Mogusu v Republic (Criminal Appeal E099 of 2021)
[2023] KEHC 17770 (KLR) (19 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17770 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL APPEAL E099 OF 2021

A. ONG'INJO, J

MAY 19, 2023

BETWEEN

BENSON MOGUSU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of Hon. C. A. Ogweno (RM) delivered on 26th November 2021 in Mombasa Chief Magistrate Court Criminal Case No. 1836 of 2018, Republic v Renson Mogusu)

JUDGMENT

Background

1. The Appellant, Renson Mogusu was charged with the offence of grievous harm contrary to Section 234 of the *Penal Code*.

2. Particulars were that Renson Mogusu on the 22nd day of September 2018 at Majengo area in Mvita Sub-County within Mombasa County unlawfully did grievous harm to David Waithaka.

Prosecution case

3. PW1, David Waithaka, the complainant, said that on 22.9.2018 at around 8.00 pm, his friend Awash informed him that his sister had been assaulted. That they went to where she was at Saba Saba and that she was with a man called Omar. That when they confronted the man who had attacked his sister, several men joined them and that they pushed and attacked them. He said that he was with Omar who was hit on the head by the accused person who pursued them while armed with a metal bar. That when he went to rescue Omar, the accused hit him on the head and he lost consciousness. The complainant was taken to Mewa Hospital and later to Jocham and finally he was referred to Coast

General Hospital where he was admitted. The court saw a big scar and denoted that the complainant's right hand appeared immobile.

4. The complainant testified that upon reporting the matter to the police, he led the police to where the appellant was arrested when he came back from classes. PW1 testified that the appellant was among the men that they confronted and asked why they had assaulted his sister. He did not know the appellant by name and learnt of his name at the police station.

5. PW2, Dr. Navisa Said, a medical officer at Coast General Hospital stated that she had a P3 Form for David Waithaka filled by Dr. Uba on 15.6.2018 who was on maternity leave but she had worked with her for 4 years and that she knew her handwriting and signature. PW2 informed court that the treatment Ref. No. was 667875 and that the victim upon examination had a deep cut wound extending from the left parietal region to the frontal region. She stated that there was a fracture of the left parietal bone with minimal contutional bleeding. That the approximate age of the injury was 23 days and the probable type of weapon was blunt.

6. PW2 further testified that the victim was issued with analgesics, there was drainage of the haemorrhage, stitching and wound dressing and that the P3 was signed and stamped on 15.10.2018. She stated that she also had a discharge summary from Coast General Hospital, Reference No. 667875 for David Waithaka who was admitted on 23.9.2018 and discharged on 28.9.2018. That Dr. Kenga, the neurosurgeon, noted that the victim had a left parietal fracture associated with minimal haemorrhage and the results were noted on the medical report from Jocham Hospital. PW2 produced images of the CT scan PMFI 1-4 as PExh 1-4.

7. PW3, Omar Abubakar, stated that on 22.9.2018, he was at Sega area at around 8.30 pm and that David's sister was arguing saying she had been assaulted by some men. That he and the complainant confronted suspects who were seated by the roadside on allegations that one of them had assaulted the complainant's sister. That in turn those suspects attacked them and in turn one of the suspects hit him using a metal bar at the back of his head and right arm. That when the complainant went to rescue him, the same man hit him with a metal bar on the head and he lost consciousness. He said that the assailant was the appellant herein.

8. PW3 was also recalled for cross examination by Mr. Bikundu and he said he did not witness Njoki being assaulted and he did not know if she reported the assault. He said that a group of around 10 people attacked them at around 8 pm but he did not record in his statement that the scene was lit. He said he was hit with a stone at the back of his head but he did not take a P3 Form. He also confirmed that he did not know the appellant's name.

9. PW4, Teresia Njoki, the complainant's sister said that on 22.9.2018, at around 8.30 pm, she was heading home around Sega area, she came across several men who started taunting at her and that one of them slapped her twice and she reported to her brother the complainant herein who confronted them. PW4 testified that the appellant was hiding a metal rod behind his back and that he hit the complainant who fell unconscious. She said that the appellant was not known to her but she recognized him because the scene was lit with street lights. PW4 was not present when the appellant was arrested and she did not indicate that the scene was lit or that the appellant hid a metal rod on his back. She also said she did not know the three people who attacked her.

