Mayieka v Republic (Criminal Appeal E032 of 2023) [2024] KEHC 666 (KLR) (2 February 2024) (Judgment)

Neutral citation: [2024] KEHC 666 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CRIMINAL APPEAL E032 OF 2023

KW KIARIE, J

FEBRUARY 2, 2024

BETWEEN

RAEL NYAKERARIO MAYIEKA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(From the original conviction and sentence in Criminal Case No. E1343 of 2022 of the Chief Magistrate's Court at Kisii by Hon. C.A. Ogweno– Senior Resident Magistrate)

JUDGMENT

1. Rael Nyakerario Mayieka, the appellant, was convicted of grievous harm contrary to section 234 of the *Penal Code*.
2. The particulars of the offence are that between the 13th and the 14th day of December 2022 at the Ikuruma location in Marani Sub County of Kisii County, jointly with others, unlawfully did grievous harm to B.J.S. by gouging out his eyes.
3. The appellant was sentenced to serve five years imprisonment. She has appealed against both the conviction and the sentence.
4. The appellant was represented by Nyagaka, Mosota Isaboke, Kerosi Ondieki & Associate Advocates. She raised the following grounds of appeal:
    a. The learned trial magistrate erred both in law and, in fact, in not considering the alibi defence raised by the 3rd Accused person.
    b. The learned trial magistrate erred in law by relying on evidence that was not credible in the circumstances, thereby arriving at a wrong conclusion.

c. The learned trial magistrate erred both in law and fact when she relied on evidence that was not sufficiently trustworthy to have supported the conviction entered.

d. The learned trial magistrate erred both in law and fact when she acted heavily on suspicion to convict the 3rd accused person.

5. The state opposed the appeal through Mr. H. B., Kaino, learned counsel. He raised grounds of opposition as follows:

    a. That the alibi defence was not raised at the trial.

    b. That the prosecution witness who connected the appellant to the case was reliable.

    c. That the circumstantial evidence was adequate.

6. This is a first appellate court. As expected, I have analyzed and evaluated all the evidence adduced before the lower court afresh. I have concluded, considering I neither saw nor heard any witnesses. I will be guided by the celebrated case of *Okeno v Republic* [1972] EA 32.

7. The family of B.J.S., a minor whose eyes were gouged out by the members of the family who were convicted, is painted as dysfunctional. This came from the evidence of M.N.M. (PW1), the mother of the unfortunate minor. Her evidence was that the rest of the family, except her husband and the appellant, did not want her, ostensibly for creating competition for the land. She testified that her husband was unable, due to some disability, to fend for her and their children, and this compelled her to seek employment elsewhere.

8. Alloys Ochogo (PW2), the area chief, gave evidence about the family that would make the term dysfunctional an understatement. I will avoid repeating the description, for in my view, it will not affect the outcome of this appeal.

9. When M.N.M. (PW1) visited the complainant in the hospital, her evidence was that he asked her to ask Sifica to return his eyes. He did not implicate the appellant.

10. Before the complainant's mother arrived, the complainant was in the hospital for one week with Mary Kemunto Makori (PW7). Her evidence was that the complainant was talking but did not tell her what happened.

11. The prosecution tendered two theories of how the incident occurred. According to the evidence of K.CS. (PW6), a minor and the complainant's sister, the appellant chased B.J.S. but did not catch up with him. He did not return that night. She, however, did not testify why the appellant chased him.

12. The appellant, in her defence, testified that when K.CS. (PW6) reported to her that B.J.S. had defecated in a cooking pot (sufuria). She disciplined him by caning him on the legs. This is when the boy ran away.

13. During cross-examination, K.CS. (PW6) changed her evidence and said that B.J.S. ran away when they went to fetch water. The Court of Appeal in the case of *Ndungu Kimanyi v Republic* [1979] KLR 283 (Madan, Miller, and Potter JJA) held:

> The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

14. The evidence of this minor, though it does not incriminate the appellant, is unworthy of belief. This, therefore, means the theory her evidence put forth cannot hold.

15. The second theory was based on the evidence of Naomi Teresa Nyaboke (PW11). This witness testified that the appellant assisted in placing B.J.S. in a sack after his eyes were gouged out. This is not evidence of common intention, as stated in section 21 of the *Penal Code*. The Court of Appeal in the case of *John Ouma Awino & another v Republic* [2014] eKLR noted the following:

> Common intention under Section 21 connotes a situation where there are two or more parties that intend to pursue or to further an unlawful object or a lawful object by unlawful means and so act or express themselves as to reveal such intention. It implies a pre-arranged plan. Although common intention can develop in the course of the commission of an offence, it normally precedes the commission of the crime showing a pre-meditated plan to act in concert. It comes into being, in point of time, prior to the commission of the act.

16. If the evidence of PW11 passes the test, the appellant was an accessory after the fact and not a principal offender under section 21 of the *Penal Code*. Section 396 (1) of the *Penal Code* defines accessory after the fact as follows:

A person who receives or assists another who is, to his knowledge, guilty of an offence, in order to enable him to escape punishment, is said to become an accessory after the fact to the offence.

