REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL 83 OF 2006

JOHN MWANIKI KITUYU.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant, **JOHN MWANIKI KITUYU,** was convicted for the offence of causing grievous harm. He was then sentenced to life imprisonment.

In the appeal, which he lodged to this court, the appellant challenged both his conviction and sentence.

In summary, the appellant raised the following grounds of appeal;

(i) ***The circumstances prevailing at the time the offence was committed were unfavourable***

For positive identification.

(ii) ***The only reason why the complainant named***

him, in the first report to a person in authority, was because of a past grudge which she had against him.

(iii) ***The prosecution failed to call some essential witnesses.***

(iv) ***The prosecution failed to prove the case beyond any reasonable doubt.***

(v) ***The trial court erred, by shifting the burden of proof to the appellant.***

(vi) ***The trial court failed to give due consideration to the appellant's defence.***

(vii) ***The conviction was against the weight of evidence adduced.***

As regards his identification, the appellant submitted that the same was doubtful because there was no

way that he could have attacked the complainant, as he was well known to her. His view is that he could not have done so because she would have automatically identified him.

The appellant submitted that the incident occurred at dusk, when it would be expected that there would be darkness inside the house in which the complainant was attacked. Furthermore, the complainant is faulted for failing to state the distance between her and the appellant, as well as the length of time she took to observe the attacker.

Similarly, the appellant pointed out that PW3 did not tell the court about the distance between himself and the attacker, when they met face to face.

As far as the appellant was concerned, people do resemble, and there was a possibility that both the complainant and PW3 were mistaken, in their alleged recognition of the appellant, as the person who had attacked the complainant.

It was submitted that the two witnesses had their senses impaired by stress, fear and shock of the attack.

It was also submitted by the appellant, that both PW1 and PW3 simply assumed that because the appellant had previously assaulted them, he was the person who did so again, on the occasion in issue in this case.

Meanwhile, as regards the issue of essential witnesses, the appellant drew the court's attention to the fact that PW1 had said that several neighbours had witnessed the attack on her. However, none of those neighbours testified.

On his part, the investigating officer (PW2) was criticized for failing to produce in evidence, his investigation diary and any sketch he may have drawn of the scene of crime. Also, PW2 is said to have failed to establish if there was bad blood between the complainant and the appellant.

As regards the reason for his arrest, the appellant points out that it had nothing to do with the attack on PW1. His reason for so saying was that PW5 had testified that he (PW5) had received reports that the appellant had expressed an intention to assault the said witness.

However, even though the appellant says that he was only arrested for creating a disturbance by chasing PW5 with a panga, the appellant did not have any weapon at the time of his arrest.

Finally, the appellant faulted the learned trial magistrate for failing to take into account his defence, thereby convicting him against the weight of evidence.

I have given due consideration to the appellant's submissions, as well as to the submissions made by the learned state counsel. I have also given due consideration to the judgment of the learned trial magistrate. And, in the exercise of my obligation, as a first appellate court, I have given due consideration to the evidence on record. I now propose to re-evaluate the evidence, and to draw therefrom my own conclusions, whilst bearing in mind that I did not have the benefit of observing either the appellant or the witnesses when they testified.

PW1, **EULITA AKODOI PIRIOKO MUSEE**, was the complainant. She testified that she had lived with the appellant, as his wife, since 1990.

On the material date, (20/11/2004), she was asleep inside her house, at Bidii Farm. Her son was also asleep in the same house. At about 6.30 a.m, PW1 heard her son opening the door. She then heard the sound of the son, (PW3), running.

A little later, PW1 had footsteps return to the house. Assuming that PW3 had returned, PW1 called out to him, asking what was wrong.

It is then that PW1 came fact to face with the appellant, who asked for money. However, before PW1 could reply, she was attacked mercilessly, with a panga, until she fell down unconscious.

According to PW1, the appellant had a torch and a panga when he assaulted her. She also said that many neighbours witnessed the assault.

PW2, SGT PETER OMOSA ISABOKE, was instructed by the D.C.I.O, Mr. Shikuku, to investigate the incident. He talked to PW3, who told him that he (PW3) met the appellant outside the complainant's house, when PW3 was going out to relieve himself.

According to PW2, the complainant's son told him that he heard the mother screaming that Mwaniki was killing her. That is said to have happened when the appellant had chased PW3 away from the house.

PW2 said that when he visited the scene of crime neighbours were present, and that some of them recorded statements.

It was PW2's evidence that the appellant was arrested by members of the public as he was looking for PW5, who had helped the complainant to hospital, after she had been injured.

PW3, BONIFACE KIPKELEL, is the son to the complainant (PW1). He testified that the appellant was his step father.

He said that on the material day, he woke up at about 6.00 a.m., to attend to a call of nature.

