Ndirangu v Republic (Criminal Appeal E035 of 2023)
[2024] KEHC 7594 (KLR) (20 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7594 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E035 OF 2023

DKN MAGARE, J

JUNE 20, 2024

BETWEEN

CHARLES NDEREBA NDIRANGU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence in Karatina Criminal Case No. E146 of 2023 delivered on 27th April 2023, and sentence meted out on 31st May, 2023 by Hon. E. Kanyiri – Principal Magistrate)

JUDGMENT

1. This is an appeal from the conviction and sentence given on 31/5/2023. The Appellant was given a life sentence. The appellant was not a first offender having been convicted in CR. 255 of 2019.

2. The Appellant filed a Memorandum of Appeal which I shall treat as a Petition of Appeal. He set out the following grounds:

    a. That the learned trial magistrate erred in both law and fact in failing to appreciate the fact that the alleged victim in this case clearly demonstrated an incredibly doubtful integrity and whose evidence was and remains doubtful occasioning a serious prejudice.

    b. That the learned trial magistrate further erred in both law and fact in not considering that the whole prosecution case was riddled with material discrepancies which were capable of unsettling the verdict hence a prejudice.

    c. That the learned trial magistrate further erred in law and fact in failing to consider the plausible appellant's statement in defence which was not contested and or unproved by the prosecution hence still stands clearly demonstrating that the instant matter was a framed up one to curtail Appellant's success for envious reasons.

d. That the instant matters proof was below the required standard of proof and therefore capable of impeaching the whole substance of the matter.

3. The appellant was charged with grievous harm contrary to Section 234 of the Penal Code. The particulars are that on the 19th day of November, 2021 at around 2000hrs in Hiriga village Mathira west sub-county Nyeri County, he unlawfully did grevious harm to Catherine Ndirangu by cutting her on the head, shoulder and hands with a panga.

4. The Appellant pleaded that the offence was true because he was defending himself. The court rightly entered a plea of not guilty. The Appellant was assessed for fitness to stand trial and the report dated 25/11/2021 by Dr. M. Ricu Mwenda confirmed that he is fit to stand trial. This was denied.

Evidence

5. The complainant, stated that the accused is her son. She stated that she was pounding food and the complainant's father was in the living room. The son cut his mother in several places, twice on the head. When the father came to help out the Appellant cut him twice. The other son's wife came and got the vehicle to take them to hospital. They were treated. They took 30 days. Her finger not functional.

6. The Appellant did not cross examine in spite of being given a warning on the gravity of the offence.

7. PW2 was Samuel Muriuki. He stated that he found the mum seated on a chair pouring blood. She had a cut on the head. He did not find the Appellant. They took her to hospital. They were treated. The Appellant did not cross-examine. PW3 also gave evidence on what transpired. She found the father on the floor and the mum was screaming. The Appellant had already been hacked. She called PW2. She came with several boys/young men to take parents to hospital. She was not cross-examined.

8. PW4 was Dr. Stephen Ndiritu. He is based in Karatina. He filed the P3 for PW1. She had been hacked by the appellant. He found that PW1's fingers fractured. There was no cross-examination.

9. There was a transfer of the trial court. The Appellant opted to have the trial proceed from where it had reached except he wanted PW3 recalled. PW3 was recalled as PW4. She testified. On being cross examined she stated that she recalls the incident but not the date. She stated that she was a second wife.

10. PW5 the investigating officer testified from Mumias. He stated he went to the scene and found blood at the kitchen door. On cross examination he stated that he arrested the Appellant on 20/11/2021. The Appellant responded, refuted claim that the witness reached out to the Appellant.

11. The Appellant was put on his defence. He opted to remain silent.

Analysis

12. The charge was based on Section 234 of the Penal Code. The section provides as follows: -

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

13. The ingredients of the said offence are as follows: -

i. The nature of the injuries.

ii. Intention.

iii. Victim.

iv. Perpetrator

14. The entire evidence was consistent and unopposed. PW1, PW2, PW3 and PW4 confirmed the aggressor to be the Appellant. The Appellant did not question the evidence. It did not however remove the burden of proof from the state.

