JOM v Republic (Criminal Appeal E016 of 2022)
[2024] KEHC 3860 (KLR) (18 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3860 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL APPEAL E016 OF 2022

WA OKWANY, J

APRIL 18, 2024

BETWEEN

JOM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment and Sentence in Sexual Offence No. 10 of 2020 at the Keroka Principal Magistrate's Court by Hon. S.K. Arome, Senior Resident Magistrate dated 2nd February 2022)

JUDGMENT

1. The Appellant herein, JOM, was charged with the offence of attempted defilement contrary to Section 9 (1) (a) of the *Sexual Offences Act*. The particulars of the charge were that 11th February 2020 in Masaba-North sub-county within Nyamira County intentionally and unlawfully attempted to cause his penis to penetrate the vagina of ZNM (particulars withheld), a child aged 16 years.

2. The Appellant also faced the alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*. The particulars were that on the 11th February 2020 in Masaba- North sub-county within Nyamira county intentionally touched the buttocks of ZNM, a child aged 16 years.

3. The Appellant faced a second count of grievous harm contrary to Section 234 of the Penal Code. The particulars of the charge were that on 11th February 2020, in Masaba -North sub-county within Nyamira County, intentionally did grievous harm to ZNM.

4. The Appellant pleaded not guilty to all the charges and a trial was thereafter conducted in which the prosecution presented the evidence of 5 witnesses as follows: -

5. PW1, ZNM (particulars withheld), the complainant narrated how, three days prior to 11th February 2020, the Appellant had approached her and asked her to be his girlfriend a proposal that she rejected. She stated that on the evening of 11th February 2020 the Appellant followed her into the house where she lived and pushed her towards a seat that was in the kitchen. She resisted the Appellant's overtures and it is at this point that the Appellant removed a panga and cut her on the chin, mouth, shoulder, collar bone and right hand. The Appellant then dragged her out of the house where he attempted to throw her into the well. PW1 was however saved by the fact that the well was locked. Neighbours who were attracted to the scene by the commotion came to her rescue. The Appellant fled from the scene.

6. Neighbours rescued the complainant and ferried her to hospital. A report was made to the police who issued PW1 with a P3 Form. PW1 identified the Appellant as her attacker and stated that she knew him very well as she had met him before the incident.

7. PW2, AMO, testified that she lived with PW1 who was her friend's daughter. She stated that she knew the Appellant well as he would come to her home every day to stay with her grandson. She testified that she returned home on 11th February 2020 and found a pool of blood the kitchen floor, the bathroom and well. A large crowd had gathered at her home. They informed her that the complainant had been taken to the hospital following an attack. She later reported the incident to the police.

8. PW3, EOO, did not witness the attack but testified that both the Appellant and complainant were his cousins. He stated that he was informed that the complainant had been assaulted.

9. PW4, No. 75xxx PC Queenton Luquiso Sadiq Ouma, was the police officer who received the assault report. He took photographs of the complainant and noted that she had cut wounds on the mouth and had lost several teeth. He recorded the Complainant's statement and issued her with a P3 Form.

10. PW5, Lameck Nyaribo, was the Clinical Officer who examined ZNM on 17th February 2020 and filled a P3 Form which he produced as (P. Exh4). He also produced the Discharge Summary (P. Exh3).

11. At the close of the Prosecution's case, the trial court placed the Appellant on his defence upon finding that he had a case to answer.

12. The Appellant (DW1) denied the claim that he committed the offence. He stated that he was at home with his parents and on 6th February 2020 when he was informed that a girl had been attacked and cut with a panga. He stated that the police and area Chief arrested him over the attack.

13. At the close of the case, the trial court acquitted the Appellant of the first count and its alternative but convicted him on the second count of grievous harm contrary to Section 234 of the Penal Code. He was consequently sentenced to serve 4 years' imprisonment.

14. Dissatisfied with the decision of the trial court, the Appellant instituted the present Appeal and raised the following grounds of appeal: -

    1. The learned Trial Magistrate erred in law and in fact by convicting the Appellant on count 2 and sentencing the Appellant to 4 years' imprisonment when the learned trial magistrate exonerated/acquitted the Appellant on the same count.

    2. The learned Trial Magistrate erred in law and in fact in analysing the Respondent's evidence separately, forming a considered opinion/impression thereof and then laying the burden of proving and/or dispelling the pre-meditated impression upon the Appellant contrary to the established principle in criminal law, which casts the burden of proof upon the Respondent.

3. The learned Trial Magistrate erred in law and in fact by finding and/or holding that the complainant's case, evidence and/or testimony was well corroborated with other witnesses when it is apparent that the said complainant had been coached on what to say.

4. The learned Trial Magistrate erred in law and in fact in making a finding that the Prosecution established guilt against the Appellant to the required standard of beyond any reasonable doubt when the Complainant's and/or witnesses' evidence was riddled with massive contradictions and inconsistencies that could sustain a conviction.

