Losike v Republic (Criminal Appeal E040 of 2022)
[2023] KEHC 23622 (KLR) (17 October 2023) (Judgment)

Neutral citation: [2023] KEHC 23622 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT LODWAR

CRIMINAL APPEAL E040 OF 2022

RN NYAKUNDI, J

OCTOBER 17, 2023

BETWEEN

MUSTAPHA LOSIKE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

Coram: Before Justice R. Nyakundi

Mr. Yusuf for the State

1. The appellant herein Mustapha Losike was charged with two counts, one being the offence of grievous harm contrary to section 234 of the *Penal Code*. The particulars of the offence were that on the March 29, 2021 at Namoruputh village in Loima Sub- County within Turkana County unlawfully did grievous harm to Mathew Lemuya.

   The appellant was also charged with the offence of breaking into a building and committing a felony contrary to section 306(a) of the penal code. The particulars of the offence were that on the March 23, 2021 at Nakorimunyen dispensary and stole 21 cartons of super cereals plus ujimix valued at Kshs 147,000/= the property of the government of Kenya.

2. He was charged with an alternative count of handling stolen goods contrary to section 322(i) (2) of the penal code. The particulars of the offence were that on the March 29, 2021 at Namorputh village in Loima sub-County within Turkan county otherwise than in the course of stealing, dishonestly retained 13 packets of super cereal plus ujimix and 820 sachets of Rut-f USAID (Plumpy nuts) valued at Kshs 47,366/= knowing or having reason to believe them to be stolen goods.

   He was tried and convicted by the magistrate's court and sentenced to a term of 20 years' imprisonment. It is that judgment conviction and sentence that provoked this appeal by the appellant claiming that:

i. The learned magistrate erred in law and in fact by convicting the appellant against the weight of the evidence on record.

ii. The earned magistrate grossly erred in relying on contradictory, non-corroborative and unreliable evidence by the prosecution witness.

iii. The learned magistrate erred in convicting the appellant despite overwhelming doubts in the prosecution case.

iv. The learned magistrate erred in convicting the appellant on the basis of conjecture and speculation rather than on the basis of solid evidence.

v. The learned magistrate erred in considering facts which were irrelevant and leaving out facts that were pertinent to the case.

vi. The learned magistrate erred in fact and law in failing to acquit the appellant against the grain of evidence

vii. The learned magistrate erred in shifting the burden of proof to the appellant.

viii. The learned magistrate erred in failing to consider the defence evidence.

ix. The learned magistrate erred in granting a harsh, irregular and excessive sentence.

x. The learned magistrate erred in not considering the appellants mitigation before passing sentence.

xi. The both the conviction and sentence have no basis in the law.

3. Parties filed written submissions in support of their arguments, which this court has considered in making its final determination.

Appellant's Submissions

4. It was the appellant's submission that the exhibits provided at the trial court were worthless as there was no exhibit found within his possession as he was foreign to the charges of the prosecution. In essence the appellant submitted that the prosecution's case did not meet the standard required in law.

Respondent's Submissions

5. The respondent submitted that the offence of grievous harm was clearly proved and the claimant stated how he was attacked by the appellant using a stick and a blow fell him down. The respondent further submitted that the clinical officer confirmed that the complainant had been hit by an object, he had a swollen and unwounded right zygomatic region. The wound had a deep cut and bone fracture.

   The prosecution in closing urged this court to maintain the sentence to serve as deterrence to an otherwise common offence in the region.

Analysis And Determination

6. I have considered the appeal and submissions by both parties. I have also read the record of the trial court and the judgment. As a first appellate court, this court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See *Okeno vs Republic [1972] EA 32*.

The appellant in giving his testimony, he stated that on March 29, 2021 he took a client on his boda boda to Loya, he stayed there up to 2:00PM and he took him back and returned the motorcycle to his boss and went back to his home to check on the wife who had delivered 2 weeks prior and also to find out if she had been taken care of. He then went to meet his other sister at the market.

7. On returning home, he met a crowd outside his home they rushed to him and attacked him until he lost consciousness. On regaining, he found himself at Lorugum police station where he was told he had committed an offence, which he had not.

It was the prosecution case that there was a series of theft at Namuruputh where government facilities such as schools and hospitals were broken into and food stuffs stolen. The matter was reported to the area chief and the police, which led to independent investigations until on March 29, 2021 when they were led to the home of the accused person.

On arrival they found the accused wife at home but the accused was not home. The chief and NPR officer decided to camp in the accused home where they had found the stolen food stuffs in one of the houses in the compound. That at around 4:00PM the accused came in the company of two others while armed with Rungus and chains they attacked the sub-chief and NPR officer at his home. The sub-chief sustained injuries on his face. He sustained a right zygomatic bone fracture with deep cut wound.

