



REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

HIGH COURT CRIMINAL APPEAL NO 78 OF 2017

B E T W E E N:

NASIBU AMIRI JOSEPH.....APPELLANT

Versus

THE REPUBLIC RESPONDENT

JUDGMENT

(Being an Appeal from the original conviction and sentence from the PM's Court, Taveta in Criminal Case No 20 of 2017 delivered on 23rd August 2017)

1. The Appeal before the Court was commenced by a Petition filed on 2nd October 2017 three months after the original conviction and sentence. The Appellant was granted leave to appeal out of time on 2nd November 2017 by Hon Lady Justice J Kamau.
2. The Grounds of Appeal that Appear in the Memorandum of Appeal are:
 1. *I pleaded not guilty to the charges*
 2. *The prosecution failed to bring any key witnesses before honourable court to prove their charges.*
3. The Applicant states in his petition that "*I the under mention do most humbly beg leave to appeal against both the conviction and sentence for an offence of grievous harm passed upon me by the chief/principal/senior resident/1st class/and 2nd class magistrate PM's Taveta. In criminal case no. 20/017 at the PM's court at Taveta, judgment dated 23- 8-2017 I plead not guilty (Here state grounds of appeal and separate sheet if necessary) I am a poor man and have no money for appeal*".
4. Attached to the Petition are the Grounds of Appeal which state:
 1. *I pleaded not guilty to the charges.*
 2. *The prosecution failed to bring any key witness before honourable court to prove their charges.*
 3. *In the charge sheet, the incident was done on 24th 11-2013 while her mother's statement provided before the court that her daughter appeared home on 27th 11-2013.*
 4. *The investigation officer did a shoddy job as far as the alleged matter of grievous harm is concerned i.e he never visited the crime scene, secondly your honour, the P3 form states clearly that the complainant went for medical on the 3rd November 2013.*
 5. *Supplementary grounds of appeal to follow when and if furnished with a certified true copy of the proceedings of this case.*
 6. *In the view of circumstances of this case, the custodial sentence of 30 years is harsh, severe and manifest excessive punishment.*
 7. *Your honour I beg your honourable court to reduce the conviction give option or fine, slash conviction or order retrial or whichever your honourable may deem fit.*
 8. *That in the event of my humble appeal may find merit, I would wish to be allowed to be present during the hearing of my appeal.*

5. On 6th February 2018, the Appellant filed Amended Grounds of Appeal which were:

- 1) That the Learned trial magistrate erred in law and fact in convicting and sentencing me while not considering that the appellant was not assigned an advocate by the state as required by the law since I am a layman in law
- 2) That the Learned trial magistrate erred in law and fact in convicting and sentencing me while not considering that the BURDEN OF PROOF WAS NOT DISCHARGED BEYOND REASONABLE DOUBT
- 3) That the Learned trial magistrate erred in both law and fact in basing my conviction and sentence on the prosecution witnesses without humbly considering that, I the appellant was a first offender hence deserved an alternative sentence.
- 4) That the Learned trial magistrate erred in law and fact in not considering that my defence evidence which created a reasonable doubt to the prosecution whereby the benefit ought to have been given to me.

6. The Parties have filed their respective Written Submissions pursuant to the Order of Hon Lady Justice Jacqueline Kamau made on 28th February 2018. The Appellant filed had already filed his Written Submissions on 6th February 2018. The Respondent filed its Written Submissions on 27th February 2018 and the Appellant responded on 7th March 2018.

7. The Appellant's Written Submissions raise additional grounds as well as expanding upon the Grounds already pleaded. The Appellant's Submissions can be summarised thus:

- (a) The evidence of identity was not sufficiently cogent as to found a conviction. Any conviction founded on identification evidence is unsound;
- (b) The evidence of identity was weak and subject to challenge in particular as there question on the prevailing conditions
- (c) the Complainant's evidence was inconsistent' and the evidence of PW-1 and PW-3 was not consistent.
- (d) The Prosecution failed to prove its case
- (e) The Learned Trial Magistrate did not take into consideration the Appellant's Defence.

