Ndung'u v Republic (Criminal Appeal E002 of 2022)
[2023] KEHC 1518 (KLR) (1 March 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAHURURU

CRIMINAL APPEAL E002 OF 2022

CM KARIUKI, J

MARCH 1, 2023

BETWEEN

CHRISPUS KARIUKI NDUNG'U ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the Conviction and Sentence of Hon C. M. Muhoro, Senior Resident Magistrate passed on 26/1/2022 in Nyahururu Chief Magistrate's Court Criminal Case No. 804 of 2019)

JUDGMENT

1. The appellant herein, Chrispus Kariuki Ndung'u, was charged with the offence of grievous harm contrary to Section 234 of the *Penal Code*. The particulars of the crime were that on the 25th day of April 2019 at Donga Area in Subukia Sub-County within Nakuru County, the Appellant wilfully and unlawfully did grievous harm to Daniel Oluoch, thereby occasioning him actual bodily harm.

2. The trial magistrate found the Appellant guilty of the offence as charged, convicted him, and sentenced him to serve five (5) years imprisonment.

3. Aggrieved by both the conviction and sentence, he lodged the instant appeal based on the following grounds of appeal: -

    i. That the learned trial magistrate erred in law and, in fact, in finding that the Appellant inflicted the injuries suffered by the Complainant, PW1.

    ii. That the learned trial magistrate erred in law and fact in finding that the Appellant had a grudge against the Complainant.

    iii. That the learned trial magistrate erred in law and, in fact, in finding that the evidence of PW1, PW2, and PW3 was truthful, whereas another person, Harun, was adversely mentioned as having been armed with a *panga*.

iv. That the learned trial magistrate erred in law and fact in believing PW4 that the Appellant had lodged a report on damage of pipes against the Complainant, thus leading to the offence. In contrast, no particulars of the report were produced as exhibits.

v. That the learned trial magistrate erred in law and fact in dismissing the Appellant's defence and disbelieving him.

vi. That the learned trial magistrate erred in law and, in fact, in meeting an excessive sentence in the circumstances.

vii. That the learned trial magistrate erred in law and failed to observe Section 169 of the *Criminal Procedure Code*.

4. Reasons wherefore the Appellant prays for the judgment delivered on 26/1/2022 to be set aside in its entirety and for the Appellant to be set at liberty.

Appellant's Submissions

5. The Appellant submitted that the particulars of the charge sheet did not support the evidence of the prosecution witnesses, especially the Complainant, who testified that he was attacked on April 24, 2019. Yet, the date of the offence in the particulars is 25/4/2019, and the trial magistrate, in her judgment, confirmed the same date.

6. Further, it was stated that the particulars of the charge indicated that the crime was committed in Donga Area in Subukia, yet PW1 stated that his *shamba* is at Kwahaji and reasserted the same during cross-examination.

7. It was asserted that from the preceding, it is evident that the charge sheet was referring to a completely different offense from the one the witnesses were testifying on. The Appellant was thus convicted of the crime in the charge sheet, which was not supported by the evidence.

8. The Appellant averred that from PW1's testimony that a mob attacked him, and the evidence was not cogent that the Appellant was armed with a *panga* and that he cut the deceased. Additionally, they highlighted the testimony of PW2 and PW3, who stated that Harun attacked the Complainant with the *panga*. Finally, they questioned why he was not arrested, unlike the Appellant, who went with the others to the police station. Yet, it is unusual for a person to commit such a heinous offense and still present himself to the police.

9. It was argued that the identification evidence was weak and unsafe to convict as there were doubts about who cut the Complainant, which ought to have been resolved in the Appellant's favour. Further, the *panga* that was produced as an exhibit was not in any way linked to the Appellant.

10. The Appellant submitted that he was only implicated because he had reported the Complainant to the police earlier for damaging his pipe, and the matter was still being investigated. That PW2 and PW3, the Complainant's relatives, had reasons to lie. It was asserted that failure to call an independent eyewitness to the offense was fatal to the prosecution case. Reliance was placed on *Benjamin Kipkorir Bett vs Republic* [2020] eKLR, *Anthony Njogu Wanjiku & Another vs Republic* [2006] eKLR

11. The Appellant pointed out that the court's judgment did not comply with Section 169 of the *Criminal Procedure Code* because it does not contain the points of determination and the reasons, and the omission cannot be cured and is fatal.

12. In conclusion, the Appellant prayed that the appeal be allowed and the Appellant be acquitted. Still, if the court is to find otherwise, they prayed for the sentence of 5 years imprisonment to be set aside for a lesser sentence to be imposed, a noncustodial sentence preferably.

Respondent's Submissions

13. The respondent submitted that the Complainant's left wrist was fully chopped, fitting the grievous harm definition per Section 4 of the *Penal Code*.

