Director of Public Prosecutions v Mbogo (Criminal Appeal E069 of 2022) [2024] KEHC 1385 (KLR) (14 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1385 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E069 OF 2022

LM NJUGUNA, J

FEBRUARY 14, 2024

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS ..... APPELLANT

AND

ESPON NJIRU MBOGO ..... RESPONDENT

(Appeal arising from the decision of Hon. S. Ouko RM in the Senior Principal Magistrate's Court at Runyenjes, Criminal Case No. E427 of 2021 delivered on 15th June 2022)

JUDGMENT

1. The appellant has filed a petition of appeal dated 19th December 2022, challenging the abovementioned decision, now seeking orders that the appeal be allowed and the acquittal be quashed. The appeal is premised on grounds that:

    a. The learned trial magistrate erred in law and fact by acquitting the respondent when there was sufficient evidence to convict him;

    b. The learned trial magistrate misdirected herself in law by failing to properly analyze the evidence before her;

    c. The learned trial magistrate erred in law and fact by ignoring the expert evidence of the doctor without giving any considerable reasons thereof;

    d. The learned trial magistrate misconstrued the principle of a single witness testimony and improperly rejected the evidence of the complainant;

    e. The learned trial magistrate erred in law in totally disregarding the entire prosecution's evidence; and

    f. The acquittal of the respondent was against the weight of the evidence.

2. The respondent was charged with the offence of assault causing bodily harm contrary to section 251 of the Penal Code. The particulars were that on 03rd February 2018, at Iriari village Kyeni North location in Embu East Sub-county within Embu County, the respondent unlawfully assaulted Caroline Karimi Njiru thereby occasioning her actual bodily harm. The respondent pleaded not guilty to this charge and the prosecution called witnesses in support of its case.

3. PW1, the complainant, stated that the incident occurred while she was still married to the respondent but their divorce proceedings are pending in court. It was her testimony that on the day of the incident, the respondent asked her why she doesn't go to ACK Church with him and he took a stick, locked the door and began beating her with it. That he hit her on the head and she fell down and lost consciousness. That their house is surrounded by a fence and due to the respondent's violent nature, no one would go to rescue her even if they heard her and that it was not possible for the neighbours to access their compound. That the respondent is the one who took her to hospital.

4. That she regained consciousness 3 days later at Kyeni Hospital where she was admitted for one week and the doctor filled in a P3 form. That the police officers at Kathageri Police Station frustrated her efforts to follow up on the case because when she reported, no action was taken. That she was injured on the head and the left eye was popped out. On cross-examination, she stated that the respondent used to assault her habitually and in 2018 she reported the incidents to the police but he was not arrested. That the neighbours visited her in hospital and told her that the respondent had refused to take her for treatment but they forced him.

5. PW2 was Dr. Moses Maina of Consolata Hospital Kyeni who stated that on 04th February 2018, PW1 went to him and complained that she had been assaulted by her husband. That she had marked swelling around the eyes and tenderness on the right side of the neck. He concluded that the injuries were inflicted by a blunt object and PW1 was admitted in hospital for 5 days during which time she was treated. That he filled the P3 form noting that bodily harm had been done, and the same was produced as evidence. On cross-examination, he stated that he did not witness the assault.

6. PW3, Sgt. Samuel Onyamasi of DCI Embu East stated that he was asked to investigate the case when the incident was reported. That PW1 recorded her statement and she was given the P3 form which was duly filled and she also produced her marriage certificate. That following the investigations, the respondent was arrested in church while preaching and was released on cash bail to give the complainant and the respondent time to reconcile but they did not agree. That he also forwarded the file to the ODPP for advice but they did urge him to charge the respondent with the offence. That the matter had been initially reported at Kathageri Police Station but no action was taken and so it was referred to him.

7. The prosecution closed its case and the court found that a prima facie case had been established. The respondent was placed on his defense and he called witnesses in support of his case.