When he opened the door, PW3 came face to face with the appellant, who was armed with panga. According to PW3, the appellant chased after him, but the witness outran him, into the maize plantation.

When PW3 returned to the house, after about 30 minutes, he found PW1 in a pool of blood. Later, PW1 was escorted to Kitale District Hospital.

After PW3 reported the incident to the police, they requested him for a picture of the appellant, which PW3 provided.

PW4, STEPHEN MARWA WAMUKOTA, testified that as at 17/6/2004 he was serving a jail sentence, having been convicted for being a possession of illicit brew.

PW4 said that the appellant was also in prison at that time, for having assaulted PW3. According to PW4, the appellant instructed him to relay a message to both PW5 and his family, that as soon as he had served his prison sentence, he would "***finish"*** them.

PW5, PETER NYONGESA, recalled that PW4 had, in June 2004, told him that the appellant had sent him to warn PW5, his family and the appellant's wife that he would attack them severely, once he left prison.

On 20/11/2004, PW5 learnt that PW1 had been attacked, and grievously harmed. PW5 later learnt from his wife, who had gone to visit PW1 in hospital, that PW1 had been attacked by the appellant.

According to PW5, the appellant visited the witness's house on 1/1/2005. However, PW5 was not at home, as he had gone to visit his other wife at Goseta. When PW5 learnt that the appellant had been hovering around his home, PW5 reported the issue to the Kitale Police Station. The, as PW5 was returning home, he and his brothers ambushed the appellant, and arrested him.

PW6, DR. MESHACK LIRU, was a Medical Officer of Health, based at Kitale District Hospital. He testified that he was requested by the C.I.D Kitale, to fill a P3 form, for PW1.

PW6 learnt from PW1 that she had been attacked by someone known to her.

PW6 examined the complainant and ascertained that she had suffered multiple deep cut wounds on the head, back, left shoulder and both forearms. She also had fractures of the left hand ulna bone, and of the left clavicle. A piece of her skull had been chopped off.

The degree of injury was assessed by PW6 as being grievous harm. And the doctor produced photographs showing the injuries.

After the appellant was put on his defence, he gave an unsworn testimony. First, he told the court of an incident on 6/2/2001 when he found PW1 at his house, with someone else. The appellant confirmed that PW1 was his wife.

When the appellant went to call neighbours, he returned to find PW1 and the other man having left.

On the evening of the next day, the appellant says that PW1 poured hot water on him, whilst PW3 hit him on the back with a hammer. However, he snatched the sufuria, and used it to hit both PW1 and PW3.

When he reported the matter to the police, the appellant was placed in custody. Later he was convicted and sentenced to four years imprisonment, after he had admitted the charge that had been preferred against him.

As regards the incident that gave rise to the case herein, the appellant denied any knowledge of it. His story is that after being released from prison, he went to Meru to visit his sick daughter. He said that he only got back to Kitale on 27/12/2004, which was over one month since the alleged incident.

Thereafter, the appellant says that he visited his relatives at Kimono Farm, in Endebess, where he stayed upto 2/1/2005. He returned to seek the balance of the salary. However, he met PW5 together with three other people, who said that they would teach him a lesson for having testified in a case against them. They arrested him, tied him with a rope, and escorted him to Kitale Police Station.

Although he was charged with causing grievous harm to PW1, as well as with the offence of creating a disturbance in a manner likely to cause a breach of the peace, by chasing PW5 with a panga, the appellant maintained his assertion of innocence to the very end.

In his judgment, the learned trial magistrate acquitted the appellant on Count II, after PW5 testified that the appellant had not chased him with a panga on 1/1/2005. However, on Count I, which was for grievous harm to PW1, the appellant was convicted. He was then sentenced to life imprisonment.

As regards the identification of the appellant, I note that there is no dispute about the fact that he was the husband to PW1. The two had lived together for many years. Clearly therefore, PW1 was very familiar with the appellant facial and other physical features. In effect, when the issue of identification arises, it should actually be one for recognition.

PW1 said that she had lived together with the appellant from 1990. And the appellant told the court about an incident on 6/2/2001, when the two were still staying together. Therefore, the appellant had stayed with the complainant for about ten years.

Notwithstanding that fact, the appellant insists that the complainant and her son (PW3) were unable to positively identify him as the person who had attacked PW1.

In re-evaluating the evidence, I note that PW1 said that she became alert after hearing PW3 running outside the house, as if, he were chasing something. When PW1 heard footsteps returning to the house, she called out to PW3, to ask what was wrong. At that point, PW1 saw the appellant standing in front of her.

PW1 said that she recognized the appellant physically and by his voice.

The complainant said that it was day break. She was therefore able to see the appellant when he lifted up the panga he was holding.