5. The learned Trial Magistrate erred in law and in fact by making a finding that the Appellant's defence did not discredit the Prosecution's case while the opposite is true and without assigning any credible or plausible reason for such finding, consequently, the Learned Trial Magistrate failed to approach the judgment of the Appellant with an impartial judicial mind and hence the failure to take cognizance of the material discrepancies apparent in the evidence tendered by the complainant and her witnesses.

15. The Appeal was canvassed by way of written submissions which I have considered alongside the Record of appeal.

Analysis and Determination

16. The duty of a first appellate court is to subject the entire evidence presented before the trial court to a fresh examination in order to arrive at its own determination while bearing in mind the fact that it neither heard nor saw the witnesses testify. In Pandya vs. Republic (1957) EA 336, it was held 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."

Issues for Determination

17. The main issues for determination are as follows: -

    i. Whether the Prosecution proved the charge of grievous harm to the required standard.

    ii. Whether the sentence was legal and appropriate.

i. Whether the Prosecution proved the charge to the required standard.

18. As I have already stated in this judgment, the Appellant was convicted for the offence of causing grievous harm. I will therefore limit my analysis to the issue of whether the said charge was proved to the required standards.

19. The Penal Code provides as follows under Section 234: -

    234. Grievous harm

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

20. Section 4 of the Penal Code defines grievous harm as: -

> " 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;

21. I have considered the evidence of PW1 who explained that the Appellant attacked her with a panga and cut her on the chin, mouth, shoulder, collarbone and right hand. I have also considered the evidence of PW5 the Clinical Officer who stated that he examined PW1 and found that she had degloving ribs injury and fracture on the lower anterior teeth, 4 missing incisor teeth, tender chest and neck with a stitched cut wound on the posterior forum shoulder. He estimated the age of the injuries to be six (6) days.

22. I have further examined the P3 Form (P. Exh 3) together with the photographs that were produced as P. Exh 4 (1-4). I note that the injuries recorded in the P3 Form were; stitched degloving lip injuries, loss of four incisors on lower jaw, tender anterior chest, stitched cut wound on the right posterior forearm and stitched wound on the left shoulder.

23. PW2 and PW3 testified that they found pools of blood in the house from the kitchen leading to sitting room, the main door up to the well outside.

24. My finding is that it was not in doubt that PW1 was attacked while at home and that her assailant caused her grievous injuries as recorded in the P3 Form. As to whether it was the Appellant who assaulted her, this Court has considered the fact that the Appellant was well known to the complainant as he had, three days prior to the incident, approached her and asked her to be his girlfriend.. PW2 and PW3 also stated that they knew the Appellant as he would often come to their home and that he was the cousin of PW3.

25. I have further considered the fact that PW1 testified that she talked to the complainant on the fateful day and that the attack occurred in broad daylight at 6.00 pm. I am of the view that the interaction and frenetic struggle between the victim and her assailant was so protracted that there can be no possibility that the Appellant was a victim of mistaken identity. This is to say that the evidence of identification of the Appellant as the perpetrator of the assault was fool proof.

26. I find that the evidence presented by the Appellant at the trial consisted of mere denial that did not oust the overwhelming evidence tendered by the prosecution witnesses. I therefore find that the Prosecution proved its case against the Appellant, on the second count of grievous harm, to the required standard. I uphold the trial court's conviction on the charge of causing grievous harm.

ii. Whether the sentence was legal and appropriate.

27. The trial court sentenced the Appellant to serve 4 years' imprisonment. The Act stipulates punishment of up to life imprisonment for the offence of grievous harm . It is the duty of this Court to determine whether the sentence passed by the trial court was legal and appropriate.

28. In Bernard Kimani Gacheru vs. Republic [2002] eKLR, the Court of Appeal outlined the circumstances under which an appellate court may interfere with the sentence passed by a trial court as follows: -

> " It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy

and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

29. I have considered the nature of the injuries that the complainant sustained in the attack and the manner in which the Appellant planned and executed the attack by approaching the complainant when he was already armed with a lethal weapon. The Appellant's actions were not only heinous but were also completely unprovoked. The Appellant left the victim with permanent injuries, including loss of teeth, that disfigured her face. I am of the view that the trial court should have meted out a harsher punishment on the Appellant in light of the fact that this case can qualify to be classified under the offence of attempted murder. The Appellant not only followed the complainant home where she was alone, but had armed himself with a panga so that he could 'teach the complainant a lesson' if things did not go his way. In my humble view, such conduct warrants a deterrent sentence.

30. Be that as it may, I find that it will be against the interests of justice to enhance the sentence passed by the trial court as the Appellant was not informed of such a possibility at the onset of the Appeal so as to enable elect on whether or not he still desires to proceed with the appeal. For the above reasons and despite my reservations on the sentence passed by the trial court, I find that the same was not only legal, but extremely lenient considering the circumstances of the case. I find no reason or justification for interfering with the sentence.

31. Consequently, I find that the instant appeal is not merited and I therefore dismiss it.

32. It is so ordered.

JUDGEMENT DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 18TH DAY OF APRIL 2024.

W. A. OKWANY

JUDGE