14. It was stated that PW1 testified that on April 24, 2019, while at his *shamba* trying to irrigate and in the company of PW2 and PW3, the Appellant appeared in the company of others armed with a *panga* and hit him with it and chopped off his left wrist. Eye witness accounts of PW2 and PW3 corroborated these facts. PW1 stated that he later learned that the Appellant attacked him because he alleged that he had damaged his pipes.

15. The respondent stated that the Appellant was charged under Section 234 of the *Penal Code*, which is the punishment section. Therefore, the charge sheet should have indicated Section 231 as read with Section 234 of the *Penal Code*.

16. Further, it was contended that the particulars thereof did not disclose the *panga* as held in *Sigilani vs Republic* [2004] eKLR thus, the respondent conceded that the charge sheet was defective and the appeal ought to succeed.

17. On sentencing, the respondent asserted that the Appellant was sentenced to 5 years imprisonment from January 26, 2022, which means he barely served 11 months. A retrial will do if the appeal is not wholly allowed.

Analysis and Determination

18. Having considered the Petition of Appeal, the Appellant's and respondent's written submission, and the trial court proceedings, I find that the main issues for determination are as follows: -Whether the prosecution proved its case beyond reasonable doubtWhether the defence raised placed any doubt on the prosecution's caseWhether the sentence imposed on the Appellant is manifestly excessive in the circumstances.

19. It is settled law that a first appellate court must evaluate afresh the evidence before the trial court to arrive at its independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify. Further, it is not the function of a first appellate court merely to scrutinize the evidence to see if there is some evidence to support the lower court's finding and conclusion; it must make its findings and draw its 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 *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123), *Peters vs Sunday Post* [1958] EA 424)

20. The Appellant was charged with the offence of grievous harm contrary to Section 234 of the *Penal Code*, which is the punishment section. The charge sheet should have indicated Section 231 as read with Section 234 of the *Penal Code*. To secure a conviction under the offence of grievous harm, the prosecution had to prove the following essential elements beyond reasonable doubt:-The victim sustained grievous harm.That the harm was caused unlawfully.That the accused caused or participated in causing the grievous harm.

21. Section 4 of the *Penal Code* Chapter 63 Laws of Kenya reads as follows:-

> " Grievous harm means any harm which amounts to maim or dangerous harm or seriously and permanently injures health, or which is likely so to injure health, or which extends to the permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense."

22. Therefore, the specificities of "grievous harm" are:-

> "In the case of grievous harm, the injury to health must be permanent or likely to be permanent, whereas, to amount to bodily harm, the injury to health need not be permanent;
>
> a mental injury may amount to grievous harm but not to bodily harm;
>
> the injury must be "of such a nature as to cause or be likely to cause" permanent injury to health."

23. First and foremost, the Appellant asserted that the date indicated the particulars of the charge sheet were erroneous as the date in the offence of the particulars is 25/4/2019, while the PW1 testified that he was attacked on 24/4/2019. It was also asserted that particulars of the charge indicate that the offense was committed at Donga Area in Subukia. At the same time, PW1 stated that his *shamba* is at Kwahaji, where the offense is alleged to have been committed. In addition, the Appellant argued that the particulars of the charge do not indicate how harm was inflicted on the Complainants. For example, it needs to be stated that he was cut with a *panga*, so the particulars needed to be completed.

24. It is noteworthy that the Appellant did not raise the issue of the charge's incompleteness and defectiveness as a ground of appeal as per their petition of appeal dated January 27, 2022 but proceeded to raise and bring it up in their submissions. It is trite law that a party is estopped from raising or addressing any new issue(s), ground(s), or point(s) of law in submissions not contained in the pleadings filed before the Court.

25. In criminal proceedings, the evidence presented in support of a charge is critical. On the first element, ie, the victim sustained grievous harm; it was the testimony of PW1 that he was attacked by a *panga*, and his hand was cut at the wrist. The same was corroborated by the testimonies of PW2 and PW3, who revealed that PW1 was cut on the hand at the wrist. These findings were all reflected in the P3 form, where the injury sustained by PW1 was classified as 'grievous harm.' The P3 form indicated that the victim suffered a deep cut wound on the left wrist joint, left hand was cut, and he lost the hand. PW5, in her testimony, stated that the left wrist was completely chopped off and had been put in a carrier bad. The wrist was bleeding, the wrist bone was protruding, and he was in severe pain. She concluded that the injuries as grievous harm.

