



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 33 OF 2019 [GRIEVOUS HARM]

JOSEPH OTIENO OKETCH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against judgment, conviction and sentence in Bondo PM Cr. Case No 513 of 2017 dated 17/5/2019 before Hon E.N.Wasike, SRM)

JUDGMENT

1. The appellant herein **JOSEPH OTIENO OKECH** was charged with the offence of grievous harm contrary to section 234 of the Penal Code. The particulars of the offence were that on the 6.10.2017 at about 12.00am midnight at Nango Market, Central Sakwa location, Bondo sub-county within Siaya County, unlawfully did grievous harm to Monica Anyango Otieno. The appellant denied the charge and the prosecution called four witnesses to establish their case against the appellant. The appellant gave sworn testimony denying the offence and called two witnesses.

2. The trial magistrate found the appellant guilty of the offence as charged, convicted him and sentenced him to serve seven (7) years imprisonment.

3. It is that judgment conviction and sentence that provoked this appeal by the appellant claiming that:

1. That the learned Magistrate erred in Law and in fact in finding that the Appellant was guilty of the offence of causing grievous harm contrary to section 234 of the Penal Code.

2. That the learned Magistrate erred in Law and in fact by failing to appreciate that the offence was not proved beyond reasonable doubt.

3. That the learned Magistrate erred in Law and in fact by failing to appreciate that the charge sheet was defective and that the appellant pleaded without understanding the charge he was pleading to.

4. That the learned Magistrate erred in law and fact in recording the plea which was not unequivocal.

5. That the learned Magistrate erred in Law and in fact in coming to the conclusion that the identification was unmistakable whereas the evidence on record points to circumstances obtaining being difficult and did not favour a correct identification.

6. That the learned Magistrate erred in Law and in fact by failing to notice the contradictions in PW1, PW2, PW3 and PW4 evidence and statement.

7. That the learned Magistrate erred in law and in fact by failing to appreciate that the clinician who prepared and produced the medical report was not qualified to do so.

8. That the learned Magistrate erred in Law and fact by failing to recognize and appreciate the weight of the Appellant's testimony and his witness that he was at home on the date of occurrence.

9. That the learned Magistrate basing his Judgment on the evidence on record should have used his discretion in favour of the Applicant

4. In determining this Appeal, the court must fully understand its duty as the first Appellate court as stated in the case of **Pandya vs. R**

(1957) EA 336 and **Ruwala vs. R (1957) EA 570** which is to subject “the evidence as a whole to a fresh and exhaustive examination and for this court to arrive at its own decision on the evidence, it must weigh evidence and draw its own conclusions and its own findings while making allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses.

5. Revisiting the evidence before the trial court, **PW1 Monica Anyango Otieno** the complainant and estranged wife of the appellant testified that on the 6.10.2017 at about 12 midnight, she was sleeping in her house when she heard some movements outside. She got up and went towards the door and peeped through the cracks of her door and saw the appellant standing outside. She stated that she was able to see the appellant because there were security lights outside her house and so she could recognize the appellant. That as she was trying to open the door, the appellant poured some liquid on her and shortly thereafter, the house burst into flames. She screamed for help while asking her husband why he was trying to kill her and that is when a well-wisher came to her rescue. It was her testimony that as a result of the fire, she sustained burns all over her body including her hands, abdomen, face and other body parts.

6. She stated that she was rescued by one Joseph Onyango. She was escorted to Nyabondo Hospital, then to Bondo sub-county hospital and later transferred to a Hospital in Kisumu where she was admitted for two (2) months.

7. Upon being discharged, she went back home and her brothers went and reported the matter to the police as she was still weak. She however, stated that after some recovery, she went and reported the matter to Bondo Police Station where she recorded her statement. She stated that prior to this incident, she had some disagreements with her husband.

8. On being cross examined by Mr. Mugoye counsel for the appellant, PW1 stated that her brothers were the first to go and report the matter but she followed later. She also said that the liquid appeared to be petrol. She also stated that the appellant had told her that he would pay her a visit and insisted that it was the appellant who burnt her.

9. She also reiterated that her house had a wooden door with some spacing in between. She also said her house had solar generated electricity which she used for lighting. She further stated that it is Joseph Onyango who rescued her. She reiterated that they had been having marital problems with the appellant and that they had gone through some separations.