10. PW5, No. 238040, Inspector Dorothy Onditi at Makupa Police Station stated that she received a report of assault on 15.12.2018 from the complainant and asked him to avail witnesses to record statements. She said that the OCS organised for the arrest of the appellant. In cross examination, PW5 said that it was indicated in the P3 Form that the complainant was assaulted by a person not known to him. She said that she did not arrest the appellant and that she did not have the CCTV camera footage of what

happened on the material day. She also said that no identification parade was conducted and no one was willing to record a statement on what happened on the material evening. PW5 further said that the complainant did not tell her what the source of light was and that they did not recover the weapon that was used to assault the complainant. She said that she did not know whether the complainant was drunk but he was also armed with a rungu.

Defence Case

11. DW1, the appellant, said that on 22nd September 2018 at around 8.00 pm while he was at the NYS hostel at Sega in Majengo area, he heard a commotion outside and when he went out, he saw a group of people armed with rungus but he could not identify them because it was dark. That the county askaris dispersed the crowd and he did not see anyone fighting. He said the complainant PW1 and his sister PW4 were unknown to him and that he did not assault them. The appellant said he was arrested at the hostel because he was the only one who was there.

12. DW2, Denver Kaibei testified that on 22nd September 2018 at around 8.00 pm, he was from Kenya Coast National Polytechnic and when he reached Saba Saba area, he saw a crowd of people who were armed with rungus and stones and there seemed to be a fight. He said that there was a fight between NYS students and some civilians, he said that he did not see the appellant and that the scene of crime is dimly lit and that it is densely populated.

13. Based on the evidence by the prosecution and defence, the trial magistrate found the appellant guilty and he was convicted and sentenced to serve five (5) years imprisonment.

14. The appellant was aggrieved by the decision of the trial court and he preferred the appeal herein on the following grounds: -

    1) That the learned trial magistrate erred in law and fact by convicting the appellant when the prosecution failed to prove their case beyond reasonable doubt thereby occasioning the appellant a miscarriage of justice.

    2) That the learned trial magistrate erred in law and fact in convicting the appellant when the essential ingredients of the charge of causing grievous harm had not been proved by the prosecution.

    3) That the learned trial magistrate erred in law and fact by drawing adverse inferences against the appellant thus shifting the burden of proof contrary to the law of evidence.

    4) That the learned trial magistrate erred in law and fact by turning a blind eye to the failure by the prosecution to produce crucial witnesses and documentary evidence thus rendering the conviction unsafe.

    5) That the learned trial magistrate erred in law and fact when he convicted the appellant despite the fact that identification and recognition of the appellant was done by a single witness and was not free from error.

    6) That the learned trial magistrate erred in law and fact when he convicted the appellant despite the fact that identification of the appellant was by dock identification.

    7) That the learned trial magistrate erred in law and fact by raising an issue in her judgment as to whether the circumstances were conducive for a proper identification of the appellant and then failing to address her judicial mind to the facts of the case on circumstances to determine whether the circumstances on the material night were conducive for positive identification thus casting doubt on the material issue and rendering the appellant's conviction unsafe.

8) That the learned trial magistrate erred in law and facts by failing to closely and carefully examine the difficult circumstances and facts in which the identification of the appellant was made.

9) That the learned trial magistrate erred in law and fact by failing to undertake an inquiry and careful testing of the strength, distance, position and intensity of the street lights.

10) That the learned trial magistrate erred in law and fact when she held that the complainant recognized the appellant physically and not by name without the complainant providing physical description of the appellant in his first report to the police and despite the complainant indicating to the police in his P3 that he was assaulted by a person not known to him.

11) That the learned trial magistrate erred in law and fact in relying on the prosecution evidence which was full of afterthoughts as it was contrary to what was contained in the prosecution witness statements.

12) That the learned trial magistrate erred in law and fact by finding that the complainant knew the appellant before the incident despite the material doubts.

13) That the learned trial magistrate erred in law and fact by admitting in her judgment that there were material doubts, inconsistencies and contradictions in eye witness evidence in identification of the appellant and fail to resolve the said doubts, contradictions and inconsistencies in favour of the appellant.

14) That the learned trial magistrate erred in law and facts by basing her judgment on inconsistent, incredible, contradictory and unreliable evidence of the prosecution witnesses.

15) That the learned trial magistrate erred in law and facts in relying in the evidence of prosecution witnesses who were not credible, were lying, contradicting and testifying unbelievable and improbable testimonies in the eyes of a reasonable person.

16) That the learned trial magistrate erred in law and fact when she relied on authority and precedents to prove recognition which had different facts from this case.

17) That the learned trial magistrate erred in law and fact in convicting the appellant despite the fact that there was no cogent, firm and direct evidence proving that the appellant occasioned harm upon the complainant.

18) That the learned trial magistrate erred in law and fact in her failure to ensure that the court remained independent and impartial during the course of the entire proceedings and judgment.

