REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCRA NO. 23 OF 2018

JOHANNA SIMON NTHIGA alias KIMATHI MUKUNYI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence by Senior Principal Magistrate HON. P.N Maina at Marimanti in the Principal Magistrate's Court Criminal Case No. 416 of 2017 dated 25h July, 2018.)

J U D G E M E N T

1. **JOHANNA SIMON NTHIGA alias KIMATHI MUKUNYI** was charged with the offence of Grievous Harm contrary to **Section 234** of the **Penal Code** vide ***Marimanti Principal Magistrate's Court Criminal Case No 416 of 2017***.The particulars as per the charge sheet presented to the trial court are that on the 4th March 2017 at Nthanjeni village, Gikinyo Location Tharaka North, the Appellant unlawfully maimed Juliet Kanjagi Nkanga, the complainant in the case. The Appellant denied committing the offence but after trial, he was found guilty, convicted and sentenced to serve 20 years in imprisonment. He felt aggrieved by both the conviction and sentence and preferred this appeal.

2. The prosecution's case against the appellant, indicated that the complainant,an old lady aged 70 years was attacked at around 9 pm by someone she identified as the Appellant on 4th March 2017. According to the evidence on record, she was familiar with the Appellant as he lived not very far from her residence and that on the material date, the Appellant went to her house and removed her money she had kept under her mattress which was Kshs.10,000/- proceeds from a cow she had sold earlier in the day and that when she raised an alarm, the Appellant took a stone and hit her on the eye before bouncing on her and beating her using a machete. It was her evidence that she fell unconscious and later came to hospital at Mukothima. The evidence on record shows she was treated but eventually lost the eye that was hit.

3. The medical evidence (P3- P. Exhibit 2) tendered by Emilio Mwenda Gaicho (PW6) indicated that the complainant suffered injuries classified as grievous harm.

4. The complainant's evidence on who assaulted her was corroborated by a neighbour known as **SIMON GIKANDI (PW2**) who told the trial court that he went for the rescue when he heard the complainant (PW1) raising an alarm. He further told the trial court he was between 30-50 metres away from the complainant's house when he heard screams and when he rushed to the scene he found the Appellant standing next to the complainant who was then lying down and that he was armed with a machete.

5. The above evidence was further corroborated by Abraham Mureithi Kanguo (PW3) who stated that he also heard screams as he was going to check what was happening he met the appellant on the way armed with a machete and that he reportedly warned him not to shout or scream. It was his evidence that he only met the accused walking in the opposite direction as the other people were going to where the screams had emanated from.

6. When placed on his defence the Appellant denied committing the offence and termed the evidence linking him with the offence as falsehoods. He told the trial court that the complainant had called him on the material date and requested him to take her to hospital as she had been hit on the eye. He told the trial court that he saw the complainant and that she was okey and had no blood stains and that he told her that he was not available. It was his assertion that the complainant framed him because he declined to take her to hospital. According to the Appellant the complainant fell and was hurt by a tree.

7. The Appellant was supported in his defence by Robert Gitonga (DW2) who told the trial court that he was the one who took the complainant to hospital for treatment. He further averred that the complainant reportedly told him that he had felled down while drunk. He further told the trial court that he took her to Mukothima. According to him, the complainant got hurt on 3rd March, 2017 on a Saturday though he later changed and said it was a Friday.

9. The other defence witness called by the Appellant, Peter Murimi (DW3) also testified and told the trial court that he was with the Appellant on 3rd March 2017 the whole day and that they parted company with him around midnight. He was however unclear on whether

he was with the Appellant on 4th March 2017 which was the material date. In one instance he stated that he was with him on 3rd March 2017 but under cross-examination he stated that he was again with the Appellant on 4th March 2017.

