Motiri v ODPP (Criminal Appeal E049 of 2021)
[2024] KEHC 4615 (KLR) (6 May 2024) (Judgment)

Neutral citation: [2024] KEHC 4615 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL E049 OF 2021

SM MOHOCHI, J

MAY 6, 2024

BETWEEN

DOUGLAS MORONGE MOTIRI .... APPELLANT

AND

ODPP .... RESPONDENT

(Appeal from the Judgment of the Lower Court of Kenya at Nakuru, Hon. Lilian Arika Chief Magistrate - dated 20{{^th}} December 2022 in MCCR No.17 of 2020)

JUDGMENT

1. The Appellant was on 2nd January 2020, 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 the 26h Day of September 2019, at Kasarani Estate in Nakuru Town East Sub-County Within Nakuru County, unlawfully did grievous harm to Hassan Khalonyere Opiyo by punching him on the mouth with your clenched fist whereby the said Hassan Khalonyere Opiyo lost one upper incisor tooth."

2. After a full hearing the Appellant was convicted and fined Kenya shillings Two Hundred Thousand (Kshs 200,000/-) on default to serve imprisonment for one year.

3. Douglas Moronge Motiri, the Appellant being dissatisfied appeal to this Court against the entire sentence and conviction whereby he was fined ksh.200,000 in default to serve one-year imprisonment on the following grounds. -

    i. That the learned trial Magistrate erred in law and fact, in convicting the Appellant to pay a fine of ksh 200,000 in default to serve one-year

imprisonment yet the prosecution did not prove its case beyond reasonable doubt.

ii. That the learned trial Magistrate erred in law and fact in convicting the to pay a fine of ksh.200,000 in default to serve one-year imprisonment and failed to consider the strong evidence of the defence.

iii. That the learned trial Magistrate erred in law and fact in convicting the one-year Appellant to pay a fine of ksh.200,000 in default to serve imprisonment by relying on circumstantial evidence and unclarified evidence by the prosecution.

iv. That the learned trial Magistrate erred in law and fact in convicting the Appellant to pay a fine of ksh. 200,000 in default to serve one-year imprisonment yet the prosecution failed to prove whether the appellant committed the offence of assault.

v. ThatT the learned trial Magistrate erred in law and fact, by overlooking the fact that the evidence relied on was not watertight to justify a conviction.

vi. That the learned trial Magistrate erred in law and fact, by shifting the burden of proof to the Appellant.

vii. That the learned trial Magistrate erred in law and fact in convicting the Appellant to pay a fine of ksh.200,000 in default to serve one-year imprisonment yet the medical evidence produced did not conclusively prove the offence of assault.

viii. That the learned trial Magistrate erred in law and fact in sentencing the Appellant to pay a fine of ksh.200,000 in default to serve one-year imprisonment by failing to consider the strong defence and submission by the Appellant.

ix. Thatthe learned trial Magistrate erred in law and fact, by relying in the insufficient evidence of the prosecution.

Supplementary Petition of Appeal grounds: -

i. That the learned trial Magistrate erred in law and fact, in convicting the Appellant to pay a fine of ksh.200,000 in default to serve one-year imprisonment yet the prosecution did not prove its case beyond reasonable doubt.

ii. That the learned trial Magistrate erred in law and fact, in convicting the to pay a fine of ksh.200,000 in default to serve one-year imprisonment and failed to Consider the strong evidence of the defence.

iii. That the learned trial Magistrate erred in law and fact, in convicting the Appellant to pay a fine of sh. 200,000 in default to serve one-year imprisonment by relying on circumstantial evidence and unclarified evidence by the prosecution.

iv. That the learned trial Magistrate erred in law and fact, in convicting the Appellant to pay a fine of ksh.200,000 in default to serve one-year

imprisonment, yet the prosecution failed to prove whether the appellant committed the offence of grievous harm.

v. That the learned trial Magistrate erred in law and fact, by overlooking the fact that the evidence relied on was not watertight to justify a conviction.

vi. That the learned trial Magistrate erred in law and fact, by shifting the burden of proof to the Appellant.

vii. That the learned trial Magistrate erred in law and fact, in convicting the Appellant to pay a fine of ksh.200,000 in default to serve one-year imprisonment yet the medical evidence produced did not conclusively prove the offence of grievous harm.

viii. That the leaned trial Magistrate erred in law and fact in sentencing the Appellant to pay a fine of ksh.200,000 in default to serve one-year imprisonment, by failing to consider the strong defence and submission by the Appellant.