19) That the learned trial magistrate erred in law and fact when she contradicted herself clearly in her judgment to convict the appellant that is not well reasoned and based on suspicion, speculation and summation of alleged facts whose process, logic and reasoning are not explained.

20) That the learned trial magistrate erred in fact and law as she placed reliance by her court on matters not presented before the court as evidence and not on court's record.

21) That the learned trial magistrate erred in law and facts as she completely abdicated the court's mandated role in a criminal trial.

22) That the learned trial magistrate erred in law and facts when she exhibited open bias against the appellant, by helping the prosecution fill the gaps in the proceedings and judgment that

should have been resolved in favour of the appellant rather than relying on the law, procedure and established principles of criminal trial by conducting a fair trial.

23) That the learned trial magistrate erred in law and fact by failing to properly analyse, understand and apply her judicial mind in all the elements required to prove the offence of grievous harm to reach a correct conclusion in law and facts.

24) That the learned trial magistrate erred in law and fact by convicting the appellant despite confirming that there was material flaws in the investigation and that the investigating officer who was in the conduct of this matter was of little help in the case rendering the conviction unsafe.

25) That the learned trial magistrate erred in law and facts when she ignored the evidence by the investigating officer.

26) That the learned trial magistrate erred in law and fact by failing to conduct fair hearing and thus relying on original handwritten proceedings that were either amended, substituted, altered, erased or added to suit the conviction of the appellant.

27) That the learned trial magistrate erred in law and facts when the evidence she noted in her judgment was in total variance with what is contained in the original handwritten proceedings.

28) That the learned trial magistrate erred in law and facts when there is material contained in her judgment that clearly shows she was biased against the appellant.

29) That the learned trial magistrate erred in law and facts by rejecting the appellant's photograph which production was not objected by the prosecution.

30) That the learned trial magistrate erred in law and fact by failing to consider the appellant's final submission in his judgment.

31. That the learned trial magistrate erred in convicting the appellant in total disregard of the appellant's sworn defence and witnesses without cogent reasons.

32) That the learned trial magistrate erred in facts and law when she only admitted evidence that showed that the appellant was guilty and ignored all evidence that pointed to the appellant's innocence.

33) That the learned trial magistrate erred in law and facts in sentencing the appellant to 5 years imprisonment by not considering the appellant's mitigation on non-custodial sentence.

15. This appeal herein was canvassed by way of written submissions.

Appellant's Submissions

16. On whether the appellant was properly identified and recognized as the perpetrator, the appellant cited the case of *Nzaro v Republic* (1991) KAR 212 where the Court of Appeal held that evidence of identification by recognition at night must be absolutely watertight to justify a conviction. That the appellant was only identified by a sole witness, PW1, who never mentioned the name of the appellant to the police yet he claimed that he knew him. That the law on identification by a single witness was set out by the Court of Appeal in *Abdalla Wendo v Republic* [1953] 20 EACA 166 and it was held in the case of *Roria v Republic* [1967] EA 583 that the possibility of mistaken identity with its potential for great injustice always looms.

17. On whether the circumstances were conducive for proper identification, the appellant submitted that the learned trial magistrate proceeded to conclude in her judgment that the complainant having stated that he recognized the appellant physically though not by name, there was no need for an identification parade. He cited the case of *R v Turnbull & Others* [1976] 3 All ER 549 where it was held that recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made. The appellant avers that the learned trial magistrate seemed to have overlooked the centrality of all circumstances of the material night. On the purpose of identification parades, the appellant cited the case of *John Mwangi v Republic* [2014] eKLR where the court held that identification parades are meant to test the correctness of a witness identification.

18. On whether the trial magistrate undertook an inquiry and careful testing of the strength, distance, position and intensity of the streetlights, the appellant averred that there was absolutely no evidence given of the nature and intensity of the lights to assist with identification. That there was no description of the distance the lights were in relation to both the complainant and his attackers, and that the complainant did not disclose from which direction the lights was coming from and that they are not clear whether he had an opportunity of seeing the face of those who attacked him.

19. On whether there was failure to produce crucial witnesses and documentary evidence, the appellant submitted that it was clear that there was material doubt on the manner the appellant was arrested, identified and described by the complainant in the absence of the arresting officer. That moreover, the evidence contained in the CCTV camera was never produced by the prosecution despite a clear testimony on oath by PW5 that there were cameras at the scene.