10. **Joseph Atemo Onyango** testified as PW2 and stated that on the 6.10.2017 at about midnight, he was sleeping when he heard some noise coming from a neighbour's house who is known as Rambugu. He then said that he got up and switched on security lights and that is when he saw Rambugu's husband running away. He proceeded to the scene and saw fire inside Rambugu's house and the door had been locked from outside. He broke the door open and saw fire and that is when he summoned Rambugu outside who by then was on fire and so he wrapped her with some clothes. The landlord took her to hospital.

11. He stated that the victim had been badly burnt all over her body. He visited her at the hospital. The witness said that the appellant was running from the door of the complainant's house. He further stated that he used to see the appellant visiting the complainant on several occasions and that he and the complainant had been neighbours for about 3 months.

12. On being cross-examined by Mr. Mugoye, PW2 stated that he was illiterate. That he used to see the appellant visiting the complainant and that the appellant was of a shorter stature. He also said that the complainant's door was made of wood with spaces in between. He denied having an affair with the complainant.

13. **David Odiera testified as PW3** and stated that he was a Clinical Officer working at Bondo District Hospital. He testified and produced Pex 1 a P3 form and a Discharge Summary P.Exh.2 for PW1 Monica Anyango Otieno. PW3 stated that the complainant went to their facility with a history of having been burnt in her house by a person well known to her at Nango Market. On examining her, the Clinical Officer observed that the patient had facial burns, she had burns on the anterior and posterior chest walls including the abdomen, she had gluteal (buttocks) burns, she had circumferential burns on both upper limbs including the armpits and shoulders and she had circumferential burns on both lower limbs. He said the probable weapon used was a chemical agent and classified the degree of injury as grievous harm.

14. In cross examination by Mr. Mugoye advocate, PW3 stated that he examined the complainant after 3 months following the incident and that the complainant stated that the delay was occasioned by her long hospitalization at St Joseph Nyamonye Hospital. He stated that according to the discharge summary, the complainant was admitted in hospital on 7.10.2017 and discharged on 21.11.2017. He also stated that he was not sure of the type of chemical used to burn her.

15. **NO. 43449 PC Omudho Okwaro** testified as PW4 and stated that previously he worked at Bondo Police Station and the Investigating Officer in the case. He stated that on the 9.10.2017, he was at the station when the O.C.S assigned him this case. That the sister to the complainant had gone to the station and reported that the complainant had been burnt in her rented house at Nango. The officer then stated that he initiated investigations by visiting the complainant at Bondo District Hospital but found when she had been transferred to Kisumu.

16. He further testified that together with other officers, they visited the scene and interrogated neighbours of the complainant and took photographs of the scene after which they recorded relevant witness statements. He stated that one Joseph Otieno told them that on the fateful date, he heard screams coming from the complainant's house which prompted him to proceed to the scene where he found the complainant's house locked from outside and so he managed to break open and shortly afterwards, he saw the suspect.

17. PW4 further stated that he later visited the complainant at Nyabondo Hospital and recorded her statement. He testified that the complainant told him that she suspected the appellant to have committed the crime and that the appellant who was her former husband had called her on the material date and told her that he would be visiting her but that he never went to see her. The witness stated that on 15.10.2017, the appellant was escorted to the police station by Administration Police Officers from Kopollo Administration Police Camp whereupon he re-arrested the appellant and at the conclusion of his investigations, he charged the appellant with the offence.

18. In cross examination by Mr. Mugoye, PW4 stated that he had been in the service for over 30 years. He reiterated his testimony and stated

that the appellant and complainant had been separated but they had children who were living with the appellant. He also stated that he doubted if the appellant would harm the mother of his children. He reiterated that the complainant told him that she suspected the appellant to be involved. He also stated that he established that both the complainant's and neighbour's doors were locked from the outside. He could not establish the exact substance used to burn the complainant.

19. At the close of the prosecution case, the appellant was placed on his defence. He testified on oath and stated that the complainant was his wife and they had some differences causing them to separate but they re-married again. He stated that on the 5.10.2017, he was at home from morning till evening doing his routine chores. The appellant stated that the genesis of their issue was about his foster child who was his wife's child and who, upon reaching form 3, he insisted on going back to his biological father. He stated that after their second separation in 2015, the complainant went and stayed at Nango. He further testified that he married a second wife Mary Atieno Otieno. He denied ever committing the offence.