ix. That the learned trial Magistrate erred in law and fact by relying in the insufficient evidence of the prosecution.

x. That the learned trial Magistrate erred in law and fact by convicting the appellant despite the prosecution's failure to prove the ingredients of the offence of grievous harm.

xi. That the learned trial magistrate erred in law and fact in convicting the appellant despite the prosecution's failure to call crucial witnesses.

xii. Thatthe learned trial magistrate erred in law and fact in convicting the appellant while relying on contradictory evidence.

xiii. That the learned trial magistrate erred in law and in fact, in convicting the appellant despite not having been properly identified.

xiv. That the learned trial magistrate erred in law and fact in convicting the appellant despite the prosecution's failure to prove its case beyond reasonable doubt.

4. The Court on 9th July 2023, directed that the Appeal would be heard and disposed by way of written submissions.

Appellant's Submissions

5. The Appellant refined the following issues in submission;

i. Whether the learned trial magistrate erred in law and fact in convicting the Appellant despite the prosecution's failure to prove the ingredients of the offence of grievous harm?

ii. Whether the learned trial magistrate erred in law and fact in convicting the Appellant despite the prosecution's failure to call crucial witnesses?

iii. Whether the learned trial magistrate erred in law and fact in convicting the Appellant while relying on contradictory evidence?

iv. Whether the learned trial magistrate erred in law and fact in convicting the appellant despite not having been properly identified?

v. Whether the learned trial magistrate erred in law and fact in convicting the appellant despite the prosecution's failure to prove its case beyond reasonable doubt?

6. As to whether the learned trial magistrate erred in law and fact in convicting the Appellant despite the prosecution's failure to prove the ingredients of the offence of grievous harm.

7. The ingredients of the offence of grievous harm were elaborated by the Honourable Court in Criminal Appeal No. 88 of 2019 Pius Mutua Mbuvi Vs Republic where the Court held:

> " I note that the appellant was charged under section 234 of the Penal code and that the same is the punishment section; the charge sheet ought to have indicated section 231 as read with section 234 of the Penal Code. For the appellant to be convicted of the offence of doing grievous harm c/s 231 as read with section 234 of The Penal Code, the prosecution had to prove each of the following essential ingredients beyond reasonable doubt;
>
> The victim sustained grievous harm.
>
> The harm was caused unlawfully.
>
> The accused caused or participated in causing the grievous harm."

8. As to whether the victim sustained grievous harm according to the medical evidence produced? That, the P3 form was filled 23 days after the occurrence of the incidence. No medical treatment notes were produced before Court to confirm the injuries suffered by the complainant and the time of the said injury.

9. That, PW8 confirmed in cross-examination that, the injury was classified as grievous harm due to tooth avulsion but tooth came off somewhere else. PW 8 testifying as a medical doctor stated that it was not indicated that the patient was treated for the loose tooth. He also confirmed that there was no record that the patient had seen a dentist. PW5 himself confirmed that he never saw the plaintiff. The age of the gap or estimated period when the tooth came out was not given by a medical officer. PW 5 also stated that his treatment documents were with his brother hence it begs the question, if they were available why could they not be produced?

10. It is therefore not possible to connect the loosing of the upper incisor to the Appellant and can therefore not be termed as grievous harm. PW2 testified in cross-examination that the complainant had a bandage even before he helped him, this would then mean that the injuries were sustained even before the alleged assault.

11. That it was held in Criminal Appeal No. 88 of 2019_ Pius Mutua Mbuvi Vs Republic that,

> " These findings were all reflected in the P3 form by which the injury was classified as "grievous harm." This evidence was not impeached in cross-examination nor controverted by the defence. I note that the complainant was reported to have been examined at Kathiani level 4 Hospital and Machakos Level 5 Hospital and that x-rays were conducted on him; I have not seen the treatment notes or the x-rays being tendered in evidence. The appellant had taken issue with the filling out of the P3 form about 22 days after the incident. In order for this Court to be convinced that indeed the injuries that Pw1 had suffered as indicated on the P3 form were the same as those noted by the medical personnel who attended to Pw1 hours within when the injury was occasioned, I would have expected to see the treatment notes

from Machakos Level 5 Hospital, Kathiani Hospital and the x-ray reports. If indeed metal implants were placed in the hands of Pw1, I expected to see medical evidence to that effect and in my view the exclusion of some medical reports could be by design and point towards deliberate untruth with a view to concealing what exactly happened on the material day of the offence. I am not convinced that there is sufficient evidence to prove that the assault occasioned on Pw1 resulted in grievous bodily harm within the meaning of section 4 of The Penal code."