Prior to the attack on PW1, her son had already encountered the appellant, when he had opened the door, with a view to going out to answer the call of nature.

According to PW3, the sun was just rising, and the appellant was about 3 metres from him.

In my considered opinion, the two eye-witnesses did not need to have described the clothing worn by the appellant, for the court to find their respective testimonies reasonable. It is not a requirement of positive identification that the clothing of an accused person be described. Although if the accused person did raise the issue, it could form part of the yardstick to be used in assessing the reliability of the identification of the accused.

In this case, the issue of the appellant's clothing did not arise, and therefore the twp eye-witnesses did not have any reason to volunteer the same.

The appellant submitted that the attack on PW1 occurred at dusk. As the incident took place at about 6.00 a.m, that period of the morning would be known as dawn.

The learned trial magistrate held that the appellant was properly identified, as the attack had occurred at between 6.00 and 6.30 a.m, as the sun was rising, and both PW1 and PW3 saw the assailant clearly. I find no reason at all to differ with that finding. If anything, I can only add that at a distance of about 3 metres, there was hardly any possibility that PW3 could have been mistaken in recognizing his step father. I therefore hold that although the circumstances prevailing were not ideal, both PW1 and PW3 positively recognized the appellant.

As to why the appellant attacked the complainant even though he knew that he could be easily recognized, this court cannot decipher how the appellant's thought process worked prior to the attack.

However, it is to be noted that previously, the appellant had attacked PW3. Obviously, on that occasion too, he knew that both PW1 and PW3 would recognize him, but that did not stop him.

Of course, in his defence, he explained that he had only attacked the two, in response to their attack on him. But the bottom line remains that he did attack them. Therefore, the fear of recognition would appear to have been insufficient to dissuade the appellant from attacking the complainant.

In any event, it was not necessary for the prosecution to explain, or for the trial court to ascertain why the appellant could have attacked the complainant, even though he should have known that he would probably be recognized. Perhaps the answer lay in the severity of the attack, which appears to have been calculated to end the complainant's life. Had that been achieved, she would have not been around to tell of her experience at the appellant's hands, as the dead tell no tales.

Having come to the conclusion that both PW1 and PW3 had positively recognized the appellant, I find that that was the reason which prompted them to give the appellant's name when they made their first respective reports. I find no basis for the appellant's contention that the two witnesses were either motivated by either by revenge or by a mere figment of their imagination.

As regards the neighbours to PW1, who may have witnessed the incident, but who were not called as witnesses, it is true that they could possibly have further reinforced or fortified the prosecution case. But even without their evidence, I find that the evidence of recognition weas already sufficient. I say so because there is no legal requirement that persons who are eye-witnesses to an incident should testify in court, in order for the court to convict an accused person. The validity or soundness of a conviction is not pegged on the number of witnesses who testified for the prosecution. Indeed, it is trite law that facts can be proved even by the evidence of a single witness.

From the evidence on record, it is patently clear that the injuries sustained by PW1 constituted grievous harm. And, as I have already made a finding that the said injuries were occasioned by the appellant, I hold that the prosecution had proved the case beyond any reasonable doubt.

That also implies that the conviction was therefore not against the weight of evidence, as contended by the appellant.

If anything, once I came to the conclusion that the appellant had been positively recognized as the assailant, that implies that the prosecution had dislodged the appellant is alibi. I say so because having been placed at the scene of the crime, at the time when it was being committed, the defendant could not have been elsewhere, at that very moment.

The learned trial magistrate, who had the benefit of observing the witnesses as they testified, formed the considered opinion that the prosecution witnesses were credible. I have found no reason to doubt that assessment.

And as regards constituency in the evidence of the prosecution witnesses, I have the view expressed by the trial court, that the said witnesses were consistent on the material facts, especially as regards the person who attacked the complainant, with what and where.

In the result, I hold that the appellant's conviction was safe, as it was found on sound, consistent and corroborative evidence.

On the issue of sentence, the learned state counsel invited me to uphold the same. He pointed out that the appellant had one previous conviction, which was relevant. The said conviction was in relation to a previous assault on PW1. On that occasion, the appellant was jailed for four years, after he had admitted assaulting his own wife and his step son.

After being released from prison, the appellant attacked his wife in a most savage manner. As I have already observed herein, the severity of the attack was a clear indication that the assailant intended to end the complainant's life, or to at least cause her to suffer maim or permanent deformity.

Given those circumstances, I do find that the sentence meted out against the appellant was justified. It is therefore upheld.

Accordingly, the appeal is dismissed, and I uphold both conviction and sentence.

Dated and Delivered at Kitale, this 3rd day of December, 2007.

FRED A. OCHIENG

JUDGE