8. The Appellant was charged with and convicted of the offence of grievous harm contrary to Section 234 of the Penal Code. The Particulars of the Offence were that " *NASIBU AMIRI JOSEPH On the 24th day of November 2013 at around 2100 at Burandogo village within Taita Taveta County, unlawfully and intentionally did grievous harm to Gladys Mkamburi Kakya*". The Court heard from seven (7) prosecution witnesses. Firstly the Court heard from the Complainant (PW 1) Gladys Mwamburi. She said she was married to the Accused for four years. She said there had been a disagreement and she had left the matrimonial home and returned to her mother's home. Her Mother gave evidence and corroborated that the Complainant had returned home. She also said that the Accused had visited the home on several occasions that day looking for the Complainant. That was corroborated by the younger sister (PW-3) who was also an occupant of the home. The Complainant had been out buying kerosene. When she got home, she said, the Accused was waiting for her. He had a panga. He proceeded to slash her with the panga. In the process he slashed her head, her hand, her wrist, her abdomen. However the more serious injury occurred when the Accused was slashing the Complainant. She held up her hands to protect herself and he sliced through the palm and severed four fingers. Although she survived the attached, the Complainant was hospitalised for several weeks and eventually had her hand left with permanent scarring. The younger sister (PW-3) who was in the home on the night in question gave evidence that she knew the Accused was outside waiting for her sister, his wife. She heard the Complainant scream but she was too frightened to come out and assist her. The Accused says the Complainant did not give evidence of screaming. The Accused challenges all that the evidence in his Appeal. However, during the trial his Defence consisted of bare denials. The Accused challenges the evidence identifying him. He was identified at the scene immediately before the offence by his wife, his mother-in-law and his sister in law. Further, he was identified by his wife of four years as the perpetrator. That is recognition. The authorities cited by the Respondent rely on evidence of recognition including recognition of a voice being reliable evidence. In this case the perpetrator and the complainant lived in close proximity for a number of years. The Appellant was further identified immediately after the incident in the company of the severely injured complainant. That identification was by his father, mother and brother. The brother was PW-2 and he stated that the Appellant left the Complainant in his care before he disappeared. It was left to the brother to take her to the hospital. The medicals records confirm that the injuries were caused by a sharp object. The initial medical evidence corroborates the complainant's evidence. The P3 Form which was completed after the arrest corroborated the initial medical evidence confirming the existence of scars in place of the wounds originally recorded.

9. Although the offence occurred in 2013, there was no prosecution until January 2017. The reason for that was that the Appellant disappeared immediately after the offence. He was apprehended during the commission of another offence. Having been released on bail pending trial he set out the threaten and intimidate the prosecution witnesses.

10. The Accused challenges the Prosecution evidence in its totality, yet during the trial he did not cross-examine, nor question the evidence in the way he is doing now. Clearly that part of his appeal is an afterthought. The Appellant was not provided with defence counsel at state expense, however, as he was not charged with a capital offence, there is at present no requirement that such counsel be provided. The Appellant chose to give unsworn evidence in his Defence. That meant he was not cross-examined. His evidence was that he was elsewhere. He did not raise the issue of mistaken identity then.

11. Having re-considered the evidence before the Court, it is clear that the Appellant did not provide any cogent explanation why 5 witnesses put him in close proximity to the Complainant immediately before and after the offence, if he was nowhere in the vicinity. Instead he chose to intimidate the witnesses. The Learned Trial Magistrate was entitled to - and did prefer the sworn testimony of the Complainant and prosecution witnesses over the unsworn, evidence of the Appellant. That evidence was not corroborated in any respect. In the

circumstances, there are no grounds put forward, nor argued that demonstrate the conviction should be set aside.

12. The Appellant is also challenging the sentence as too harsh and manifestly excessive. In that respect, the Appellant told the Court he was a first offender. However, at the same time he told the Court he was an orphan, however, that same Court had heard evidence that the Appellant's Father accompanied the Complainant to the hospital. In the circumstances, any conclusions as to the absence of veracity would be well founded. The Appellant followed the Complainant to her mother's home. He searched the home for her. He did not find her so he left and came back. There was an element of determination and tenacity to his conduct. He then attacked her and injured her severely. Her injuries were well documented and the result including the amputation of part of her hand and fingers must have been observed by the trial magistrate. The Appellant hunted down his victim and caused her serious harm. In light of his conduct during the day the conclusion that he had the intention to cause that harm is clear from the circumstances as well as direct evidence. The Appellant has failed to demonstrate that the sentence is manifestly excessive. Given the Appellant's conduct and the aggravating factors to the offence, including the fact that it is gender based violence, this Court comes to the conclusion that the sentence is justified. The Accused will serve only 2/3 of the sentence which amounts to 20 years. In light of the risk he poses to women, that is justified. The Appellant has shown no remorse for his actions.

13. However, this Court is conscious of the fact that the Appellant will one day be released back into society and it is preferable that he is either rehabilitated or has gained some insight into his offending behaviour before he is released. In the circumstances, it is in the interest of justice in the wider sense that the Appellant served 15 years of his sentence incarcerated and the remaining 5 years to be spent on probation to assess whether or not he has been rehabilitated and it is so ordered.

Order accordingly,

FARAH S. M. AMIN

JUDGE

Delivered dated and signed at Voi this the 2nd day of September 2019