26. Accordingly, I am 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*.

27. The second element required proof that the harm occasioned on the victim was caused unlawfully, meaning that the same was without legal justification. On this aspect, PW1, PW2, and PW3 were consistent with their testimonies that PW1 was in his farm on that fateful day when he was approached by a crowd, among them the Appellant; when he asked them what they wanted, he was attacked. Moreover, PW2 and PW3 were eye witnesses to the attack, and I find their direct evidence cogent, credible, and compelling. Accordingly, I find that the prosecution proved beyond reasonable doubt that the injury sustained by the Complainant was caused unlawfully, and there was absolutely no legal excuse to justify the same.

28. Last is the aspect of positive identification that the Appellant caused or participated in causing the grievous harm. In his grounds of appeal, the Appellant stated that the learned trial magistrate erred in law and, in fact, in finding that the evidence of PW1, PW2, and PW3 was truthful. In contrast, another person, Harun, was adversely mentioned as having been armed with a panga.

29. The Appellant averred that from PW1's testimony that a mob attacked him, and the evidence was not cogent that the Appellant was armed with a *panga* and that he cut the deceased. Additionally, they highlighted the testimony of PW2 and PW3, who stated that Harun attacked the Complainant with the *panga*. Finally, they questioned why he was not arrested, unlike the Appellant, who went with the others to the police station. Yet, it is unusual for a person to commit such a heinous offense and still present himself to the police.

30. It was argued that the identification evidence was weak and unsafe to convict as there were doubts about who cut the Complainant, which ought to have been resolved in the Appellant's favour. Further, the *panga* that was produced as an exhibit was not in any way linked to the Appellant.

31. From the trial record, pw1 testified that he was in his samba working with his wife and brother when he saw a crowd walking towards them. He knew the people as they used to farm together, And Harun, Mativo, and the Appellant were among them. He asked where they were going, and Harun said they were looking for him. The Appellant then hit him with a panga, and the people he was with a scream, and the Appellant and Harun took off.

32. On cross-examination, PW1 stated that there were other people on the scene but only mentioned the Appellant because he was the one who chopped his wrist with a panga.

33. the testimony of PW2 corroborated PW1's account. She stated that he was at the shamba with PW1, her husband, and PW3, her brother-in-law, when the accused and Harun went to where they were. PW1 asked them what they wanted, and Harun raised his panga. He wanted to cut PW1, but he fell. The Appellant, who also had a panga, managed to cut PW1. He aimed for his neck, but PW1 blocked it, and his hand was cut instead. This account was consistent with PW3's account, which testified that two men, ie, Harun and the Appellant approached them with pangas and said they wanted Dan, ie, PW1. They went towards PW1, but Harun slipped and fell, and the Appellant raised his panga and hit PW1. PW1 tied to protect himself, but the panga cut his hand, and his wrist fell off, so he was cut on his left hand.

34. It follows that the Appellant was identified by recognition from the evidence on record. I have no reasons to doubt that PW1 positively recognized and remembered the Appellant as the one who attacked him. They used to work together at the farm. There was corroboration in the prosecution evidence on the identification of the Appellant by PW2 and PW3. I find that they were truthful, clear, and consistent with their testimonies that although both Harun and the Appellant were armed with pangas, it was the Appellant and not Harun who attacked the accused, displacing the Appellant's assertion that it was either Harun or an unknown person who attacked PW1. I believe the prosecution's evidence was watertight on the identification of the Appellant as PW1's assailant.

35. Moreover, I am satisfied with the trial court's finding that the Appellant's defence did not materially controvert the prosecution's evidence and that his defence was a bare denial. Lastly, the Appellant stated that the learned trial magistrate erred in law and fact in finding that the Appellant had a grudge against the Complainant; however, the trial magistrate only noted that the accused seemed to have a grudge against the Complainant, and in any case, the same is immaterial given the fact that the main elements of the charge against the Appellant had been proved beyond a reasonable doubt.

36. Having gone through the trial court's judgment, I find the Appellant's submission that the learned trial magistrate erred in law and, in fact, failed to observe Section 169 of the *Criminal Procedure Code* misplaced.

37. On sentencing, the Appellant stated That the learned trial magistrate erred in law and, in fact, in meeting an excessive sentence. I will rely on the case of *Wanjema vs Republic* [1971] EA 493, where the Court stated as follows regarding interference with sentencing:-

> " The Appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, took into account some immaterial factors, acted on a wrong principle, or the sentence is manifestly excessive in the circumstances of the case."

41. Considering this ground, I find the sentence meted was neither illegal nor unlawful. Sentencing is a question of fact and is always at the trial court's discretion. Something must be on record to show that the trial court erred in exercising its discretion in meeting the 5-year term of imprisonment. Therefore, I find no reason to interfere with the same. Thus, the court makes the orders;

i. That the appeal lacks merit and is hereby dismissed.

ii. The court upholds both the conviction and sentence of the trial court.

DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 1ST MARCH 2023.

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CHARLES KARIUKI

JUDGE