Maitha v Republic (Criminal Appeal E014 of 2022) [2023] KEHC 3263 (KLR) (19 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3263 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KABARNET

CRIMINAL APPEAL E014 OF 2022

TM MATHEKA, J

APRIL 19, 2023

BETWEEN

SILVESTER KIOKO MAITHA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal against conviction and sentence imposed by Honourable E.M Muiru, (PM) in Kilungu Criminal Case No. 186 of 2021 delivered on 23rd September 2021)

JUDGMENT

1. Silvester Kioko Maitha was charged with grievous harm contrary to section 234 of the *Penal Code* – that on March 21, 2021 at 1200 hrs at Kaluli village Kiu sub location Ngaamba location, Mukaa sub-county Makueni County he wilfully and unlawfully did grievous harm to Alex Musau Matheka.
2. The matter went to full trial – where the learned trial magistrate heard 5 witnesses including one eye witness. Upon close of the case for the prosecution – the accused was placed on his defence where he gave defence of an alibi – which the court dismissed.
3. He was found guilty and convicted accordingly and the judgment read on January 23, 2021. On the same date he sentenced the accused to 28 years imprisonment.
4. Aggrieved by both the conviction and sentence, the appellant filed this appeal dated February 2, 2022 on the following grounds:
    1. That the trial court erred in both law and fact by convicting the appellant when the case against him had not been proved beyond reasonable doubt.
    2. That the trial court erred both in law and fact by failing to find and hold that the prosecution's evidence was full of doubts which doubts ought to have been resolved in favour of the appellant.

3. That the trial court erred in law by dismissing the appellant's defence and shifting the burden of proof to the appellant.

4. That the trial court erred in law and in fact by failing to appreciate that indeed the existed bad blood between the complainant and the appellant herein.

5. That the trial court erred both in law and fact by reaching conclusions based on his own opinions rather than on evidence.

6. That the learned trial magistrate erred in law by convicting and sentencing the appellant herein on a charge sheet that was defective.

7. That the learned trial magistrate erred in law by making and delivering a judgment that was not consistent with the provisions of section 169 of the Criminal Procedure Code.

8. That the learned trial magistrate erred in law by failing to find and hold that the appellant defence of alibi which was not falsified or contradicted was watertight and acquit the appellant herein.

9. The learned trial magistrate erred in law by sentencing the accused person to a sentence that was excessive in the circumstances.

5. He also filed written submissions through advocate Andrew Makundi. He submitted on 3 issues:-

   a. The defense of alibi in Kenya and its applicability.

   b. Whether the learned magistrate erred in law and in fact in ignoring the evidence adduced by the accused person and only paid a lip service to the defense of the accused.

   c. Whether the learned magistrate erred in law and in fact in meeting a harsh and punitive sentence, taking into consideration the accused was a first offender.

6. He relied on the following cases – on the 1st issue –

   In the case of *Wangombe v Republic* (1980) KLR 149, the Court of Appeal held as follows:

   > " When an accused raises an alibi as an answer to a charge made against him he assumes no burden of proof and the burden of proving his guilt remains on the prosecution. Even if the alibi is raised for the first time in an unsworn statement at his trial, the prosecution (or police) ought to test the alibi wherever possible; but different considerations may then arise as regards checking and testing it and it is sufficient for the trial court to weigh the alibi against the evidence of the prosecution."

   It is trite that the onus is on the prosecution to displace the defense of alibi after the defense raises it at the trial since as was

   held by the Court of Appeal in *Victor Mwendwa Mulinge v Republic* (2014) e KLR:

   > " It is trite law that the burden of proving falsity, if at all, of an accused's defense of alibi lies on the prosecution."

7. On the 2nd issue counsel submitted on the fact that the accused person was held in police custody for more than 24 hours and the learned trial magistrate did not bother with that yet that was a violation of the a ccused's rights. On the 3rd issue counsel submitted that the sentence was harsh – considering

that the accused was a 1st offender. He used the 2016 *Judiciary of Kenya Sentencing guidelines* and the objectives of sentencing set out thereon.

8. In conclusion, the counsel submitted that the accused was unrepresented yet disadvantaged, that his constitutional rights were violated and the sentence was extremely harsh. He urged the court to quash the trial court's decision.

9. In response, the ODPP filed their submissions and argued the following issue:-

   i. Whether the complainant was assaulted and injured.

   ii. What was the nature of the injuries

   iii. Who assaulted him.

   iv. Whether the defence by the appellant was plausible.

   v. Whether the appellant's constitutional rights were infringed and whether it affected the proceedings.

   vi. Whether the sentence was harsh and punitive.

10. With regard to the appellant's constitutional rights – it was submitted he was arrested on March 21, 2021 and charged on March 24, 2021.

11. The State argued that the appellant had raised the issue but the court never dealt with it. It was argued that the appellant could still pursue the remedy of general damages.

12. On the conviction – the State conceded that indeed the sentence was harsh an extreme. In the circumstance, the issue for determination on whether the appeal has merit on the conviction

    and sentence. The duty of the court is to re-evaluate the evidence on record and draw its own conclusion knowing that it never heard/saw the witness.

13. On the evidence, the case for the prosecution was established by an eye witness – person who was present when the offence was committed. The offence was committed during the day at noon inside her hotel by a person known to her against her regular customer.

14. Infact, the defence has been very careful not to argue against the conviction on record.

15. In my view, has the State established the charge of grievous harm – all the ingredients and .... there was no doubt it was the accused who committed the offence.

16. On the issue of sentence – the State has conceded that it was indeed failed in the circumstance.

17. Section 234 of the *Penal Code* provides that for offence of grievous harm – anyone found guilty is liable to imprisonment for life. Available evidence will demonstrate that the .... are not life imprisonment and death sentences are generally convicted to sentences of between 25 years and 30 years imprisonment.

18. In this case the accused was a 1st offender he had committed grievous harm – did he deserve the ultimate sentence? Evidently, the learned trial magistrate decided to give an ....for the 28 years imprisonment.

19. Granted sentence is at the discretion of the trial court - .... Then the same must be interfered with. –

20. In any event, on appeal – the appeal was empowered to alter the sentence.

21. To enable this court appear at an appropriate sentence I ask that Probation After Care avails to me a social inquiry report on the accused within 14 days hereof.

DATED, DELIVERED AND SIGNED THIS 19TH DAY OF APRIL 2023.

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MUMBUA T. MATHEKA

JUDGE