12. That similarly, the Court in Criminal Appeal No.1 of 2020 Republic v Nicodemus Muthiani Munyoki held:

> " As regards the first finding, it is true that the initial treatment notes from St. Mary's Hospital were not produced. What were produced were two P3 forms dated 12th November, 2017 and 29th November, 2017 respectively. In the said P3 form, what was noted was a gap where the teeth had been extracted. As correctly noted, there was no medical evidence linking the extraction of PW1's teeth with the assault on 12th November. 2017. l agree that it was necessary to produce the initial treatment notes since the person who filled in the P3 form was not the same person who extracted the teeth. By failing to produce the said treatment notes, I cannot fault the Learned Trial Magistrate in her finding that the prosecution failed to prove their case beyond reasonable doubt." The Court further held, " I find that from the medical evidence presented, what is relied on to constitute the offence of grievous harm has no nexus with the act of the Respondent."

13. As to whether the learned trial magistrate erred in convicting the Appellant despite the prosecution's failure to call crucial witnesses?

14. The Appellant submits that, the place of occurrence of the offence was at a shop where the Complainant was buying a banana. According to him that is where he was attacked and assaulted. The person who would best explain to Court how and what led to the assault would be the seller whose statement was never recorded and neither was she called to testify. Her evidence would be vital as it would speak to the important aspects of a criminal case such as the motive or the circumstances leading to the attack. Calling her as a witness was vital and would have helped the Court to reach a safe conclusion of the matter without occasioning injustice to the Appellant. Also, the prosecution witnesses testified that there were boda-boda riders at the scene who could identify the Appellant none of whom were called as witnesses in this case.

15. That the Court in Criminal Appeal No. 13 of 2020 Peter Nyamu Mutithi v Republic held,

> " As stated in the case of Bukenya -V- Uganda (supra) failure to call a crucial witness by the prosecution witness the Court to make an adverse conclusion against the prosecution case. The Court stated: "In our view, the failure by the prosecution to call crucial witnesses weakened their case to an extent that they failed to prove the case against the appellant beyond reasonable doubt as required in criminal cases. The gap created by the failure of the prosecution to call important witnesses is a doubt whose benefit we must give to the appellant which we hereby do."

16. As to whether the learned trial magistrate erred in convicting the Appellant while relying on contradictory evidence it the Appellants contention that, the prosecution witnesses provided the Court with contradictory evidence which touched on the critical aspects of the case and specifically the identification of the appellant. Appellant stated in is testimony under oath that he was not at the scene

and when his wife called him he found the Complainant already injured. He also called DW2 who also confirmed that he saw the Appellant arriving after PW5 had already been injured. PW3 testified that he did not know the person who was assaulting the victim had a light blue shirt whereas PW4 indicated that the assailant had a purple shirt. The Court in Criminal Appeal No. 33 of 2019 Joseph Otieno Oketch Vs Republic, held as follows:

> "In my humble view, there were material contradictions in the evidence of PW1, PW2 and PW4 which contradictions went to the core of the prosecutions' case and which create doubt as to whether the complainant and PW2 saw the person of the appellant on the material night."

17. As to whether the learned trial magistrate erred in convicting the Appellant despite not having been properly identified it is the Appellants submission that, there was no identification parade conducted for the Appellant to be identified by the Complainant or the witnesses called as the person who assaulted the Complainant. The prosecution entirely relied on dock identification in this case. PW1 and PW2 did not witness the alleged offence, however PW3 and PW4 testified that they witnessed someone they had never seen before assaulting the Complainant yet they were never called to identify him rendering the dock identification useless.

18. That, the Court in Criminal Appeal No. 33 Of 2019 Joseph Otieno Oketch Vs Republic also held, In R-VS- Turnbull & Others (1976) 3 ALL ER 549, which decision has been generally accepted and greatly used in the Kenya's system, the English Court considered the factors that ought to be considered when the only evidence tums on identification by a single witness. The Court said

> "The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? ln what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made. "

19. That, the above decision does not say that, there cannot be safe recognition even at night. The Court of Appeal in Douglas Muthanwa Ntoribi vs Republic (2014) eKLR in upholding the evidence of recognition at night held as follows: -

> "On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified: -
>
> "I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PVW1, the complainant."