10. The trial court in its judgment found that the prosecution's case had been proved beyond reasonable doubt and found the defence to be inconsistent and fictitious. The Appellant was dissatisfied with that finding and preferred this appeal raising the following grounds in his petition of appeal namely:-

i. That the learned trial magistrate's judgment was against the weight of evidence.

ii. That the learned trial magistrate erred by not taking into account the evidence of the Appellant.

iii. That the prosecution's evidence at the trial was false and unreliable.

iv. That the prosecution's case was not proved beyond reasonable doubt.

v. That the learned trial magistrate erred by disregarding the Appellant's evidence and that of his witnesses.

vi. That the learned magistrate erred in law in reaching a conclusion that was not supported by facts.

vii. That the learned magistrate erred in fact and law when he found that the appellant was positively identified.

viii. That the sentence was excessive in the circumstances

ix. That the judgment and the entire finding was bad because it was against the law and evidence on record.

11. The Appellant in this appeal has filed, for reasons best known to him, two set of submissions. He filed one dated 19th January, 2019 through learned counsel Gregory Mutuma Muthuri and his own undated submissions filed on 30th January, 2019.

12. In his brief submissions dated 19th January, 2019 the Appellant has pointed out that the only eye witnesses called to testify are children of the complainant. He contends that the neighbours who came and took the complainant to hospital for treatment should have been called to testify.

13. The Appellant has also questioned how the witnesses identified him when the incident occurred at night. He has further contended that he could not have waited for the witnesses to come and identify him at the scene upon committing the offence adding that if he was culpable he could have ran away.

14. The Appellant has contended that his defence was not considered and that the existence of a grudge with PW4 was not considered by the trial court.

15. He has further contended in his submissions filed on 30th January, 2019, that the prosecution's case is characterised by inconsistencies and contradictions. He has and has pointed out that PW1 first stated that she saw the Appellant as she removed her pot from the fire and that as she raised an alarm she was hit and on the other hand she was not aware that the Appellant had entered the house. In that regard, the appellant asserts that complainant was not quite clear on when she was hit.

16. The Appellant has further pointed out that complainant stated that she was hit by the Appellant with a stone and attacked with a machete but the only injury revealed was on her eye. This in his view should have created doubt about the truthfulness of her testimony.

17. The Appellant has also pointed out that the evidence of PW6 was inconsistent with the evidence of PW1 in that PW6 reportedly stated that PW1 told him that she was hit by a stick and yet PW1 stated in court that she was hit by a stone.

18. The Appellant further states that the investigating officer P.C Ronald Ibwaga contradicted himself on when the assault report was reported at Gatunga Police Station as he stated that the report was made on 3rd March 2017 and later changed and stated that the report was made on 17th March 2017. He has also faulted the investigating officer for not bringing the stone used to assault the complainant as an exhibit in court. It is his contention that the omission affected his credibility.

19. He further states that his defence was not scrutinized by the trial court. It is his submission that he felt he had only wronged the complainant by failing to take her to hospital and that it was on that basis that he had asked to be pardoned by the trial court. He contends that his defence that the complainant had fallen and injured herself was corroborated by Robert Gitonga (DW2).

20. The State/Respondent has opposed this appeal vide written submissions dated 29th January, 2019.The Respondent has supported both conviction and sentence passed by the trial court against the appellant.

21. The Respondent asserts that the complainant knew the Appellant well and saw him trying to steal her money and that is why she raised alarm which made her to be hit on the eye.

22. The Respondent contends that the complainant (PW1) knew the Appellant well and that PW2 found the Appellant at the scene of crime

while PW3 met him on the road walking away with a machete in his hand as other neighbours rushed in for the rescue.

23. On sentence, the Respondent contends that the sentence was not excessive as **Section 234** of the **Penal Code** provides for life imprisonment. The Respondent has asserted that the sentence was justified and has urged this court not to interfere submitting that this court can only interfere if wrong principle was used or where an important factor was overlooked or where the sentence is manifestly excessive.

24. **Analysis and determination**

It is now well settled that this being a first appellate court, the mandate of this court this stage is to re assess and re-evaluate the evidence tendered during trial and come up with own conclusion having in mind that it does not have the benefit of having seen or heard the witnesses testify as the trial court.

This appeal has raised the following issues for determination namely:-

i. **Whether or not the defence was considered.**

ii. **Whether identification of the appellant was positive**

iii. **Whether the prosecution's case was proved beyond reasonable doubt.**

iv. **Whether the sentence was excessive.**

25. **(i) Whether the defence was considered at the trial.**

The Appellant in his defence asserted that he was not responsible for the injury that the complainant suffered. In fact he went to the extent of suggesting that the complainant injured herself after she fell down and the narrative given by DW2 (Robert Gitonga) was that the complainant fell down because she was drunk.

