Kulei v Republic (Criminal Appeal E034 of 2022)
[2024] KEHC 6631 (KLR) (6 June 2024) (Judgment)

Neutral citation: [2024] KEHC 6631 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KABARNET

CRIMINAL APPEAL E034 OF 2022

RB NGETICH, J

JUNE 6, 2024

BETWEEN

CORNELIUS KEN KULEI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the decision of the Honourable Chief Magistrate J.Wanjala in Kabarnet CMCR case No. E009 of 2022)

JUDGMENT

1. The Appellant (Cornelius Ken Kulei) was charged with the offence of grievous harm contrary to section 234 of the Penal Code. The particulars of the charge were that the Appellant on the 13th day of January, 2022 at around 0000 hours at Koriema center, Kimalel location in Baringo South Sub County within Baringo County, unlawfully did grievous harm to Dorothy Kiptarus Kiprono.

2. When called upon to plead to the charge, the Appellant denied the charge hence the matter was set down for hearing. The prosecution availed 3 witnesses in an attempt to prove the charge against the Appellant. Upon the close of the prosecution's case the accused person was placed on his defence where he gave sworn testimony and called 2 witnesses in support of his case.

3. By judgment delivered on the 23rd August, 2022, the trial court found the appellant guilty of the charge of grievous harm and convicted him under section 215 of the CPC and sentenced him to 18 months imprisonment.

4. Dissatisfied and/or being aggrieved by the conviction and sentence by the Chief Magistrate Hon Judith Wanjala, appeals against the said conviction to this Honourable court and sets forth the following grounds of appeal: -

i. That the learned trial magistrate erred in both law and fact by failing to find that the prosecution had not proved their case beyond reasonable doubt to warrant conviction of the appellant.

ii. That the learned trial magistrate erred in both law and fact in disregarding the appellant's defence thereby arriving at a manifestly unjust conclusion that the appellant was guilty of the offence

iii. That the learned trial magistrate erred in both law and fact in failing to find that the complainant and the appellant were involved in a fight wherein the complainant bite the appellant on his hand thereby causing damage to her two installed denture to break.

iv. That the learned trial magistrate erred in both law and fact in failing to find the alleged two broken incisors if any were as a result of the complainant biting the appellant on his hand.

v. That the learned trial magistrate erred in both law and fact in sentencing the appellant to a custodial sentence when there were favorable conditions in his favor for a non-custodial sentence and/or a fine.

vi. That the learned trial magistrate erred in both law and fact by failing to thoroughly analyze the evidence on record thereby arriving at a manifestly unjust conclusion that the prosecution had proved its case beyond reasonable doubt.

vii. That the learned trial magistrate erred in both law and fact by failing to find that there were insufficient evidence to support a conviction in that there was no evidence to corroborate the complainant's allegation that the appellant had knocked off her two lower incisors.

viii. That the learned trial magistrate erred in both law and fact by failing to find that the complainant allegations were unfounded and/or were motivated by a grudge she held against the appellant for leaving her for another lady.

5. The appellants pray that this appeal be allowed, conviction and sentence be set aside.

6. The Appeal proceeded by way of both oral and written submissions.

Appellant's Submissions

7. The Appellant submits that the respondent totally failed to present sufficient evidence to prove the charge against him beyond reasonable doubt. He submits that in her evidence, Pw1 stated that on 13th January 2022 at 1200am, the appellant stormed into her house while she was having dinner, confronted and boxed her on the mouth knocking off her two lower incisors which were referred to as 1st and 2nd incisors. That a struggle ensued and in an alleged self defence she bit the appellant on the hand inflicting an injury on him.

8. However on examination or scrutiny of the photographs presented by the appellant showing the complainant bite marks on his hand and/or finger reveals that all the complainant front teeth including the alleged knocked out incisors inflicted injury on the appellant's hand hence the contention that the appellant boxed her on the mouth knocking out the two lower incisors is unfounded; that the photographs of the appellant's injury lend credence to the appellant evidence that the complainant's teeth came off when he was disengaging his hand from the bite grip of the complainant.

9. The appellant submits that the complainant did not scream as she alleged and further, she did not avail any of the neighbors whom she alleged respondent to her screams nor the neighbor in whose house

she alleged she went to spent the night in and DW2's contention that the complainant did not scream and chairs were thrown around is correct.

10. The appellant further submits that if he knocked out the complainant's teeth as alleged, there would have been injuries on the mouth, including swelling of the mouth, bleeding and blood stains on the clothes she was wearing at the time of the alleged assault. That the blood-stained clothes if any were not produced to corroborate her evidence of assault and no photograph of her lower mandible was ever produced to corroborate her injury.

