



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 14 OF 2016

(From Original Conviction and Sentence in Kakamega CMCCRC No. 1266 of 2013 (Hon. J Ong’ondo, Senior Resident Magistrate) of 25th January 2016)

FREDRICK SHIANGALA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant herein has proffered this appeal challenging his conviction and sentence in Kakamega CMCCRC No. 1266 of 2013, of the offense of causing grievous harm, contrary to section 234 of the Penal Code, Cap 63, Laws of Kenya, and was sentenced to life imprisonment. He had been charged, jointly with another, of robbery with violence contrary to section 295, as read with section 296(2) of the Penal Code. The particulars were that on 25th June 2013, he and others while armed with dangerous weapons, being *pangas*, they had robbed Rosemary Muhihayo of a mobile phone, and used violence immediately after the time of the robbery. After taking evidence, the court was not satisfied that robbery with violence had been proved, the appellant was convicted instead of grievous harm.

2. The duty of a first appellate court was stated by the Court of Appeal, in *Gabriel Kamau Njoroge vs. Republic* (1987) eKLR (Platt, Apaloo JJA an Masime Ag JA), in the following words:

“ ... it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect.”

3. The facts of the case, as presented in the trial court, are that on at 7.30 PM on 25th June 2013, the appellant and another knocked at the door to the house of PW1, when she was having dinner with her children. The appellant grabbed her. When she asked what she had done, and she was hit by the appellant’s co-accused on the head. She fell down unconscious. She came to find her children crying, and neighbours streaming in. She told her rescuers who her attackers were, and she was rushed to hospital. PW2, a child of PW1, of thirteen years, identified the appellant as one of the assailants. He said that appellant attacked PW1, and handed her over to another person. When he heard PW1 screaming outside, he rushed to where she was. He found her soaked in blood. PW3 received the first report, and organized help for PW1. PW4 arrested the appellant. PW5 treated PW1, and classified her injuries as grievous harm. PW6 was one of the first responders to the distress call by PW1. PW7 was the investigating officer. The appellant was put on his defence. He gave a sworn statement, and described how he was arrested on 27th June 2013.

4. The appellant was aggrieved by the conviction and sentence, and proffered the instant appeal, through his petition of appeal dated 8th February 2016, raising several grounds of appeal: that the evidence was malicious fabricated farfetched and uncorroborated; there was no sufficient light for identification purposes; there was a systematic planned and implemented strategy to implicate him of the crime; there was an afterthought on the part of the prosecution witnesses; and his *alibi* was not considered, and the sentence imposed was harsh. He later filed another petition of appeal dated 16th May 2019, where he raises three grounds, where he says that the provisions of Article 50(2) of the Constitution were not adhered to, the circumstances for identification were not suitable, and crucial witnesses were not called.

5. The appellant put in written submissions in support of his case. The respondent also put in written submissions. I have read the written submissions placed in the record before me, and I have noted the arguments made in them. I shall examine each of the grounds raised and argued in turns, starting with the initial grounds of 2016.

6. I will take the first, third and fourth grounds together. It is argued that the trial court ought to have noted and found that the evidence was fabricated, malicious, farfetched, uncorroborated, among others. The appellant has not dealt with this in his written submissions. PW1 was hurt in the process. She sustained life-threatening injuries. I do not, therefore, see the foundation that the evidence upon which the instant

case could be said to be malicious, fabricated, farfetched or uncorroborated. I shall talk about identification herebelow, but let me say that the evidence placed the appellant at the scene. He was the one who entered the house of PW1, grabbed her and passed her on to his accomplice. She had nothing to gain from framing the appellant, for he had not given any reason as to why that should be so. There was also nothing on record to show that there was a plan and strategy to implicate the appellant of the crime. There was also no material to show any afterthought on the part of the witnesses.

7. The second ground turns on identification. The appellant argued that the circumstances did not allow for a positive identification of the assailants, specifically with respect to the light. The incident happened in the early evening. PW7 said it was 7.00 PM. Judicial notice can be taken of the fact that 7.00 PM is still early, and not so dark. Identification was still possible at that early evening hour in the absence of any light. PW1 said there was light, from a tin lamp. She said that she and her children were having supper, certainly that was not being done in darkness. I am persuaded that there was sufficient light for identification purposes. The appellant and his co-accused were relatives of PW1. PW1 said the appellant was her in-law, and they stayed in the same compound. That would mean that that was not even a case of identification but recognition, as the appellant was known to the complainant, not just physically, even by voice. The appellant was said to have spoken to his co-accused, telling him that he had gotten hold of PW1, which gave PW1 a chance to hear his voice, and recognize it. She said, in her testimony, that she knew his voice. The appellant was also identified by PW2, the older child. He identified him as his uncle, a brother to his father, again based on recognition.