17. Naomi Teresa Nyaboke (PW11) is the witness whose evidence directly linked the appellant to the offence. Her evidence was that the appellant was involved in assisting her accomplices to put the complaint in a sack after his eyes were gouged out. Before she testified, the prosecution counsel informed the court *inter alia*:

> We ask for her privacy to be protected. The witness is a stammerer. Her level of intelligence is below average. She used [*sic*] a lot of sign language. She is, however, able to communicate despite her challenges. She can testify.

18. When this witness gave her evidence, this is a salient part of her evidence touching on the appellant:

> On 13/12/2022, I remember what happened. I went to buy breakfast before going to the shamba. I then went to the shamba at 10 a.m. Junior went to the spring (mtoni). On his way back, I was at the shamba. I heard Junior cry. I ran towards where he was (Behind Accused 2's house). I had a jembe. I sat on this bench (near Accused 1's house). Uncle came near Accused 2's house. He entered Pacifica's house.
>
> Uncle and Maina went to take alcohol at 2. We had not had lunch. There was flour in the house. Alex came to the house. I asked him where he was taking the knife. He had a knife. He threatened to stab me.
>
> Uncle left. Maina took the knife from his kitchen. He went to the shamba inside the Napier grass. He was wearing a jacket and jeans and a blue T-shirt. He was wearing those shoes (points at Accused 1's sandals).
>
> Alex gouged out Junior's eyes. He then went to her mother's house. He told the mother what he had done. He told us not to say anything.
>
> Pacifica was worried. Nyakerario was in her house. Alex gouged out the eyes one after another.

> I left the bench and went near Accused 2's house. Alex was done. I ran away as Alex chased after me with a knife. I went to Kegogi. I was very hungry. I came back at 5 p.m. I sat on the bench. I was afraid to go into Alex's house. I later on went and prepared some food.
>
> Pacifica later in the evening left with Moraa for a journey. Alex escorted Pacifica to the bus station. She carried a chicken and a lot of clothes. Alex told me to pack my things and leave.
>
> That evening after the incident, Pacifica, Maina and Nyakerario put Junior into a sack and took him to Pacifica's house. They were here. (Witness walks the court to the hind of Pacifica's house)
>
> They put him in a sack here. Alex got the sack from the house. They passed through here (points between Accused 2's house and the fence). Pacifica, Maina and Nyakerario were together.
>
> (Witness walks court to Pacifica's house into A2's bedroom) They placed Junior under the bed. They closed the bedroom window. Pacifica had earlier on gone for a burial. Alex came back after seeing off the mother later in the evening. He was drunk. He said Pacifica had embarked on a journey. He returned late at night. I asked him where the sack was. He said he took it far away, near a maize plantation.

19. The prosecution, having known in advance the challenges this witness had, had a duty to seek an expert's opinion on how much weight the court should place on her evidence. I also expected the prosecution to enlist the services of a sign language interpreter, which they did not. The trial court and this court were left on their own to determine the same. This is not an easy task. I came across some write-up on the evidence of people with mental retardation, which states:

> Evidence concerning eyewitness testimony given by people with mental retardation in court was reviewed. Despite general perceptions that people with mental retardation make incompetent witnesses, available evidence suggests that they can provide accurate accounts of witnessed events. The accounts are usually less complete than those provided by the general population and are greatly influenced by the methods of questioning. The sparse available evidence suggests that cross-examination methods may lead to memory distortion. The use of closed, complex, and leading questions and the absence of aids to recall may have a particularly adverse effect on people with mental retardation. Resulting errors could lead to a false conviction or acquittal. Future policy and research in this much neglected area were discussed. (Kebbell MR, Hatton C. People with mental retardation as witnesses in court: a review Mental Retard. [1999 Jun])

This quote echoes the spirit of section 125 (2) of the *Evidence Act*, which states:

A mentally disordered person or a lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them.

PW11 is, therefore, a competent witness. When analyzing this witness' evidence, I will look for corroborating evidence since the prosecution failed to subject the witness to expert evaluation that the court could use as a guide.

20. In her evidence, Naomi Teresa Nyaboke (PW11) said that Pacifica, Maina and Nyakerario put B.J.S. in a sack and took him to Pacifica's house in the evening after the incident. They did this behind Pacifica's house. However, this contradicted the evidence of K.CS. (PW6), who testified that after the appellant had chased B.J.S. and after failing to apprehend him, she returned to the house. They ate and slept. This gave the impression that the appellant did not leave the house as testified to by PW11.

21. The evidence of PW11 also gave an impression of being omnipresent. Right from behind Pacifica's house to inside her bedroom under the bed. It raises doubts about how she came to know these facts without her testifying that she followed the appellant and the other accused persons.

22. Inspector Evans Wesonga (PW12) was the investigating officer in this matter. He did not testify whether he investigated for evidence behind Pacifica's house and under her bed to find out if what PW11 testified was true. Equally, he did not inform the court whether the sack referred to by PW11 was recovered. Had there been a recovery of the sack and some positive evidence in the spots this witness mentioned, this would have been corroborative of her evidence. No evidence to support the charge against the appellant was adduced, and none was adduced to prove the offence of an accessory after the fact. Without material evidence to corroborate her evidence, it was unsafe to rely on her evidence to convict the appellant.

23. The appellant's conviction is, therefore, quashed, and the sentence is set aside. She is set at liberty unless, if otherwise, lawfully held.

DELIVERED AND SIGNED AT KISII THIS 2ND DAY OF FEBRUARY 2024

KIARIE WAWERU KIARIE

JUDGE