8. It was also the prosecution evidence that the foodstuff stolen from the health facility were recovered from the accused house. Part of the food was stolen by members of the public during the scuffle.

For the appellant to be convicted of the offence of doing grievous harm contrary to 231 as read with section 234 of The Penal Code, the prosecution had to prove each of the following essential ingredients beyond reasonable doubt;

a. The victim sustained grievous harm.

b. The harm was caused unlawfully.

c. The accused caused or participated in causing the grievous harm.

9. Regarding the first element, bodily 'harm' means any bodily hurt, disease or disorder whether permanent or temporary. The nature of grievous harm is defined by section 4 of The Penal Code as any harm which amounts to a maim or dangerous harm or seriously or permanently injures health or which is likely so to injure health, or which extends to permanent disfigurement or to a permanent or serious injury to any external or internal organ, membrane or sense.

The specificities of 'grievous harm' therefore are;

(1) 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

(2) a mental injury may amount to grievous harm but not to bodily harm

(3) the injury must be 'of such a nature as to cause or be likely to cause' permanent injury to health.

10. In the present case, the prosecution in proving their case called a doctor who produced the P3 form which documented the injuries sustained by the complainant. It was revealed that he sustained a right zygomatic bone fracture with deep cut wound it. This evidence was not controverted by the defence. I take note of the medical report filed and the pictures produced in evidence clearly showing the injuries sustained by the complainant who was injured while in his line of duty. I am therefore convinced that

there is sufficient evidence to prove that the assault occasioned on the complainant resulted in grievous bodily harm within the meaning of section 4 of The Penal code.

The second element required proof that the injury sustained by the complainant was caused unlawfully. This means that the same was without legal justification or excuse. I find that the prosecution proved the same beyond reasonable doubt and as such the injury was caused unlawfully.

11. On the aspect of participation of the appellant, there is credible direct evidence of the complainant as well as the appellant placing the appellant at the scene of the crime as an active participant in the commission of the offence. In addition, the appellant's evidence did not controvert the evidence that he was seen at the scene. He told court that he was as well attacked by a crowd until he lost consciousness.

On the second charge, it was the prosecution's evidence that the foodstuffs stolen from the health facility were recovered from the accused person's house and part of it was stolen by members of the public during the scuffle. In response to that, the appellant in his submissions merely denies the same. I therefore find that the prosecution proved this count beyond reasonable doubt and the conviction on this count was proper. I would, accordingly, find the appellant guilty of the alternative charge of handling stolen property contrary to section 322 (2) of the Penal Code.

The offence of grievous harm c/s 231 of the Penal Code is a felony attracting a maximum punishment of life imprisonment. On the other hand, the offence of handling stolen goods contrary to section 322(i) (2) of the penal code attracts a term of not more than 14 years imprisonment.

Section 322 (1) and (2) of the Penal Code provides as follows:-

1. A person handles stolen goods if (otherwise than in the course of the stealing) knowing or having reason to believe them to be stolen goods he dishonestly receives or retains the goods, or dishonestly undertakes, or assists in, their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so.

2. A person who handles stolen goods is guilty of a felony and is liable to imprisonment with hard labour for a term not exceeding fourteen years.

Notably, Section 322 (3) of the Penal Code provides as follows:-

> 'Any person who has been detained as a result of the exercise of the powers conferred by section 26 of the Criminal Procedure Code (Cap. 75) and is charged with having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained, and who does not give an account to the satisfaction of the court of how he came by the same, is guilty of a misdemeanour.'

12. As regards to sentencing, I am alive to the general principle that the appellate court should only intervene in the sentence where the subordinate court disregarded a material fact, or considered irrelevant factor or that the sentence was manifestly harsh or excessive as to constitute an error of principle (see *Ogolla s/o Owuora v R [1954] EA 270* and *Macharia v R [2003] 2 EA 559*).

In the final analysis, I find that the evidence against the appellant is overwhelming. This appeal has no merit and is hereby dismissed. I uphold the conviction of the appellant for the offence of causing grievous bodily harm contrary to Section 234 of the Penal Code as charged and the offence of handling stolen property contrary to section 322 (2) of the Penal Code. I affirm and uphold the 20-year term of imprisonment meted on the appellant.

DATED AND SIGNED AT LODWAR THIS 17TH TH DAY OF OCTOBER, 2023

In the Presence of

Mr. Yusuf for the state

Appellant

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R. NYAKUNDI

JUDGE