The Learned Judge further noted that the complainant testified that he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error. "

20. As whether the learned trial magistrate erred in convicting the Appellant despite the prosecution's failure to prove its case beyond reasonable doubt, it is the Appellant submissions that, the prosecution failed to prove the charge against the Appellant to the required standard by failing to prove all the ingredients of the charge of grievous harm and specifically if the injury was caused by the Appellant and it amounted to grievous harm. Similarly, they failed to call the crucial witnesses inthis case, of importance the Appellant was not properly identified as the person who assaulted the Complainant. No identification parade was conducted whatsoever considering PW3 and PW4 did not know the Appellant before.

21. The Appellant thus prays that, the Appeal be allowed and the conviction and sentence recorded against him be quashed and set-side.

Respondent's submissions

22. The state considered the said grounds and refined the two issues for determination as follows;

    i. Whether the prosecution case was proved beyond reasonable doubt; and

    ii. Whether the appellant's defence was duly considered.

23. The Respondent opposes the appeal and submits that, as to whether the prosecution case was proved beyond reasonable doubt it is submitted that, Section 234 of the Penal Code provides that;

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

24. It is well established that, the ingredients of the offence are that, the victim sustained grievous harm, that the harm was caused unlawfully and that the accused was identified as the perpetrator.

25. The Respondent submit that, in this case, the prosecution through oral testimony of the witnesses and medical evidence proved that indeed the victim sustained grievous harm. PW1 gave a detailed account of how he was assaulted by the Appellant and the treatment he underwent at Nakuru PGH Hospital pursuant to the injuries sustained during the assault. The injuries were captured in the P3 form which was produced by PW8 and the injuries sustained were classified by the doctor as being grievous harm due to the missing incisor tooth.

26. On the identity of the Appellant, the Appellant was well known to the Complainant. The two had had disagreements concerning the Complainant's wife. PW3 and PW4 witnessed the Appellant assaulting the Complainant and they testified to that effect and they identified the Appellant as the perpetrator.

27. That the assault meted on the Appellant was unjustified and unlawful. The evidence as laid out by the prosecution was sufficient in proving the case against the Appellant.

28. As to whether the Appellant's defence was duly considered? The Respondent submit that, the Trial Court was of the view that the Appellant's defence consisted of mere denials and was irrelevant and that the Appellant was evasive in his defence. The Trial Court duly considered the Appellant's defence, analyzed the same against the evidence of the prosecution in the judgment and correctly rejected it. The Appellant's defence did not shake the case mounted by the prosecution and therefore this ground should fail.

29. That given the nature of the case and the evidence adduced at trial, the Appellant was rightfully convicted and sentenced by the Trial Court. The Respondent submit that, this Court to find that the

appeal herein is devoid of merit and find that the conviction herein was safe and sentence lawful and that the appeal be dismissed and the conviction and sentence herein be confirmed.

Analysis and Determination

30. This being a first appeal, this Court is obligated to reconsider the evidence, re-evaluate it itself and subject the entire evidence to its own independent scrutiny and arrive at a decision on whether or not to allow the appeal. (See the case of Okeno Vs Republic [1972] E.A 32). This Court has considered the submissions that were made by the Appellant and by Ms. Jackie Kisoo on behalf of the State. Having carefully re-evaluated the evidence adduced before the trial magistrate's Court.

31. The sole issue for determination by this Court is, whether the prosecution proved the charge of "assault causing grievous harm" against the Appellant to the required standard of proof beyond reasonable doubt?

32. The Court has considered the record of Appeal and the submissions on record. The Appellant was charged with charged with the offence of Assault causing grievous harm contrary to Section 234 of the Penal Code. The Prosecution called nine (9) Witnesses and produced a total of 17 exhibits upon being found with a case to answer he was placed to his defence and he gave sworn evidence and called one witness in his Aid.

33. The scrutiny of the record of Appeal reveals that the Prosecution tendered evidence of Assault causing grievous harm by calling the complainant who testified how the Appellant pounced on him suddenly and beat him thoroughly without warning.

34. That he was;

    a) kicked

    b) Jumped on all over while he was down, especially the ribs

    c) punched in the mouth, causing two teeth to be loose (one tooth came out later that right and he showed to Court the gap from the missing tooth.

    d) beaten for almost ten minutes

    e) beaten on the head using a sharp object which stabbed him as a result a lot of blood which shot at high pressure

    f) advised to go back to hospital for removal of stitches on his head after seven days

    g) advised to be careful not to swallow the loose tooth in case it came off

35. The Complainant evidence of injury was corroborated by PW8 and PW9 who were medical expert who duly produced in evidence the P3 form as exhibit number 9, and X-ray report exhibit number 10 and a tooth produced as exhibit number 8.