26. The Appellant also states that his defence of *alibi* was disregarded. I have however looked at the judgment from the lower court and find that the trial court clearly considered the defence of *alibi* and found that the evidence of DW3 (Peter Murimi) did not stand the test of law. The trial court found that also contradicted himself in his defence in that at one point he stated that he was with the complainant and at another he said he was not with her.

27. This court has re-assed the defence of alibi by the Appellant and has noted that in his sworn statement of defence, the Appellant did not specifically come out strongly that he was not at the scene of crime. He raised no tangible alibi and it is only Peter Murimi (DW3) who attempted to offer an *alibi* for him. However DW3 was somewhat confused as to whether he w as with the accused on 3rd March 2017 or 4th March 2017. Furthermore he did not give tangible evidence on where they were with the accused on the material date and time and what they were doing. As I have observed the Appellant himself did not state categorically that he was with DW3 at the material time.

28. It is however important to note that an accused person does not assume the burden of proof as that burden is always with the prosecution even where he/she raises alibi as a defence. In the case of ***Juma Antony Kakai -vs- Republic [2018] eKLR***, the court citing with the approval the decision in ***Wang'ombe -vs- Republic [1976-80) 1 KLR 1683*** observed as follows:-

> ***"When an accused person raises an alibi as an answer to a charge made against him, he assumes no burden of proof and the burden of proofing 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 ought to test the alibi wherever possible but different consideration 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 prosecution."***

29. This court has considered the defence of *alibi* which has only been brought up strongly in this appeal rather during trial and finds that the defence could not stand the weight of the prosecution's case. At least 2 other witnesses (PW2) and PW3) saw the Appellant at the scene besides the complainant. The Appellant as I have observed above was not very clear on whether or not he was at the scene of crime. On one hand he stated;

> ***" On 4th March 2017, she called me to her house and asked me to look for a motorcycle to take her to hospital since she had been hit on the eye. I informed her that I will not be available ....."***

The Appellant on the other had stated under cross-examination,

> ***" She sent a man from market to come and call ..... she lives alone but has neighbours. She wanted me to help her..... when I went to see her, she had no blood stains."***

With the above statements on oath by the Appellant it is clear that the defence of *alibi* was clearly not consistent with what the defence of alibi and that defence therefore could not hold any water.

30. The Appellant's contention that PW4 (Evangeline Karimi) gave false evidence because she had a grudge against him in my view does not hold any water for two reasons:-

a) In the first place, PW4 did not give any incriminating evidence against the Appellant and the probative value of her evidence on the overall weight of prosecution's case was insignificant.

b) The Appellant did not lay any basis for any existence of a grudge between her and him at the trial. The Appellant did not challenge her during trial in regard to their relationship by way of cross-examination.

31. The Appellant's allegations that PW1 was upset with him and gave false evidence because he declined to take her to hospital and that it was against their culture to turn down a request from an elderly person in my view is a bit far-fetched. The Appellant certainly cannot fault the trial court for disregarding such contention in his defence even if the same was raised became the same was never raised. It is an afterthought.

32. **(ii) Whether identification of the Appellant was positive**

The Appellant has submitted that the incident occurred at night and that it was not possible to positively identify him. However there is no dispute that the Appellant was familiar with the complainant and both PW2 (Simon Gikando) and PW3 (Abraham Mureithi Kanguo) because they are all neighbours. PW1 gave clear evidence on what transpired on the fateful night and she stated that she positively identified the appellant. The Appellant did not challenge the complainant on the identification aspect. PW2 stated that he found the Appellant standing next to the complainant and identified him while PW3 met him on the way going to the opposite direction as others went to the complainant to rescue her after hearing screams from her. PW3 stated that the Appellant had a machete on one hand and even warned him to stay quite. It is on the basis of the evidence three witnesses that the trial court found that identification was positive and having re-evaluated and analysed the evidence my own conclusion is similar. The identification of the Appellant was beyond doubt. The appellant did not challenge any of the 3 witnesses on the aspect of identification.