20. On whether there was drawing of adverse inferences against the appellant thus shifting the burden of proof contrary to the law of evidence, the appellant cited the decision of Mativo, J. in *Elizabeth Waithiegeni Gatimu v Republic* [2015] KLR that the standard of proof ought to be beyond reasonable doubt. The appellant stated that the prosecution failed to discharge its burden on the element of identification whose effect was adverse to the appellant.

21. On whether the prosecution's case was full of afterthoughts, material doubts, inconsistencies and contradictions, the appellant cited the decision of the Court of Appeal in the case of Ndungu *Kimanyi v Republic* [1979] KLR 283 where Madan, Miller and Potter, JJA. held that the evidence of a witness in a criminal case should create an impression in the mind of the court that he is a straight forward person. He submitted that there was no link between the evidence of PW1, PW3 and PW4 and that of PW5. The appellant states that the trial magistrate indicated in the judgment that PW4 testified that they ran away towards different directions. That therefore, if they ran in different directions, there was no chance for PW3 to see the appellant hit PW1. Also, failure of PWI in providing descriptions and identity of the appellant to the police when reporting and then testifying in court that he knew and recognized the appellant was clearly an afterthought. Further, that PW5 indicated that the complainant was armed with a rungu but the legal effect of this issue was never analysed by the trial magistrate.

22. On whether there were material flaws in investigation and ignoring the evidence of the investigating officer, the appellant pointed out that the trial magistrate in her judgment ignored the evidence of the investigating officer who confirmed that she did not visit the scene of the assault to establish whether the accused was properly identified. The Appellant cited the decision of Justice Gikonyo in the case of *R v Harriet Kanorio*, Criminal Appeal No. 155 of 2018.

23. On whether there was variance in proceedings and judgment, the appellant averred that a perusal of the handwritten proceedings show that they have either been amended, substituted, altered, erased

and added to suit conviction of the appellant. The appellant stated that the variance between the proceedings and the judgment means that the judgment was based on suspicion, speculation and summation of alleged facts whose process, logic and reasons are not explained and that the trial magistrate was biased against him.

24. On whether there was rejection of the appellant's produced photograph, the appellant contended that he produced a photograph after marking it for identification and that the said photograph was not objected by the court or prosecution during production. The appellant submitted that since the photograph was formally produced as defence exhibit and not objected, the trial magistrate fell into an error in rejecting it.

25. On whether there was ignorance of the appellant's sworn defence without cogent reasons, the appellant stated that he made a sworn defence that was properly corroborated by DW2. However, the trial court ignored the defence that the appellant was not on the scene and evidence of the dim lights on the scene which was never challenged by the prosecution.

26. On whether there was failure to consider the appellant's mitigation on non-custodial sentence, the appellant submitted that he mitigated and prayed for non-custodial sentence but the trial court did not consider that prayer or even order for a probation report despite the appellant indicating that he was a first offender.

27. The Respondents did not oppose the appeal either by filing grounds of opposition or submissions.

Analysis and Determination

28. This being the first appellate court, it is guided by the principles in *David Njuguna Wairimu v Republic* [2010] eKLR where the court of appeal held: -

> " The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

29. After considering the grounds of appeal, records of the trial court and the Appellant's submissions, the issue for determination is whether the prosecution proved the essential ingredient of identification of the perpetrator of the offence of grievous harm beyond all reasonable doubt.

30. It is not in dispute that the complainant, David Waithaka, suffered grievous harm on 22nd September 2018 following a scuffle along Sega Road in Majengo within Mvita Sub-County. The incident happened between 8 and 9 pm in the night when the complainant was informed that his sister had been assaulted and he went and confronted the man who allegedly assaulted his sister. The complainant said that when they confronted the man who had attacked his sister, several men joined them and that they pushed and attacked them. He said that he was with Omar who was hit on the head by the accused person who pursued them while armed with a metal bar. That when he went to rescue Omar, the accused hit him on the head and he lost consciousness. The complainant was taken to Mewa Hospital and later to Jocham and finally he was referred to Coast General Hospital where he was admitted. The court saw a big scar and denoted that the complainant's right hand appeared immobile.

31. The complainant testified that upon reporting the matter to the police, he led the police to where the appellant was arrested when he came back from classes. PW1 testified that the appellant was among the men that they confronted and asked why they had assaulted his sister. He did not know the appellant by name and learnt of his name at the police station.

32. According to Omar Abubakar, PW3, he and the complainant confronted suspects who were seated by the roadside on allegations that one of them had assaulted the complainant's sister. That in turn those suspects attacked them and in turn one of the suspects hit him using a metal bar at the back of his head and right arm. That when the complainant went to rescue him, the same man hit him with a metal bar on the head and he lost consciousness. He said that the assailant was the appellant herein. Both PW1 and PW3 said that there were streetlights 10 meters from the scene which made them recognize and identify them.