8. DW1, the respondent, stated that the complainant is his wife for over 30 years. That on the day of the alleged incident, he was at home with his wife and daughter and there was no fight. That he had recently subdivided his land and given a portion to her to hold as trustee but she wanted to sell the land and he moved to stop the sale. That the complainant left home and allegedly went to Rukurire for work but instead she brought the case. That she never brought eye witnesses to support the story she gave to the police.

9. DW2, Christine Mwende, the daughter of DW1 and the complainant stated that on 3rd February 2018 she was at home and nothing happened. That the complainant has been a good mother all along until 2018 when DW1 subdivided the land and then she changed. That she has been living away from home and not at her parent's home. She asked the court to release DW1 as he was innocent. On cross-

examination, she stated that she did not know her mother's personal issues. That there was no issue about church and that initially, the complainant, who is her mother used to go to ACK Church and then changed to NISA and her father (the respondent) followed the complainant to NISA.

10. DW3, Purity Muthanje Njiru, a step-daughter of DW1 stated that the complainant had changed churches 3 times and all along they were okay and always went where she wanted them to go. That in 2018, DW1 divided the land and on the day when he did that, the complainant became violent and locked herself in the house and got out with a panga and threatened them and they reported the matter to the police. That whenever the complainant went to hospital, she informed them but if she went on that day, she did not inform them. It was her evidence that she knew nothing about the alleged assault.

11. DW4, Nicasio Murimi, DW1's farmhand stated that he was at work in DW1's compound on the day of the alleged incident and did not witness any assault. That he slept there that day and did not see anything out of the ordinary. On cross-examination, he stated that the complainant was never taken to hospital on 4th but she was not at home between 4th and 9th February 2018 as she had run away from home.

12. The appeal was canvassed by way of written submissions.

13. In its written submissions, the appellant relied on section 251 of the Penal Code on the elements of the offence of assault and on the case of Vicky Chelangat v. Republic (2022) eKLR. That PW1 narrated the circumstances under which she was injured and that she remained quiet because the respondent had a temper. That the respondent told her that he would kill her and then kill himself before he started hitting her, after which he hit her on the head and she fell down, losing consciousness. That the testimony of PW1 was corroborated by PW2 who treated her.

14. It was its argument that following the incident, evidence showed that it was the respondent who took PW1 to hospital and that she was unconscious. That it was his duty to explain the circumstances under which the injuries were inflicted and that he did not controvert PW1's testimony that he used to beat her often. Reliance was placed on section 111(1) of the *Evidence Act* and the cases of Paul Muturi Mwangi & Another v. Republic (1988) eKLR and Abdala Bin Wendo v. R (1953) 20 EACA 166 at 168 for the argument that the respondent was properly identified as the perpetrator of the bodily harm caused on the complainant. It urged the court to overturn the finding of the trial court.

15. The respondent, in his submissions, stated that there was no sufficient evidence to sustain a conviction as the testimony of PW1 was not consistent with that of PW2. That PW1 stated that she was unconscious from 3rd February 2018 on a Saturday and regained consciousness on 6th February 2018 on a Tuesday yet PW2 allegedly examined her on 4th February 2018 when she was allegedly unconscious though PW2 stated that she was conscious at examination.

16. It was his argument that the discharge summary does not have the hospital stamp while the P3 form is stamped. That it is questionable that the P3 was filled 2 years after the incident and that the reason for the delay in prosecuting the case has not been given. That anyone who would have been an eye witness stated that on the alleged date, nothing like an assault happened at the home of the respondent and they all testified as such. He relied on sections 111(1), 173 and 77(1) of the *Evidence Act* and stated that the acquittal is right in the circumstances and must be upheld. Further reliance was placed on the case of Bernard Kebiba v. Republic (2000) eKLR.

17. The issues for determination herein are as follows:

    a. Whether the offence of assault was proved beyond reasonable doubt; and

    b. Whether the acquittal should be overturned.

18. The role of the first appellate court is cut out and this court will thus endevour to revisit all the evidence at trial and make its own findings. In the case of Kiilu & Another v Republic [2005]1 KLR 174, the Court of Appeal stated thus:

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."