33. **(iii) Whether the prosecution's case was proved beyond reasonable doubt.**

The Appellant was charged with the offence of causing grievous harm contrary to **Section 234** of the **Penal Code.**

The provision of **Section 4** of the **Penal Code** defines grievous harm 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 any permanent or serious injury to any external or internal organ, membrane or sense. The injury suffered by the complainant (loss of an eye) was clearly grievous. The complainant was seriously injured on her eye and had to undergo a surgery where she eventually lost the eye. The P3 (P. Exhibit 1) tendered by Emilio Mwenda Gaicho (PW6) , a clinical officer at Tharaka District Hospital, indicated that the injury suffered by the complainant was classified as ***'grievous''.*** The complainant obviously suffered permanent disfigurement and is without doubt grievous as per **Section 234** of the **Penal Code.**

34. I have already found that the question of identification of the culprit was positive and it follows therefore that the evidence tendered by the prosecution against the Appellant in my considered view established beyond reasonable doubt that the complainant suffered an injury classified by law to be grievous by dint of **Section 234** of **Penal Code**. The evidence tendered by the prosecution sufficiently established beyond doubt that the Appellant was responsible for those injuries. The complainant stated that she had sold her cow and the Appellant may have gotten a whiff about the same and that is why he went and stole the money and as he was doing so the complainant raised an alarm which made the Appellant hit her with a stone perhaps with a view to silence her which he did but it was too late as the neighbours had heard the screams and rushed to find the complainant lying unconscious with Appellant standing beside her. I find the evidence tendered by the prosecution was overwhelming and the defence offered was weak, inconsistent contradictory and did not shake the prosecution's case.

35. **(v) Whether the sentence against the Appellant was too harsh.**

It is clear from the provision of **Section 234** of the **Penal Code**, that the sanction provided by law for that sort of offence is life imprisonment. The learned trial magistrate exercised his discretion and sentenced the Appellant for 20 years imprisonment upon considering the mitigating factors. As a principle, this court sitting as an appellate cannot interfere with such discretion unless it is shown that that in exercising that discretion the trial court took into consideration an irrelevant factor or omitted a relevant one or that the sentence passed was manifestly excessive. In the case of ***Benard Ochieng Opiyo -vs- Republic [2015] eKLR***, the court observed as follows:-

> ***" As to whether the sentence was excessive, 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."***

This court has considered all the mitigating factors and find that the injuries caused to the complainant were serious and given her age, the Appellant really should not be talking about punitive nature of the sentence. He ought to be showing more remorsefulness than I was able to deduce from his conduct when he appeared for the mention of this appeal and indeed upon being found guilty.

The only thing that the Appellant mentioned which cannot escape the attention of this court is the way the trial court cancelled his bond upon being found to have a case to answer. The right to presumption of innocence under **Article 50(2) (a)** cannot be taken away from an accused person until the contrary is proved beyond reasonable doubt. The record of proceedings indicate that the trial court cancelled the Appellant's bond upon finding that he had a case to answer pursuant to the provisions of **Section 211** of **Criminal Procedure Code**. That was erroneous and the Appellant's right was infringed and as a result spent almost one month in prison while awaiting the verdict of the trial court on whether he was guilty or not. The trial court ought not to have shown that it had predetermined that that he was going to return the verdict of guilt and I find that it was erroneous for him to do so. It is on that basis that I am inclined on that basis that the Appellant's sentence by 2 years to mitigate against that wrong.

In conclusion, therefore, this court finds no merit in this appeal on conviction. Conviction is for the aforestated reason upheld. On sentence I

would not have interfered with the discretion of the trial court but owing to the error I have observed above, a perception was created in the mind of the Appellant that the trial court was harsh on him and on that basis I set aside the sentence of 20 years imprisonment and in the place I hereby sentence the Appellant to 18 years imprisonment.

Dated, signed and delivered at Chuka this 17th day of June, 2019.

R.K. LIMO

JUDGE

17/6/2019

Judgment signed, dated and delivered in the presence of the Appellant in person and Momanyi for State/Respondent.

R .K. LIMO

JUDGE

17/6/2019