Emoit v Republic (Criminal Appeal 11 of 2017)
[2019] KEHC 9485 (KLR) (7 March 2019) (Judgment)

George Emoit v Republic [2019] eKLR

Neutral citation: [2019] KEHC 9485 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CRIMINAL APPEAL 11 OF 2017

KW KIARIE, J

MARCH 7, 2019

BETWEEN

GEORGE EMOIT ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the original conviction and sentence in Criminal case No. 300 of 2015 of the Chief Magistrate's Court at Busia by Hon. M.A Nanzushi – Senior Resident Magistrate)

JUDGMENT

1. George Emoit, the appellant herein, was convicted in three counts. In count one he was charged with an offence of malicious damage to property contrary to section 339(1) of the Penal Code, in count two he was charged with an offence of cutting down trees contrary to section 334(c) of the Penal Code and in count three he was charged with an offence of setting fire to a crop of cultivated produce contrary to section 334(a) of the Penal Code.

2. The particulars of the offences were that on 30th January 2015 at Okiludu village, in Chakol Division of Busia County, jointly with others not before court wilfully and unlawfully damaged four semi-permanent houses valued at Kshs. 40,000/= the property of John Osobolo Masika.

   In count two, the same day and at the same place, jointly with others not before court wilfully and unlawfully cut down various species of trees valued at Kshs. 47,300/= the property of John Osobolo Masika.

   In count three, the particulars were that on the same day and at the same place, jointly with others not before court wilfully and unlawfully set on fire to ½ hectare of sugar cane plantation valued at Kshs.100,000/= the property of John Osobolo Masika.

3. The appellant was committed serve 12 months on community service. He now appeals against both conviction and sentence.

4. The appellant was represented by the firm of J.P Makokha & Company Advocates. He raised five grounds of appeal as follows:

    a) That the learned trial magistrate misdirected herself in law and in fact by not appreciating that the prosecution failed to dispel the appellant's alibi.

    b) That the learned trial magistrate misdirected herself in law and in fact by not appreciating that the evidence of the prosecution witnesses 1 &2 as to the time of the alleged offence was committed and the identification of the appellant was not corroborated at all.

    c) That the learned trial magistrate misdirected herself in law and in fact by not appreciating the contradictions in the entire evidence of PW1 &PW2.

    d) That the learned trial magistrate misdirected herself in law and in fact by not appreciating that the evidence of PW3 regarding her role in maliciously setting up and implicating the appellant due to perceived prior disagreements.

    e) That the learned trial magistrate misdirected herself in law and in fact by not attaching requisite weight on the evidence of DW1 &DW2 who testified and denied to ever having been at the alleged scene of crime.

5. The appeal was opposed by the state through Ms. Ngari, learned counsel.

6. The facts of the prosecution case were briefly as follows:

    On the Material day, a crowd of about twenty people descended on the home of the complainant and damaged his house, set his sugar cane on fire and cut down some trees. He identified three people, one of them the appellant

7. The appellant denied to have participated in the offences and pleaded an alibi.

8. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of Okeno vs. Republic [1972] EA 32.

9. This matter was partly heard by Hon. Agutu. The record is silent as to why Hon. M.A Nanzushi took over. Whatever the reason for the taking over by Hon. Nanzushi, it was incumbent upon her to comply with section 200 (3) of The Criminal Procedure code. The section provides:

    (3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.

    This is a mandatory provision which is not optional in compliance. The Court of Appeal in the case of Henry Kailutha Nkarichia & another v Republic [2015] eKLR held as follows:

    The requirement that the court inform the accused of the right to recall witnesses is plain, admitting to no obscurity. The duty on the court is mandatory and a failure to comply with it wholly vitiates the trial since it goes to the very heart of an accused person's right to a fair trial. We need do no more than reiterate what we recently stated in David Kimani Njuguna vs.

