Maina v Director of Public Prosecutions (Criminal Appeal E013 of 2023) [2024] KEHC 980 (KLR) (7 February 2024) (Judgment)

Neutral citation: [2024] KEHC 980 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E013 OF 2023

LM NJUGUNA, J

FEBRUARY 7, 2024

BETWEEN

DENNIS MURIMI MAINA ..... APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT

(Appeal arising from the decision of Hon. S.K. Ngii PM, in the Principal Magistrate's Court at Siakago Criminal Case No. 720 of 2021 delivered on 16th May 2023)

JUDGMENT

1. The appellant has filed a petition of appeal dated 13th June 2023 seeking orders that the appeal be allowed, conviction be quashed and sentence be set aside. The grounds of the appeal are as follows:
    a. That the trial magistrate erred in law and fact when he relied on uncorroborated evidence to convict the appellant;
    b. That the trial magistrate erred in law and fact when he held that the prosecution had proved its case beyond reasonable doubt;
    c. That the trial magistrate erred in law and fact when he relied on the evidence of PW2 to convict the appellant, who informed the court that it is the complainant who said that the appellant has assaulted him;
    d. That the trial magistrate erred in law and fact when he shifted the burden of proof to the appellant;
    e. That the trial magistrate erred in law and fact when he sentenced the appellant without considering that he was a first offender;

f. That the trial magistrate erred in law and fact when he sentenced the appellant without considering the report by the probation officer recommending him for a non-custodial sentence;

g. That the trial magistrate erred in law and fact when he failed to comply with section 169 of the *Criminal Procedure Code* in writing his judgment;

h. The decision of the trial magistrate was generally not supported by evidence on record; and

i. The sentence imposed by the trial magistrate was excessive in the circumstances.

2. The appellant was charged with the offence of assault causing grievous harm contrary to section 234 of the Penal Code. The particulars of the charge are that on 19th September 2021 at around 2330Hrs at Riandu Area in Mbeere North sub-county within Embu County, the appellant unlawfully did grievous harm to Simon Fundi Mugo. The appellant pleaded not guilty to the charge and a plea of not guilty was duly entered. The prosecution called 4 witnesses in support of its case.

3. PW1 was John Mwangi of Mbeere District Hospital who stated that he examined and treated the victim. He stated that the victim had a single penetrating wound over the left scapular bone and that the injuries were about 12 hours old. That the victim was sutured and observed for 6 hours at the facility. He categorized the degree of injury as "maim" as stated in the medical examination report which he produced as evidence.

4. PW2, Simon Fundi Mugo stated that on the day of the incident, he was on his way home when a motor cycle approached from behind and the appellant a pillion passenger on it. That the appellant alighted and began threatening him as they had been having some differences. That he took off and the appellant followed him then stabbed him on his back but he outran the appellant. That though it was dark, he had a torch and he could see his attacker. That he went to a neighbor's house where he spent the night and was given first aid before being taken to hospital the following morning. He stated that he reported the matter to the police after being treated at Siakago District Hospital. On cross-examination, he stated that he had been having personal differences with the appellant who had been taunting him for a while. That on the night of the incident, he was walking along the road alone and had a torch so he was able to see the appellant as his attacker.

5. PW3, Augustine Njagi Ngungi stated that on the day of the incident, he was informed by his daughter Karimi that PW2 had been attacked and stabbed. That he rushed to where PW2 was and found him in a certain homestead, with a deep cut wound and bleeding profusely. That he took him to hospital and PW2 told him that it was the appellant who had attacked him.

6. PW4, Cpl Joram Gachoki of Siakago Police Station stated that the matter was reported at the station on 22nd September 2021 and the victim was referred to hospital for treatment. That a P3 form was issued and same was filled by the medical doctor, stating the extent of harm that had been inflicted on the victim.

7. Upon close of the prosecution's case, the court found that the appellant had a case to answer and he was placed on his defense. The appellant chose not to adduce any evidence and the trial magistrate scheduled the case for judgment. The appellant was convicted of the offence and was sentenced to 5 years imprisonment.