19. As a rule of thumb, and under section 109 of the *Evidence Act*, it is incumbent upon the one who alleges a fact, to prove it and the standard of proof is beyond reasonable doubt. According to section 251 of the Penal Code, any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years. In the English case of Rex v Donovan [1934] 2KB 498 the court held:

> " For this purpose, we think that "bodily harm" has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the complainant. Such hurt or injury need not be permanent, but must, no doubt, be more than merely transient and trifling."

Further, in the case of R v Chan-Fook [1994] 2 ALL ER 557, it was held that the meaning of the phrase "actual harm" is to be in its simplest form, thus:

> " We consider that the same is true of the phrase "actual bodily harm." These are three words of the English language that receive no elaboration and in the ordinary course should not receive any. The word "harm" is a synonym for injury. The word "actual" indicates that the injury (although there is no need for it to be permanent) should not be so trivial as to be wholly insignificant."

20. From the evidence, PW1 narrated that she was accosted by the respondent who asked her why she did not go to ACK church with him. That he then took a stick and began beating her after threatening to kill her and himself. That from the beating, she sustained injuries to her head and neck, causing a protruding eyeball and that she lost consciousness. It was her testimony that she regained consciousness while in hospital and that some neighbours who visited her told her that it was the respondent who took her to hospital after they implored him to do so.

21. PW2 stated that PW1 was indeed treated for the injuries at the hospital and then discharged after 5 days. The only other prosecution witness, PW3 testified that he took over investigations of the case since the police officers at Kathageri Police Station were reported to have done nothing about the case. On the other hand, DW1-4 testified that they were all present at the home of the complainant and the respondent and that none of them saw any occurrence like the one narrated by PW1. That no-one was taken to hospital that day and that the respondent did not beat the complainant.

22. For the appellant to succeed in this appeal, it was paramount that its evidence at the trial proves that the respondent had the intention (mens rea) to commit the assault which led to bodily harm (actus rea). The testimonies of the defense witness indeed corroborate the facts stated by the complainant that he

was at home, therefore, his identity is not in question. The appellant submitted that the trial magistrate misconstrued the principle of single witness testimony and placed its reliance on the case of Abdala bin Wendo & Another v Republic [1953], 20 EACA 166. I do agree with the appellant that a single witness can sufficiently identify the perpetrator and in this case the respondent, who was also her husband.

23. However, I take issue with the fact that none of the prosecution's witnesses witnessed the alleged assault happening and the defense witnesses all stated that no such incident occurred on the said date. PW1 stated that some neighbours were aware of the incident and upon cross-examination, she also stated that those neighbours told her that they coerced the respondent to take her to hospital. The said neighbors did not testify, neither did they record statements with police following the alleged incident. It would have been prudent to have the testimonies of the said neighbours in order for the prosecution to achieve the standard of proof. PW2 corroborated the testimony of PW1 but he too stated that he did not witness the incident but only treated PW1 for the injuries. In my view, it was necessary that the testimony of PW1 be corroborated by more witnesses because her testimony was not satisfactory as to whether the respondent indeed committed the offence.

24. The defense witnesses also stated that there was a disagreement between the respondent and the complainant over land subdivision. It is possible that the alleged land dispute may be the intention for assault on the part of the respondent, however, from the available evidence, it is doubtful as to whether the respondent indeed caused the injuries to the complainant. The standard of proof in criminal cases is beyond reasonable doubt. This means that onus was on the prosecution to demonstrate beyond reasonable doubt that indeed the respondent assaulted the complainant thereby causing her bodily injuries. Further, it is suspect that the respondent was charged with the offence 2 years after the alleged incident. As measured against the required standard of proof, I do not think that the prosecution proved the offence against the respondent beyond reasonable doubt.

25. Given the foregoing, on the issue of whether the acquittal should be overturned, the prosecution's evidence did not prove beyond reasonable doubt that the respondent committed the offence. Therefore, I find no reason to unsettle the findings of the trial magistrate on the acquittal.

26. In the end, I find that the appeal lacks merit and it is hereby dismissed.

27. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 14TH DAY OF FEBRUARY, 2024.

L. NJUGUNA

JUDGE

.....for the State

.....for the Respondent