The Burden of Proof

15. The burden was on the state. The witnesses corroborated each other. The evidence was unshakable.

16. The offence of causing bodily harm is not taken seriously sometimes. In this case, the mother received vicious attacks. She testified on the nature and extent of the injuries. The mother was totally innocent. She was attacked without any patience.

17. The duty of the first Appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 is as follows:-

> "On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

18. In the case of Okeno v Republic [1972] EA 32 at 36 the East Africa Court of Appeal stated on the duty of the Court on a first appeal:

> "An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 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] E. A. 424."

19. On proof in criminal cases, Proof beyond reasonable doubt was explained by Lord Denning J in Miller V Minister for Pensions (1947) A.C that: -

> "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 a 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."

20. Where the court finds a conflict on findings of fact, the court refers to the court below to ascertain whether there is a concrete reason to differ on facts arrived at by that court. Where the finding of the court is based on no evidence the court is under duty The court of Appeal in Kiilu & Another –vs- Republic [2005]1KLR 174, stated as hereunder: -

> " An Appellant on first appeal is entitled to expect the evidence as a whole submitted to fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. It is not the function of the first appellate Court to merely scrutinize the evidence to see if there was some evidence to support the lower court's findings and 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 witnesses.

21. The issue in this case is whether the prosecution proved is case to the required standards. Most oft quoted English decision of by Viscount Sankey L.C in the case of H.L. (E) Woolmington vs. DPP [1935] A.C 462 pp 481 , comes in handy in describing the legal burden of proof in criminal matters, that;

> " Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

22. In the case of R vs. Lifchus {1997}3 SCR 320 the Supreme court of Canada explained the standard of proof as doth:-

> " The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure

that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."

23. According to Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14:

> " The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."

24. The standard of proof required in such cases was addressed by Brennan, J in the United States Supreme Court decision in Re Winship 397 US 358 {1970}, at pages 361-64 stated that:-

> " The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men.

25. Section 234 of the Penal Code provides as follows:

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

26. The Appellant was identified by the mother, sister-in-law and a brother. I find that the conviction was safe. I dismiss the appeal on conviction.

27. On sentence, the court considered the following:

    a. Previous record in CR. 255 of 2019 for possession of narcotics.

    b. Community interest and views of the victims. The court rightly relied on Omuse –Vs- Republic KLR 214.

    c. The court considers what is aggravating in the circumstances.

28. In this matter there was use of a panga, a dangerous weapon. The incident was wholly unprovoked as only "bad food" was the cause. The nature of injuries on the victims were serious. The Appellant targeted the elderly, in this case the mother. The Appellant stood to gain from death of parents to facilitate succession. He already succeeded in killing the father in the meantime. Reducing sentence will bring the victim face to face to the perpetrator.

29. The court found that life sentence is a proper sentence. This court can't differ unless the sentence is unlawful or the court look into consideration of irrelevant factors. The court used the correct parameters.

30. Sentences is a question of fact. The sentencing guidelines provide that we consider the following:-

a. In determining the appropriate sentence, courts must assess a number of issues starting with the degree of both culpability and harm.

    a. The assessment of culpability will be based on evidence of the crime provided through testimony where a trial has been conducted, or, where a plea is entered, through the prosecution summary of facts.

    b. Aggravating and mitigating features surrounding the offence may be advanced by the prosecution and the accused person (or his/her representative).

    c. Where an offence is committed by more than one offender a court shall ascertain the culpability of each of the offenders involved and render individual sentences commensurate to their involvement in the offence.

    d. The assessment of harm may be based on testimony, or the summary of facts presented and also by a victim impact statement where that has been obtained.

    e. Mitigating factors refers to any fact or circumstance that lessens the severity or culpability of a criminal act and can also include the personal circumstances of the offender.

    f. Convicted offenders should be expressly provided with the opportunity to present submissions in mitigation.

    g. A list of aggravating and mitigating circumstances – which is not exhaustive – is contained within the GATS along with those specific to murder, manslaughter, and wildlife cases, in Part V.

    h. Having heard all relevant submissions and considered any reports advanced by either prosecution or defence, or the probation or children's officer (where applicable), and any victim impact statement, the court should:

    i. Decide as to whether a custodial or a non-custodial sentence should be imposed in line with these guidelines. ii. In the case of sexual offences, before the terms of a custodial sentence are determined, the court must have recourse to relevant probation reports as required in sections 39 (2) and (4) of the *Sexual Offences Act* No.3 of 2006 that contain provisions about post-penal supervision of dangerous sexual offenders.