8. In this appeal, the court directed the parties to file their written submissions but only the respondent complied.

9. In its submissions, the respondent relied on the definition of grievous harm as provided under section 4 of the *Penal Code* and the case of *Pius Mutua Mbuvi v Republic* (2021) eKLR. It stated that according to PW1, the kind of harm occasioned on PW2 was grievous and punishable under section 234 of the *Penal Code* and that the offence was proved beyond reasonable doubt. It was also the respondent's argument that the trial magistrate wrote his judgment in compliance with section 169 of the *Criminal Procedure Code*, giving reasons as to why he reached his decision therein. For this, reliance was placed on the case of *Stephen Mungai Maina v Republic* (2020) eKLR. As to whether the appellant's mitigation was considered before sentencing, it was its argument that the same was considered and the sentence resonates with the offence and the effects of the injuries on the victim's wellbeing. Further reliance was placed on the case of *Shacrack Kikoech Kogo v Republic*, Kisii HCCRA No 253 of 2003 and it stated that the trial magistrate acted on the correct legal principles in sentencing.

10. The issues for determination herein are as follows:

    a. Whether the offence was proved beyond reasonable doubt;

    b. Whether or not the sentence meted on the appellant is excessive; and

    c. Whether the trial court's judgment contravened section 169 of the *Criminal Procedure Code*.

11. The role of the first appellate court is 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:

    1. 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.

    2. 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."

12. On the issue of whether the offence was proved beyond reasonable doubt, the appellant was charged under section 234 of the *Penal Code* which provides:

    Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.

13. According to section 4 of the *Penal Code*, "grievous harm" means

    > " any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense." (emphasis mine)

14. PW2, the complainant, narrated the circumstances under which he sustained the injuries. It was his testimony that he was on the way home when he was attacked by the appellant who stabbed him on the back. That he got away but was bleeding profusely according to PW3. PW2 also stated that he and the appellant had been having personal differences and, on that night, although it was dark, he saw the appellant as his attacker. That he managed to outrun the appellant and the pursuit ended. PW1 stated that he examined and treated PW2 and he observed that the injuries inflicted on him amounted to "maim". The term "maim" is defined on the medical examination report as "destruction or permanent

disabling of an external or internal organ, member or sense". Injuries that are classified as maim give the meaning of grievous harm according to section 4 of the *Penal Code*. PW1 concluded that the single penetrating wound was caused by a sharp object.

15. According to Sections 4 and 234 of the *Penal Code*, for the offence of grievous harm to be proved, the court must satisfy itself that:

    a. There was an unlawful act;

    b. Grievous harm resulted from the unlawful act; and

    c. The appellants (accused persons) participated in causing the grievous harm to the victim.

16. From the evidence tendered by the prosecution, it is clear that indeed the appellant was identified by the victim and his unlawful acts led to grievous harm on the victim. The burden of proof lay on the prosecution and it established its case against the appellant. When the appellant was placed on his defense, he did not rebut the prosecution's evidence, to his detriment. The trial magistrate noted that the appellant was within his constitutional rights under Article 50 of the *Constitution*, to remain silent and not offer his defense. I share these sentiments and add that the case established against the appellant was beyond reasonable doubt and he was rightly convicted.

17. On the second issue as to whether the sentence meted out to the appellant was harsh and excessive, the offence carries a penalty of life imprisonment. The trial magistrate exercised his discretion in the matter and sentenced the appellant to 5 years imprisonment. In my view, this sentence is not harsh or excessive and I shall not interfere with the same.

18. On the third issue of whether the trial court's judgment contravened section 169 of the Criminal procedure Code, this provision provides for the contents of a judgment and states thus:

> " 169. Contents of judgment
>
> (1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.
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> (2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.
>
> (3) In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty."

19. I have read the judgment of the trial court and found that the same was written in compliance with this provision. All the points of law for determination were brought up and discussed and the trial magistrate referred to the facts and evidence adduced in his determination of the issues. The trial magistrate also gave reasons for his perspective and used relevant law and precedents as reference. The last paragraph of his judgment clearly stated the offence for which the appellant was convicted. He

proceeded to sentence the appellant and noted the presentencing report and mitigation. Therefore, the trial court's judgment complied with section 169 of the Criminal Procedure Code.

20. In conclusion, having considered the evidence at trial and the relevant law, I find that the appeal lacks merit and it is hereby dismissed.

It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 07TH DAY OF FEBRUARY, 2024.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the State