11. The appellant further submit that PW2 the clinical officer said he saw him on 13th January 2022,27 hours after the injury though he changed it to 17hours and stated that the complainant had an open area on her lower mandible where the teeth had come off with no other injury apart from the loss of the two incisors; and on examining her mouth, it was fine and/or had no injury whatsoever; that she had no swelling on the mouth and she did not tell him of any other injury to any other part of her body save for the fallen teeth that he advised her to go for refilling.

12. The appellant submits that the doctor's advice that the complainant go for refilling of teeth show the teeth were broken but the teeth produced appears to be full teeth, going by the court presumption and or assumption and submit that the trial court gave a cursory approach to the status of the teeth, when it observed as follows: -

> " Whether broken or removed there were two teeth produced in court that appeared complete teeth. I believe that the complainant produced her teeth not somebody else teeth. The question is whether the accused person hit the complainant on her mouth and caused the teeth to fall out".

13. The appellant submit that court abdicated its responsibility of determining whether the teeth were broken or not and/or whether the teeth belongs to the complainant and/or whether they were human teeth. That the trial court placed more emphasis on the confrontation and the fight between the complainant and the appellant rather than whether the removal of the complainant's teeth was caused by the appellant.

14. That the Doctor's prognosis is inconsistent with the complainant's evidence that the appellant knocked out her two lower incisors and in fact, it contradicts her contention of assault. That further, there is no evidence that the doctor performed any surgery to remove any root of the incisors, yet it had been alleged that the teeth were broken.

15. The appellant submit that the evidence of PW2 corroborates his evidence that the complainant was wearing dentures on her lower mandible and they came off when she bite him. That this piece of evidence is confirmed by the lower court in its ruling dated 13th April 2022 where the court observed that

> " Although the cross-examination indicates that the complainant was biting the accused when the teeth fell out".

16. And when the court arrived at the above conclusion, it was not safe to convict the appellant and further, the evidence of PW2 contradicts the complainant assertion that she was injured by the appellant; that the trial court failed to scrutinize the evidence of PW2 in detail thereby arriving at a manifestly wrong conclusion that the appellant removed the complainant teeth when there were evidence to the contrary that the teeth came off when she bite the appellant's hand.

17. That the trial court made the wrong presumption when it stated that it does not matter whether the teeth were broken, loose and/or came off, yet the complainant had a full set of teeth during trial and there was no evidence presented by the respondent to prove that the teeth the complainant was wearing were dentures.

18. The appellant further submit that the evidence on record reveals that the complainant was a gilded lover and was not happy that the appellant had concealed his marriage, hence she held a grudge against him and went to great extend to fix him and in her evidence, she said she had not forgiven the appellant for lying to him that he was not married and this grudge is reflected in the probation officer's report where she insisted that the appellant must serve a custodial sentence. That the trial court ought to have warned itself of the dangers of convicting the appellant on the singular uncorroborated evidence of the complainant.

19. PW 1 and PW2 are so glaring that it creates doubt as to the assault of the complainant and the respondent was also in doubt as to the injury of the complainant and summoned the doctor who fixed her dentures but later abandoned it for unknown reason; that PW2 in his evidence stated that the complainant produced two broken teeth but the teeth exhibited in court were not broken.

20. Further that the trial court failed to take into account the appellant's defence which was credible where he explained what happened on the material day and produced exhibits showing the injuries inflicted on him by the complainant and the thorn clothes with blood stains which confirm that the complainant was also the aggressor.

21. In respect to sentence, the appellant submit that the probation report was in favor of him being granted non-custodial sentence but the trial court imposed custodial sentence without option of a fine. He urged this court to set aside conviction and sentence and set him free.

Analysis And Determination

22. This being the first appellate court. I am expected to subject the entire evidence adduced before the trial court t fresh evaluation and analysis. This I do while bearing in mind the fact that I did not have the opportunity to hear the witnesses and observe their demeanour. The principles that apply in the first appellate court are set out in the case of OKENO VS REPUBLIC [1972] EA 32 where it was stated as follows: -

> " The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [1957] EA 570.) 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; it must make its own findings and draw its own 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, (See Peters v. Sunday Post, [1958] EA 424.)"

23. Further in Mark Oiruri Mose –Vs- Republic [2013] e KLR Criminal Appeal No.295 of 2012 the Court of Appeal stated:

> " It has been said over and over again that the first appellate Court has the duty to revisit the evidence tendered before the trial Court afresh, analyze it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial Court had

the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that."