8. In *Mwendwa Kilonzo & another vs. Republic* [2013] eKLR (Maraga, Nambuye & Mwera JJA), the Court of Appeal was persuaded that torchlight was adequate for identification purposes. *Maitanyi vs. R.* [1986] KLR 198 (Nyarangi, Platt & Gachuhi JJA) and *Anjonini and others vs. The Republic* [1976-1980] 1 KLR 1566 (Madan, Law & Potter JJA) stressed on the superiority of recognition evidence over mere identification. The trial court was, therefore, not at fault when it found that the appellants were positively identified. The trial court was alive to all these factors and took them to account, guided by *Anjonini and others vs. The Republic* [1976-1980] 1 KLR 1566 (Madan, Law & Potter JJA) and *Karani vs. R* [1985] KLR 290 (Nyarangi JA, Platt & Gachuhi Ag JJA). The trial court did not err with regard to identification.

9. The sixth ground is that his *alibi* defence was not considered. The appellant did not offer any *alibi*. The ground is, therefore, baseless. In examination-in-chief, he talked only about his arrest on 27th June 2013. During cross-examination, he said he could not remember anything about 25th June 2013. There was no *alibi* at all for the trial court to take into account.

10. The other ground is that the sentence was harsh. PW1 was badly injured, she lost consciousness. PW5, the clinical officer who attended to her, testified that she had a fracture of the femur, which necessitated surgery to insert a K-nail. She classified the injuries as harm. Those were life-threatening injuries. The sentence appropriate, in the circumstances, had to be one that was deterrent and punitive. The persons who perpetrated that on PW1 had no mercy for her. She was defenceless, attacked at her own home, in front of her own little children. The appellant has not submitted on this in his written submissions. I note though that the appellant did not lift or lay his hand on PW1, and the injuries were actually inflicted by his co-accused. However, the two were acting in concert, and he is liable for the acts of his co-accused done in execution of a common enterprise. To protect defenceless members of the public such as PW1, a tough or stiff sentence, like the one imposed by the trial court, is merited. I shall not interfere with it.

11. With regard to the second set of grounds, filed in 2019, there are only two new issues, compliance with Article 50(2) of the Constitution and the omission to call crucial witnesses. The other issue is on identification, which I have dealt with comprehensively above.

12. On Article 50 of the Constitution, the appellant has not elaborated on how the same was violated or not complied with. In the grounds, he merely says that the trial was conducted unfairly. In the written submissions, he says that the charge ought to be read in a language that he understands. He does not aver that the charge was read in a language that he did not understand. He does not say which language he understood, and which the court should have used to read the charges to him. The record indicates that the language used was Kiswahili. When the charges were read, the appellant responded in Kiswahili. The witnesses testified in Kiswahili, and at no time did the appellant raise issue with that. He made his sworn statement in Kiswahili. I, therefore, do not see any basis for this ground.

13. The last ground is that the prosecution failed to call crucial witnesses. He has in mind the responders who came to the rescue of PW1. Firstly, for the purpose of placing the perpetrators on the scene, the most critical witnesses were the persons who were present. The eyewitnesses. The prosecution called two, PW1 and PW2. They identified the attackers, and explained what each of the assailants did. Without any other evidence, the testimonies of these two would be adequate. It is not the number of witnesses that matters, but the quality of the evidence. That of PW1 and PW2 was critical, and sufficient. They were very clear on who attacked who, and did what. That is all what is required. But the record indicates that the prosecution called responders. PW3, the Assistant Chief, was informed, he did not visit the scene, but he coordinated the response from afar. He called a clan elder, the area Chief and the police. PW1 was taken to hospital by the clan elder called by PW3. PW6 was a relative, a niece of PW1. She heard the screams from PW1, and rushed to the home. She found the children, but not PW1. She searched for her and found her in a maize farm lying, unconscious. There is no foundation for the ground or submission that there were no responders called to give evidence.

14. Overall, I am not persuaded that the appellant has presented a case on appeal to warrant disturbance of the verdict of the trial court. I shall, therefore, affirm the conviction and confirm the sentence. The appeal is, therefore, without merit, and I do hereby dismiss the same.

PREPARED, DATED AND SIGNED AT KAKAMEGA ON THE 10TH DAY OF DECEMBER, 2021

W MUSYOKA

JUDGE

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 4TH DAY OF FEBRUARY, 2022

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Mr. Mwangi, instructed by Director of Public Prosecutions, for the respondent

Fredrick Shiangala, in persons, appellant