injuries were classified as grievous harm. The appellant was then arrested and charged, but none of his companions was arrested or charged.

When put on his defence, the appellant gave unsworn testimony. He stated that on 29th of June 2014 he stayed at home until 3rd of July 2014 when he went to Thokoa market to demand money from his aunt. When getting out of his his aunt's house, a police officer told him that he had stolen money and took him to Migwani police station and charges were then leveled against him.

He also called one witness PW2 Mutina Kivoko his mother, who stated that she was aware that in July 2014 the appellant was arrested on an allegation that he had assaulted Mutemi Muthengi.

This is a first appeal. As a first appellate court I am required to reevaluate all the evidence on record and come to my own conclusions and inferences, taking into account that I did not have the opportunity to see witnesses testify, and give due allowance to that fact – see the case of ***Okeno -vs- Republic (1972) EA 32***.

I have re-evaluated the evidence on record. The appellant has raised a number of issues on appeal. I will deal with the technical issues first.

He has said that it was wrong for the learned magistrate to have relied on the evidence of relatives ie two

brothers in convicting him. Indeed two brothers testified in court about the incident, ie the complainant and his brother PW2 Kimanzi Muthengi. In my view there is nothing unusual or irregular or illegal about two brothers testifying in the same criminal case, or the court founding a conviction on the evidence of such brothers or relatives. The law does not prohibit the court from relying on the evidence of relatives in a criminal case. Provided that evidence is credible and believable, a court can convict on the same. I dismiss that ground.

The appellant has also complained that the Investigating Officer was also the arresting officer, which contravenes the Judges rules. Indeed, PW3 PC Jackson Karumba was arresting and investigation officer. There is no law which disqualifies an arresting officer from being an Investigating Officer at the same time. An Investigating Officer cannot conduct an identification parade, because he might have prior knowledge of suspect and the witnesses. He might not be an independent person to be relied upon in conducting an identification parade. However, an Investigating Officer can be the arresting officer, and his evidence herein was perfectly admissible at the trial. I dismiss that ground.

The conviction herein is grounded on the evidence of a single identifying witness, the complainant PWI. A court of law can convict on the evidence of such a single witness. In the case of ***Abdalla Bin Wendo and another -vs- R (1953) 20 EACA 2006*** the Court of Appeal for Eastern Africa reiterated that a conviction can be founded on the testimony of a single identifying witness, provided that such evidence is tested with great care especially when the conditions favouring correct identification are difficult.

In the later case of ***Mzaro -vs- R (1991) KLR 70*** the Court of appeal stated as follows:-

> ***"whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused which the defence alleges to be mistaken, the Judge should warn the Jury (himself) of the special need caution before convicting the accused the accused person in reliance of the correctness of identification or identifications."***

In our present case, the only identifying witness was the complainant PWI Mutemi Muthengi. He mentioned five names of people in the OB report. The appellant was one of those who was mentioned in the OB report. During trial however, the said witness said in cross examination that he knew only the appellant among the 4 people who attacked him. He maintained that he knew only one of the attackers. When the OB was later brought however, names of 5 suspects were contained therein. This in my view creates a doubt as to the credibility of this witness.

In addition to the above, the same witness PWI said that he recognized the appellant whom he knew for over 20 years in the moonlight. He however did not say how bright the moonlight was that night and whether he observed him closely in the face for how long. It is a mere statement from him that he recognized the appellant who admittedly he knew before.

The learned trial magistrate did not warn himself and evaluate the circumstances of recognition critically. It is apparent to me that though the witness PWI might have been honest, he was mistaken. Other than the fact that he did not give a description of the brightness of the moonlight, he become unconscious immediately he was hit with the knife. In my view, had the learned magistrate considered critically the circumstances of the identification or recognition and the contradictory report the complaint PWI made to the police against the evidence the same witness tendered in court, he would not have arrived at the conclusion that the recognition of the appellant was safe and free from the possibility of mistake. In my view, the prosecution did not establish that the appellant was positively recognized by PWI the complainant. On that account the appeal will succeed, as the conviction is not safe.

The appellant has claimed that his defence was not considered by the trial court. In my view that is not the position. In considering the defence of the appellant, the learned magistrate stated as follows:-

> ***"I have looked at the accused's defence. He has not mentioned anything of his whereabouts of 27th June 2014. Thus, his defence is an explanation of how he was arrested but has failed to explain or touch anything on his whereabouts of the night of 27th June 2014."***

It follows therefore, that the magistrate considered the defence of the appellant. In finding that he appellant committed the offence, the magistrate disbelieved the defence of the appellant. I dismiss that ground.

In conclusion, I find that the appeal has merit, as the identification of the appellant was not positive and without the possibility of mistake. I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Garissa this 31st day of May 2016.

GEORGE DULU

JUDGE