33. Whereas PW1 alleged he knew the appellant physically, PW3 said that the appellant was unknown to him prior to the incident. PW1 was recalled for cross examination and he confirmed that the P3 Form filled in respect to his injuries indicated that he was assaulted by a person not known to him. He said he was assaulted by a group of people at around 8 pm but he did not indicate that there was a source of light at the scene. He also said that the person who reported to him that his sister Njoki had been attacked did not record a statement.

34. PW3 was also recalled for cross examination by Mr. Bikundu and he said he did not witness Njoki being assaulted and he did not know if she reported the assault. He said that a group of around 10 people attacked them at around 8 pm but he did not record in his statement that the scene was lit. He said he was hit with a stone at the back of his head but he did not take a P3 Form. He also confirmed that he did not know the appellant's name.

35. PW4, the complainant's sister said that on 22nd September 2018, at around 8.30 pm, she was heading home around Sega area, she came across several men who started taunting at her and that one of them slapped her twice and she reported to her brother the complainant herein who confronted them. PW4 testified that the appellant was hiding a metal rod behind his back and that he hit the complainant who fell unconscious. She said that the appellant was not known to her but she recognized him because the scene was lit with street lights. PW4 was not present when the appellant was arrested and she did not indicate that the scene was lit or that the appellant hid a metal rod on his back. She also said she did not know the three people who attacked her.

36. PW5, Inspector Dorothy Onditi received a report of assault on 15.12.2018 from the complainant and asked him to avail witnesses to record statements. She said that the OCS organised for the arrest of the appellant. In cross examination, PW5 said that it was indicated in the P3 Form that the complainant was assaulted by a person not known to him. She said that she did not arrest the appellant and that she did not have the CCTV camera footage of what happened on the material day. She also said that no identification parade was conducted and no one was willing to record a statement on what happened on the material evening. PW5 further said that the complainant did not tell her what the source of light was and that they did not recover the weapon that was used to assault the complainant. She said that she did not know whether the complainant was drunk but he was also armed with a rungu.

37. The appellant on the other hand said that on 22nd September 2018 at around 8.00 pm while he was at the NYS hostel at Sega in Majengo area, he heard a commotion outside and when he went out, he saw a group of people armed with rungus but he could not identify them because it was dark. That the county askaris dispersed the crowd and he did not see anyone fighting. He said the complainant PW1 and his sister PW4 were unknown to him and that he did not assault them. The appellant said he was arrested at the hostel because he was the only one who was there.

38. The 2nd Defence witness, Denver Kaibei testified that on 22nd September 2018 at around 8.00 pm, he was from Kenya Coast National Polytechnic and when he reached Saba Saba area, he saw a crowd of people who were armed with rungus and stones and there seemed to be a fight. He said that there was a fight between NYS students and some civilians, he said that he did not see the appellant and that the scene of crime is dimly lit and that it is densely populated.

39. From the evidence of the prosecution and the defence, it is apparent that a scuffle ensued when the complainant who was armed with a rungu confronted a group of people he suspected assaulted his sister. The complainant's sister said that she did not know the three people who attacked her and the complainant must have confronted the wrong people leading to the scuffle with the unknown people. The incident happened on 22nd September 2018 and the appellant was arrested on 18th October 2018 after the complainant was discharged from hospital. The fact that the P3 Form indicated that the complainant was assaulted by unknown people and in consideration that the offence was committed at night, makes this court find that the evidence of identification was not satisfactory.

40. As a was held by the Court of Appeal in the cases of *Nzaro v Republic* [1991] KAR 212 and *Kiarie v Republic* [1984] KLR 739, evidence of identification at night must be absolutely watertight to justify a conviction. PW1, PW3 and PW4 did not know the appellant prior to this incident; the offence was committed at night and there was no indication of the source of light in the witness statement to prove that identification was free from error or mistake. On account of uncertainty of proper identification of the assailant, this court finds that the conviction was not safe. The appeal is allowed, conviction quashed and sentence set aside. The appellant is set at liberty unless lawfully held.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS 19TH DAY OF MAY 2023

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Barile - Court Assistant

Mr. Ngiri for the Respondent

Appellant present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE

Mr. Bukundo Advocate:

We pray for an order for release of security and release of cash bail deposited in the lower court.

Orders:

Appellant surety discharged. Security to be returned. The cash bail in the lower court, the applicant to make an application in the said court.

HON. LADY JUSTICE A. ONG'INJO

JUDGE