24. In view of the above, I have perused and considered evidence adduced before the trial court and submissions filed, I find the following as issues for consideration

    a. Whether the ingredients for the offence of grievous harm were proved beyond reasonable doubt

    b. Whether the Appellant's defence was considered.

    c. Whether the sentence meted on the accused was harsh/excessive.

    (i) Whether the ingredients for the offence of grievous harm were proved beyond reasonable doubt

25. From the evidence adduced, the complainant testified in the trial court that on the night of 13th January, 2022 at Midnight, she was in her house taking dinner when the appellant knocked at her door and asked her to open but she refused. The appellant then forced the door open and entered and asked her why she did not want to open for him then the appellant boxed her on her mouth resulting in her two lower teeth falling down. The complainant showed court where the teeth fell off from and said she had replaced with artificial teeth. After that the appellant left then returned shortly thereafter and threatened to beat her again and left.

26. The complainant stated that she went to a neighbor's house to sleep and the next day, she carried the 2 teeth which had fallen and went to report to the police. She said appellant used to be her and she tried to end the relationship in November 2021 after learning that the appellant had lied to her that he was not married but the appellant started harassing and fighting her. She stated that the incident occurred at midnight when her neighbors were asleep and there was therefore no eye witness.

27. PW2 Mr. Sitienei Kibet a clinical officer at Marigat Sub-County hospital testified that on 13th January,2022 the complainant presented a history of having been assaulted by someone known to her at around 1200 hours who hit her with a fist on her mouth and it resulted in her losing her 1st and 2nd lower incisor teeth. Upon examining the complainant, he found her 1st and 2nd lower incisor teeth loose. He gave her medicine and advised her to go for dental review with a possibility of refill of the lost teeth. He produced P3 form and treatment notes as exhibit 1 and 2 respectively. The two incisor teeth were produced as exhibit 3. He confirmed that he was the one who treated the complainant on 13th January, 2022. He estimated the age of injury as 17 hours and not 27 hours as indicated in the P3 form and time 0000 hours which is midnight and not 1200hours which is midday. He stated that he was shown the two broken teeth by the patient at the hospital wrapped in a paper. He also said there was an open wound on the lower side of the mouth where the teeth had been removed and he indicated in the P3 form loss of two lower incisor teeth but did not indicate that there was an open wound in the mouth. He also said the patient complained of pain but he did not indicate in the P3 form.

28. PW3 No. 260056 PC Bett Kibet attached at Marigat police station testified that on 13th January,2022 around 1700 hours he was assigned by the OC Crime to investigate a case that had been reported by Dorothy Kiprono the complainant herein who had reported vide OB No. 33 of 13/1/2022 that she had been assaulted by a person known to her known as Cornelius Kulei. The report was made around 16.00 hrs. He stated that he met the complainant at the customer care office and issued a P3 form to be filled. Later after the P3 form was filled, he recorded a statement from the complainant on 14th January,2022 which indicated that she was assaulted by her ex-boyfriend known as Kulei on 13th January,2022 around 0000hours, causing her to lose two lower incisor teeth.

29. He stated that on 14th January,2022 around 2000 hours he went to the complainant's house and found the suspect there and arrested him on identification by the complainant. on 15th January, 2022 he interrogated the accused person and then charged him with the offence. He produced two lower incisor teeth that had been given by the complainant. He said the accused told him that the complainant bite his hand and when he was trying to remove his hand the teeth fell out.

30. In his defence, the appellant stated that he was in a love relationship with the complainant from the year 2018 to December 2021 and the relationship was good from year 2018 to 2019 but started growing sour from the year 2021 after the complainant completed college training which he assisted her financially. He said he gave the complainant Kshs.60,000/- to revive a Posho Mill that had stapled and also buy clothes to sell and she had promised to refund the money in 2021 but failed to refund and started relationships with other men which caused them to differ.

31. He stated that in October 2021 they went to a hotel to eat and when the complainant was biting the meat her upper tooth came out and she also told him that the lower teeth were also loose. He said he took her to a dentist and her upper incisor tooth was replaced and he paid for her but when it came to replacement of the other teeth, he started dodging her telling her that he did not have money as a way of avoiding to give her more money. He stated that after about 3 weeks, the complainant informed the appellant not to bother as she had already replaced the teeth and she was no longer interested in the relationship; and when he asked the complainant money, he had given her to start business, she promised to give him on 15th January,2022, but on 12th January,2022 she called him to go and collect the money.