31. When asked to mitigate the Appellant kept silent. I find no reason to interfere with sentence. The sentence was deserving. However, there has been 2 decisions of the Court of Appeal which interpreted what life imprisonment is. In Evans Nyamari *Ayako v Republic Kisumu CACRA No. 22 of 2018* (Okwengu, Omondi & J. Ngugi, JJA) (unreported) translated life imprisonment to 30 years.

32. In the case of Barasa *v Republic (Criminal Appeal 219 of 2019*) [2024] KECA 324 (KLR) (15 March 2024) (Judgment), the court of Appeal stated as follows: -

> "Given the circumstances in which the offence was committed, the complainant being a young girl whom the appellant as the stepfather ought to have protected but instead violated, the appellant deserved a deterrent sentence. The sentence of life imprisonment was an option which was available in the exercise of discretion in sentencing and would in our view have been appropriate.
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> 13. In accordance with our decision in Evans Nyamari Ayako v Republic (supra), translating life imprisonment to a term sentence of 30 years' imprisonment,

> we allow the appellant's appeal; on sentence to the extent of substituting the sentence of life imprisonment that was imposed on the appellant with a term sentence of 30 years' imprisonment. The sentence of 30 years shall be calculated from the date the appellant was first arraigned in court in accordance with Section 333(2) of the Criminal Procedure Code.

33. In *Manyeso v Republic (Criminal Appeal 12 of 2021)* [2023] KECA 827 (KLR) (7 July 2023) (Judgment), the Court of Appeal sitting in Malindi Nyamweya, Lesiit and Odunga, JJA) held that life imprisonment unconstitutional substituted the same with 40 years. They stated as follows: -

> "We recognize that although the Judiciary released elaborate and comprehensive Sentencing Policy Guidelines in 2016, there are no specific provisions for the sentence of life imprisonment, because it is an indeterminate sentence. Nevertheless, we are in agreement with the High Court decision in Jackson Wangui, supra, which found that it is not for the court to define what constitutes a life sentence or what number of years must first be served by a prisoner on life sentence before they are considered on parole. This is a function within the realm of the Legislature...
>
> ... We are therefore of the view that while the appellant should be given the opportunity for rehabilitation, he also merits a deterrent sentence. We, therefore in the circumstances, uphold the appellant's conviction of defilement, but partially allow his appeal on sentence. We accordingly set aside the sentence of life imprisonment imposed on the appellant and substitute therefor a sentence of 40 years in prison to run from the date of his conviction."

34. It is therefore my understanding that in each case we shall translate what life imprisonment means. In this case a sentence of 40 years translates to life imprisonment.

35. I therefore substitute the life sentence, with its equivalent, that is 40 years. The period shall run as per Section 333 (2) of the Criminal Procedure Code from date of arrest.

36. In the circumstances the appellant's conduct is heinous and deserves rightfully a life sentence. The Court of Appeal has directed that the sentences be translated. The appellant's life sentence in court only is equated to 40 years.

37. In this case the Appellant did not offer any defence. In the circumstances 40 years will be a good substitute for life imprisonment.

Order

38. In the circumstances I order as follows:

    a. Appeal on conviction is dismissed for lack of merit.

    b. The appeal on sentence is dismissed. However, the court is under duty to equate the life sentence. In the circumstances the life sentence herein is equated to 40 years. The Appellant is thus sentenced to 40 years in lieu of the life sentence.

    c. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 20TH DAY OF JUNE, 2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

Appellant in person

Ms. Kaniu for the State

Cpl. Muriithi in Nyeri Maximum

Court Assistant – Jedidah