Auma v Republic (Criminal Appeal E046 of 2023)
[2024] KEHC 2493 (KLR) (11 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2493 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL E046 OF 2023

KW KIARIE, J

MARCH 11, 2024

BETWEEN

DANIEL OUMA AUMA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the original conviction and sentence in Criminal Case No. E183 of 2023 of the Chief Magistrate's Court at Homa Bay` by Hon. J.S Wesonga–Principal Magistrate)

JUDGMENT

1. Daniel Ouma Auma, the appellant herein, was convicted of the offence of cutting down cultivated farm produce contrary to section 334 (a) of the *Penal Code* and the offence of malicious damage to property contrary to section 339 (1) of the Penal Code.

2. The particulars of the offence were that on the 28th day of April 2023, at Nyalkinyi village, Homa Bay sub-County, within Homa Bay County, jointly with others not before the court, wilfully and unlawfully cut down maize and pawpaw plants valued at Kshs.92,000.00 the property of Andrew Otieno Onyango. On the same day and time, they wilfully and unlawfully damaged the door, roof, and windows valued at Kshs 100,000.00, the property of Andrew Otieno Onyango.

3. The appellant was sentenced to pay a fine of Kshs. 100,000.00 on each count and default to serve one year of imprisonment. He was in person and raised the following grounds of appeal:

    a. That the sentence of 1-year imprisonment imposed by the trial magistrate is harsh and excessive as it violated the right to benefit from the least severe punishment under article 50(2) (p) of the *Constitution*.

    b. That the trial magistrate erred in law and fact by convicting and sentencing the appellant after he was charged with two charge sheets.

c. The trial magistrate erred in law and facts by failing to deliver the judgment on three dates scheduled for judgment.

d. That the trial magistrate erred in law by not considering the appellant's defence.

e. That the trial magistrate erred in law and facts by relying on the prosecution's evidence that was marred with contradictions and inconsistencies.

f. The trial magistrate erred in law and facts by not considering the grudge between the appellant and PW1.

4. The state opposed the appeal because:

a. The offences were proven to meet the required standards.

b. The sentences were proportional to the offences.

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

6. Erroneously, the appellant contended that he was charged with two charge sheets. On the 31st day of May 2024, the prosecution successfully applied to substitute the charges. The substituted charges were read to the appellant as the law requires, and he was called upon to plead. Once the charges are substituted, the earlier changes cease to exist for the trial. This cannot be a ground of appeal.

7. The adjournment of the date for the delivery of the judgment unless it results in a miscarriage of justice cannot be a ground for appeal. The appellant concluded his case on the 8th day of August 2023, and the judgment was delivered on the 1st day of September 2023. This was less than one month after the conclusion of the hearing. In my view, this is an attempt by the appellant to hold on to a straw.

8. In the cover of the darkness, many evil things happen. The incident in this case was not exceptional. While the complainant and his family were asleep, they were attacked. There was damage to their house, and their crops were cut down. According to the complainant, the appellant was one of the attackers.

9. The appellant denied any involvement and pleaded an alibi. When an accused raises an alibi defence, they do not assume any burden to prove that it is the truth. This was stated in the case of *Kiarie v Republic* [1984] KLR, where the Court of Appeal held:

> An alibi raises a specific defence, and an accused person who puts forward an alibi as an answer to a charge does not, in law, thereby assume any burden of proving that answer, and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The Judge had erred in accepting the trial Magistrate's finding on the alibi because the finding was not supported by any reasons.

While evaluating the evidence on record, I will determine whether this defence was displaced.

10. Andrew Otieno Onyango (PW1) testified that he was roused from sleep by a loud bang on the window. A stone dropped on the bed. He went out of bed and realized that the house where his children were sleeping was also under attack. He managed to go out with his wives and children. He recognized the appellant, Nick Juma, Andrew Nyawala and Tim Joseph. He was assisted in seeing these people by the security lights around his house. The appellant had a slasher and stones. They started to slash his maize (complainant's). Due to fear, he ran with his family to seek assistance. His evidence was that the appellant was his immediate neighbour.

11. Judith Atieno (PW2) testified like her husband PW1. When she went out, she saw Nyawala, Nick and Moi. Like her husband, she said there were security lights. While she was running away, she heard her co-wife asking why was "Banya" hitting her with a stone. She said Banya was the appellant's nickname.

12. Though the evidence of these two witnesses may appear contradictory, I find that it was not. In the circumstances this family found themselves in, they were not expected to all see the same.

13. The appellant contended that the learned trial magistrate failed to consider the issue of an existing grudge. This issue was not raised during the trial, but it is surfacing in the appeal. The trial court had nothing to consider on this issue. This ground is baseless.

14. The appellant contended that on the night of the incident, he was away at his place of work. He called his wife, Mary Goretti Akinyi (DW2), as a witness. She supported his version. I find that the evidence on record displaced this alibi defence. Secondly, these two families are immediate neighbours, so DW2 should have heard the commotion in the complainant's home. She did not testify anything to that effect.

15. After the appellant was convicted and he was given a chance to mitigate, he told the court the following:

> I am really sorry for what happened; I am asking for forgiveness.

If there was any lingering doubt, which was not the case, then his mitigation amounted to an admission that he committed the offences.

16. Section 334 (a) of the *Penal Code* provides:

> Any person who wilfully and unlawfully sets fire to, cuts down, destroys or seriously or permanently injures—
>
> a. a crop of cultivated produce, whether standing, picked or cut; or
>
> ...
>
> is guilty of a felony and is liable to imprisonment for fourteen years.

Section 339 (1) of the *Penal Code*, on the other hand, provides:

> Any person who wilfully and unlawfully destroys or damages any property is guilty of an offence, which, unless otherwise stated, is a misdemeanour, and is liable, if no other punishment is provided, to imprisonment for five years.

17. An appellate court would interfere with the trial court's sentence only where there exists, to a sufficient extent, circumstances entitling it to vary the trial court's order. These circumstances were well illustrated in the case of *Nillson v Republic* [1970] E.A. 599, as follows:

> The principles upon which an appellate court will exercise its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in *James v Rex* (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. *R v Shershewsity* (1912) C.CA 28 T.LR 364.

18. The appellant was given the option of paying a fine. The fine imposed was commensurate to the offences, and I have not been persuaded that the learned trial magistrate acted upon some wrong principle or overlooked some material factor. The appeal is therefore dismissed.

DELIVERED AND SIGNED AT HOMA BAY THIS 11TH DAY OF MARCH 2024

KIARIE WAWERU KIARIE

JUDGE