32. He further stated that it was around 8. 00 p.m. when the complainant called and he promised to go then watched football up to around 11.40 when the complainant called him again and told him harshly that if he did not go for the money, then he should not bother her again. He then proceeded to the complainant's house in company of one Byron. He stated that when he reached the house, he pushed the door open and saw the complainant with a boy called Ronald. He denied having assaulted the complainant or causing her teeth to fall out.

33. The appellant availed a witness Byron Changwany who testified that on 13th January, 2022 he was watching football (Soccer) with the appellant house when he received a call and the appellant asked him to accompany him to complainant's house and on arrival, they found the door partially closed; they peeped inside and saw Dorothy and Rono inside. He said he went back to the corridor as appellant entered the house and while DW2 was at the corridor, she heard noise and commotion and things in the house moving. He stated that he saw Cornelius and Dorothy were fighting and Rony was not there. He said he left and when he saw the appellant next, he had an injury on his hand. on asking him what happened, the appellant told DW2 that the complainant injured him. Dw2 said he did not know what happened to complainant's teeth.

34. It is trite that throughout a criminal trial, the burden of proof always lies with the prosecution and the same does not shift. This position was succinctly captured in the case of Okethi Okale vs Republic (1985) EA 555. It was the duty of the prosecution to prove beyond reasonable doubt that it was the Appellant who caused the offence levelled against him. However, proof beyond reasonable doubt is not synonymous to proving a case with mathematical precision at 100%. See Miller –VS- Minister of Pensions (1947) 2ALL ER 372-373 where Lord Denning had this to say about proof of a case beyond reasonable doubt that;

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of

doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

35. From the evidence captured above, there is no dispute that the complainant sustained injuries classified as grievous harm. From the clinical officer's evidence, the complainant lost two lower incisors teeth. The defence evidence placed the appellant at the scene. The accused and his witness DW2 confirmed that they visited the complainant's house on the night of the incident and also confirmed that there was a fight. The appellant was a person known by the complainant having been lovers before the incident. The appellant explained the loss of teeth by the complainant by saying she had loose teeth which fell out when she bite him. The appellant however did not prove that complainant bite her and further it is unlikely that a bite would occasion such grievous harm to the complainant. The nature of injuries in my view is not consistent with explanation or the appellant's narrative.

36. On contradictory evidence I am guided by decision in the case of Erick Onyango Odeng vs R(2014)e KLR where the court had this to say on contradictory evidence;

" The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyze the contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers"

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37. I have considered evidence adduced and, in my view, the discrepancy is minor to shake prosecution's evidence. Record also show that the appellant's defence was considered contrary to his argument.

38. In a nutshell, it is clear in my mind that the prosecution evidence adduced was overwhelming and that the trial court rightful found that the prosecution had proved its case beyond reasonable doubt hence the appeal on conviction is hereby dismissed.

(ii) Whether sentence imposed was harsh and excessive

39. The Court of Appeal in the case of Ogolla s/o Owuor vs. Republic, [1954] EACA 270, pronounced itself on this issue as follows:-

" The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

40. The other principle to be considered is whether the sentence is manifestly excessive in view of the circumstances of the case. The Court of Appeal, on its part, in Bernard Kimani Gacheru vs. Republic [2002] eKLR restated that:

" 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 states is shown to exist."

41. Record show that the trial court considered the fact that the Appellant was a first offender, he also considered the circumstances of both the victim and the appellant and noted that the offence required a stiff punishment. In this regard, I am satisfied that due consideration was made in safeguarding the interests of the victim, the Appellant and the community at large. In this appeal, the Appellant submitted that he was remorseful and prayed for forgiveness and leniency.

42. I note that the offence of Grievous Harm contrary to section 234 of the Penal Code, is a felony and attracts a maximum sentence of life imprisonment. The appellant was sentenced to 18 months imprisonment. Considering the degree of harm caused to the complainant being of permanent in nature, I am of the view that sentence imposed by the trial court is lenient. The sentence is not excessive in the circumstances herein and I have no reason to interfere. In the result, I find this appeal without merit and is hereby dismissed.

Final Orders: -

43.

1. This appeal is hereby dismissed on both conviction and sentence.
2. Period served in remand to be compute in the sentence imposed by the trial court.

JUDGMENT DELIVERED, DATED AND SIGNED IN VIRTUALLY AT KABARNET

THIS 6TH DAY OF **JUNE** 2024.

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RACHEL NGETICH

JUDGE

In the presence of:

CA Elvis.

Ms. Ratemo for state

Appellant Present