Republic Nakuru Criminal Appeal NO. 294 of 2010 after a review of several decisions of this Court on the subject;

"All of these decisions declare that the provisions of Section 200 (3) of the Criminal Procedure Code are mandatory and a succeeding Judge or Magistrate must inform the accused person directly and personally of his right to recall witnesses. It is a right exercisable by the accused person himself and not through an advocate and a Judge or magistrate complies with it out of statutory duty requiring no application on the part of an accused person. Further, failure to comply by the court always renders the trial a nullity".

When a trial is declared a nullity, the option is to order for a retrial if the court is satisfied that but for the failure to comply with the statutory requirement there was ample evidence to convict.

10. I have perused the proceedings in the trial court and I am satisfied that there was no sufficient evidence on which to base a conviction for the appellant and his co-accused.

11. When an accused pleads an alibi defence, he does not assume the burden to prove the same to be true. The Court of appeal in the case of Kiarie v Republic [1984] KLR 739 where it was held:

An alibi raises a specific defence and an accused person who puts forward an alibi as answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is no unreasonable. The judge had erred in accepting the trial magistrate's finding on the alibi because the finding was not supported by any reasons. It was not possible to tell whether the correct onus had been applied and if the prosecution had been required to discharge the alibi.

In this case, the learned trial magistrate did not weigh the alibi defence against the evidence on record. Had she done so, it is unlikely that she would have convicted the appellant or any of his co-accused.

12. From the evidence of John Mosobolo Masika (PW1) the incident took place from around 6.30 p.m. However, his wife Rispa Alapat Wanyonyi (PW2) said the incident took place 7.30 p.m. It would appear that this incident took place later than the time the complainant and his wife testified to. The evidence of Jane Nekesa Odola (PW3) though erroneous indicated as PW4) who is the area chief said when she went to the scene in the company of police, it was at about 8.30 p.m. and destruction was still going on. If we assume that this was fair estimation of time, we can infer from the evidence that the destruction by the crowd was from about 7.30 p.m. and not earlier.

13. The prosecution did not bother to elicit evidence from the witnesses as to how they were able to recognize the appellant and his co-accused persons. The evidence of Jane Nekesa Odola (PW3) was that it was dark when she arrived at the scene. In her evidence Rispa Alapat Wanyonyi (PW2) testified that when she heard many people screaming and headed to their home she ran away. She purported to have recognized the appellant and his co-accused from a distance of 15 meters away. The prosecutor in court did not elicit evidence as to what assisted her to see and recognize these people in a dark night. In the celebrated case of R. v Turnbull [1976] 3 ALL ER 549 as follows:

Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone who he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

The purported recognition in this case was not explained as to how it came to be made in the prevailing circumstances. It cannot be relied upon.

14. There is an issue of credibility on the evidence of John Mosobolo Masika (PW1) and that of his wife Rispa Alapat Wanyonyi (PW2). According to PW1, when the incident started, he was in the home of a neighbour called Francis. He went home and told his wife and children to run away. However, according to Rispa, when the incident started, she was with her husband in the house. The court of appeal in the case of Ndungu Kimanyi vs. Republic (1979) KLR 282 the court of appeal held:

    The witness in acriminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

    It would be unsafe to rely on the evidence of the complainant and his wife.

15. It is apparent from the evidence on record that the appellant and his co-accused were singled out for they were related to Africanus Etyang who was alleged to have died in prison. The complaint by PW1 had landed him in prison. It is trite law that however strong a suspicion may be, no conviction can be based on it. The Court of Appeal in the case of Sawe v Republic [2003] KLR 354 held inter alia:

    Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.

16. If I were to order a retrial, no conviction can be founded on the evidence on record. I therefore quash the conviction of the appellant and his co-accused and set aside the sentence if not already served.

DELIVERED AND SIGNED AT BUSIA THIS 7TH DAY OF MARCH, 2019

KIARIE WAWERU KIARIE

JUDGE