36. The Complainant evidence of assault was corroborated by PW2 a brother who attended to him on the material day and escorted him to report to the central police station twice and it was his evidence that that the reason the "boda boda" operators could not intervene to assist the Complainant was because they knew the Appellant as a police officer and in fact he had threatened them during the assault. PW3 a boda boda operator was an eye witness who found the Appellant assaulting the Complainant by stepping on him. PW4 was a pillion rider on PW3's motorcycle and a friend of the son to the Complainant who heard the crowd describe the Appellant as a police officer. PW7 produced

photographs as exhibits 18(a-e) which depicted the blood soiled cloths worn on the material day by the deceased.

37. The Appellant faulted the evidence adduced by the prosecution witnesses, stating that, the prosecution failed to call crucial witnesses. However, the Appellant has not led this Court in this respect leaving the ground to the scrutiny of the record of appeal. The case of Bukenya & Others vs Uganda [1972] E.A.549 is the locus classicus on the issue of failure to call crucial witnesses where the Court of Appeal for Eastern Africa held that:

> " The prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. The Court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case. Where the evidence called barely is adequate the Court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution."

38. In Julius Kalewa Mutunga v Republic [2006] eKLR, the Court of Appeal held that:

> " ...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal Court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."

39. In the case of Bukenya & Others vs Uganda (supra), the Court was clear that the prosecution is not expected to call a superfluity of witnesses. The adverse inference will therefore only be made by the Court if the evidence by the prosecution is not or is barely adequate. Accordingly, adverse inference will not be inferred where evidence tendered is sufficient to prove the particular matter in issue or the entire case.

40. Section 143 of *Evidence Act* (Cap 80) Laws of Kenya, provides that, no particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.

41. In the case of Keter v Republic [2007] 1 EA 135 the Court held inter alia that:

> " The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."

42. A scrutiny, the record of appeal is unable to reveal any such crucial witnesses whom the Appellant on appeal claims were not called and/or particular matter(s) not proved by such witnesses so as to require the Trial Court or this Court to make any adverse inference that had such witnesses been called, they could have given adverse evidence against the prosecution.

43. The Appellant sought to attack the prosecutions case that the loss of the Complainant's tooth could not with certainty be attributed to the Assault and this Court finds that this aspect could not disturb the overwhelming evidence of assault and that the Complainant was in the Company of PW2 when seeking medical attention and on the following day when they visited the Central Police Station to report, while carrying the tooth the complainant had lost on the very night after being assaulted. This Court finds no doubt that the loss of tooth was a direct consequence of the attack.

44. With regards to alleged contradiction by prosecution witnesses, the role of an Appellate Court in the circumstances as spelt out in numerous cases is to assume the role of the Trial Court, reconcile these and then determine whether they were prejudicial to the Appellant and therefore fatal to the prosecution case or were inconsequential to the Appellant's conviction and sentence. See the case of Josiah Afuna

Angulu versus Republic, Nakuru CR Appeal No.277 of 2006 (UR) and Charles Kiplang'at Ngeno versus Republic Nakuru CR. Appeal No.77 of 2009 (UR).

45. "Contradiction" was defined by the Court of Appeal of Nigeria in the case of David Ojeabuo vs Federal Republic of Nigeria {2014} LPELR-22555(CA), Adamu JA; Ngolika JA; Orji-Abadua JA; & Abiru JA. Where the Court stated as follows: -

> "Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains."

46. In light of the above decisions I am persuaded that the unspecified contradictions if any would not displace the overwhelming evidence implicating the Appellant to the offence.

47. The Court has also undertaken a futile exercise to identify any aspect of the Trial Court shifting the burden of proof to the Appellant.

48. This Court equally notes the running strand of threats allegedly being made on the Complainant and witnesses before the commencement of the trial, during the trial and even after. The victims impact statement is telling as to how the Appellant has and continued to utilize his position as a police officer to interfere with the course of justice.

49. I therefore find no substance in the aggrievement by the Appellant's entire appeal and do find that Appellants conviction by the trial magistrate was safe and sound.

50. As to the sentence imposed this Court equally finds the same to be lenient in the face of the maximum prescribed sentence, adverse victim impact statement recommending a custodial sentence.

51. This Court thus finds the Appeal to be without merit and accordingly dismiss the same. The conviction and sentence in the Trial Court is accordingly confirmed.

It is so Ordered.

SIGNED, DATED AND DELIVERED AT NAKURU

ON THIS 6TH DAY OF MAY 2024

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MOHOCHI S. M.

JUDGE