



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CRIMINAL APPEAL NO.16 OF 2013

*(An Appeal Against Original Conviction And Sentence Of Kericho Cmc. Case No.2136 Of 2009 –
Hon. W. N. Kaberia – Ag. Senior Principal Magistrate On 25th March 2013)*

EDWIN KIBET KIRUI - APPELLANT

VERSUS

REPUBLIC - Respondent

JUDGMENT

Edwin Kibet Kirui, the Appellant herein, was tried and convicted for the offence of grievous harm contrary to Section 234 of the Penal Code. He was sentenced to 3 years imprisonment. Being aggrieved, the Appellant appealed to this court and put forward the following grounds:

1. THAT the learned Magistrate erred in Law and in fact in that he failed to consider the fact that the evidence adduced by PW1, and PW2 did not mention the accused person being in the scene of crime. PW1 only stated that it is the accused's wife who opened the door and that he never saw the accused person.
2. THAT the learned Magistrate erred in Law and in fact in failing to consider the fact that the prosecution evidence lacked corroboration and that the evidence was fabricated to suit the complainant.
3. THAT the learned Magistrate erred in Law and in fact in that he failed to consider the fact that the defence raised an alibi which was never discounted or challenged by the prosecution.
4. THAT the learned Magistrate erred in Law when he considered extraneous circumstances in arriving at the decision that he made.
5. THAT the learned magistrate erred in Law in considering the evidence of a single witness (PW1 the complainant) to arrive at his judgment.
6. THAT the Judgment was bad in law and never considered the defence submission. It was biased and never analyzed evidence before court.
7. THAT the sentence awarded was harsh and excessive in all the circumstances of the case.

Let me at this juncture, set out the case that was before the trial court before considering the substance of the appeal. The prosecution's case appears to be short and straightforward. On 30th August 2009, Bernard Onchuru, the complainant stated that while seeing off his cousin he met with Edwin Kibet Kirui, the Appellant. The duo went into the house of one Alice Obiria where they agreed to exchange their phones. The Appellant was to pay an extra sum of Ksh.2000/= to the complainant since the complainant's phone was of a higher value than that of the Appellant. Since the Appellant did not have ready cash, he requested the complainant to accompany him to his home to collect the money and a missing phone battery. The complainant was accompanied by one Antony Nyamweya and Arap Sang. Upon reaching the Appellant's house, Arap Sang gave a knock on the accused's door which was opened

by the Appellant's wife. As the complainant and his friends were talking to the Appellant's wife it is said the Appellant came and hit the complainant on the head with a stick fitted with a nut. The complainant fell down unconscious. The complainant regained his conscience at Kericho District Hospital. APC.Alex Kariuki (PW2) upon being informed of the incident together with other officers rushed to the scene where he found the complainant lying down unconscious while bleeding profusely in the tea plantation belonging to the Appellant. PW2 arrested the Appellant as a suspect for assault. Yego Kirwa (PW4), a Clinical Officer based at Kericho District Hospital examined the complainant and found him to have suffered cut wound on the scalp with depressed fracture of the skull.

When placed on his defence the Appellant testified and summoned three independent witnesses to support his case. He claimed he was away from home during the day and that when he came back at midnight he found the complainant in his compound while injured. He also said that his wife, parents and DW4 were present. It is the Appellant's evidence that he received information that the Appellant had been beaten up by villagers who had responded to the screams of his wife after it was alleged that he had assaulted her. Margaret Kirui (DW2) claimed, the accused visited her homestead pretending to be a police officer and assaulted her. Hon. Kaberia learned Ag. Senior Principal Magistrate considered the evidence from both sides and believed that of the complainant because it was consistent. The learned Senior Principal Magistrate did not believe the evidence of the Appellant and his witnesses since they told lies.

On appeal, Mr. Motanya argued all the seven grounds together. It is his submission that the prosecution had failed to prove its case beyond reasonable doubt. It is said the trial magistrate heavily relied on the evidence of the complainant, a single identifying witness. Mr. Motanya further argued that those who allegedly accompanied the complainant to the Appellant's were never summoned to testify thus discrediting his evidence. Miss. Kivali learned prosecution counsel urged this court to find that the prosecution had presented cogent evidence to establish its case beyond reasonable doubt. I have re-evaluated the evidence tendered before the trial court. According to the complainant he visited the Appellant's house in the company of one Arap Sang and Anthony Nyamweya. It is his evidence that he was assaulted in the presence of those witnesses. The complainant lost conscience after he was assaulted. Arap Sang and Anthony Nyamweya were never summoned to testify to lend credit to the complainant's evidence. It should be appreciated that it was at night and the conditions of identification could not be ascertained. The question which remains unanswered is why were the above witnesses not summoned to testify? This court is entitled to infer that their evidence was unfavourable to the prosecution. In *Juma Ngodia vs R.* [1982-88] 1 KAR 9 at the court of Appeal held inter alia:

“The prosecutor has, in general, a discretion whether to call or not to call someone as a witness. If he does not call a vital reliable witness without a satisfactory explanation he runs the risk of the court presuming that his evidence which could be and is not produced would, if produced, have been unfavourable to the prosecution.”

It was at night hence it was necessary for another independent evidence to be tendered to corroborate the evidence of the complainant who was a single identifying witness. The court of appeal for East Africa in *Abdala Bin Wendo & Anor. vs R.* [1953] 20 EACA at P.168 expressed itself as follows:

“Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness can be accepted as free from the possibility of error.”

For the above reasons I have entertained some doubt as to whether there was cogent evidence of identification.

The second main ground argued on appeal is to the effect that the Appellant's defense of libi was never given due consideration. Miss. Kivali was of the firm view that the Appellant's defense was considered

and properly rejected. There is no doubt that the Appellant told the trial court that he was away in Sotik during the time of the incident and only came back after the event. I have already stated that the Appellant was placed at the scene of crime by the doubtful evidence of the complainant. Despite the Appellant having set up the defense of alibi, the learned Senior Principal Magistrate completely ignored that defense. In fact learned the Senior Principal Magistrate went to discredit the Appellant's evidence and those of his witnesses as not reliable. He did not attach any good reasons in disbelieving these testimonies. After a careful re-consideration of the Appellant's defense I have come to the conclusion that the same actually weakened the prosecution's case thus creating some doubt as to the veracity of the complainant's case. I will give the Appellant the benefit of doubt.

On the basis of the above grounds the appeal is allowed. The conviction is quashed and the sentence set aside. The Appellant should be set free forthwith unless lawfully held.

Dated, signed and delivered in open court this 20th day of June 2014.

J. K. SERGON

JUDGE

In the presence of:

- Mr. Mutai for Director of Public Prosecutions
- Mr. Motanya for Appellant