20. In cross examination he reiterated his testimony in chief and stated that they were not in good terms after the second separation.

21. The appellant also called DW2 Mary Atieno Otieno who was his second wife. She stated that the complainant was her co-wife. She confirmed what PW1 stated that the complainant had been married to the appellant but that they separated twice and remarried and separated. DW2 stated that on the night of 5.10.2017 and 6.10.2017, she was with the appellant at home, woke up in the morning and did his usual chores. She praised her husband as a peaceful man.

22. DW3 Michael Otieno Randa the appellant and complainant's son testified that on the 5.10.2017 and on 6.10.2017, his father was at home the whole day. He stated that he was not aware of the complainant before court.

23. The defence then closed and subsequently filed their written submissions.

SUBMISSIONS

24. This appeal was canvassed by way of oral submissions. Mr. Mungau advocate submitted for the appellant whereas Mr. Okachi Senior Principal Prosecution Counsel submitted for the Respondent, opposing the appeal.

25. In support of his appeal, the appellant's counsel Mr. Mungau identified three issues for determination namely:

(1) Issue of identification

26. Counsel submitted that there was variance in the evidence of PW1 and her statement to the Police. That it is not clear whether she was asleep or she went outside her house. That she that she fully suspected her former husband who poured the liquid on her hence she was merely suspicious. Counsel relied on **C.A. Cr. A 67/2000 Shadrack Muteti Maweu V. R.** on visual identification at night which was found to be inadequate and unreliable. In his view, the identification of the complainant's assailant was not sufficient.

(2) Contradictions

27. According to Mr. Mungau, there were contradictions in the evidence of witnesses generally. That the testimonies and statements were different. That PW1, PW2 and PW3 talked of different things hence the veracity of their evidence was not tested and that therefore the trial Court should not have relied on their evidence to convict the Appellant.

(3) The motive of the assault.

28. The appellant's counsel further submitted that the Appellant and Complainant were husband and wife and that the two remarried after separating. He submitted that the motive for the attack was never canvassed at the hearing.

29. Counsel further submitted that the trial Court ignored evidence of three defence witnesses. That the Appellant had an alibi and that his evidence and that of the defence witnesses including their biological son was unshaken yet the trial Court, according to counsel, did not take into account that evidence of defence witnesses.

30. Further submission was that PW2 took some photographs which were not produced as exhibits especially in relation to the position the Complainant was in when she allegedly saw the Appellant and that in addition, it is not clear what substance was poured on the Complainant.

31. On proof, the appellant's counsel submitted that the offence was not proved to the standards required and added that suspicion however, strong cannot be a basis for conviction of the Appellant. He relied on **Cr. A. 11/2000 Joseph Mwangi, Wambugu & 2 Others vs. Republic. He referred to the evidence of PW1** and stated that the witness testified that she did not see the Appellant pour the liquid on her, whereas PW2 stated that he saw a tall person walking away from the Complainant's home. However, it was submitted that his statement at Page 34 of the record of appeal is different from his testimony. That in his statement he said he saw a tall man running away. It was further submitted that there is no evidence to prove the motive for the appellant calling the Complainant and intending to visit her that night and where.

32. Further submission was that the circumstances do not rule out mistaken identification. In addition, it was submitted by counsel for the appellant that it is not clear where the Complainant was treated. In counsel's view, if the Appellant had committed the offence he could not have stood there and wait to be identified. Counsel urged the court to allow the appeal on conviction and sentence.

33. In opposing the appellant's appeal, Mr. Okachi Senior Principal Prosecution submitted supporting the appellant's conviction and sentence. In his submission he contended that the appellant and complainant were undoubtedly a couple who had disagreed and that the appellant wanted to get back to the victim.

34. On identification, counsel submitted that the victim knew the Appellant very well as they had lived together for a while and he had left her. That the victim heard some steps, peeped outside and using a Security Light, saw her husband and in trying to welcome him into the house, he attacked her mercilessly by pouring into her house a substance that sparked fire. That PW2 heard the screams of PW1 and switched on lights adjacent to the Victims house and saw the person he knew, the Victim's husband running away from the scene of crime. He maintained that the evidence was sufficient and that no other evidence was required as the motive behind the attack was the disharmony between the couple and the husband went with vengeance.

35. On the evidence adduced by the defence witnesses, it was submitted that they gave hearsay evidence which did not punch any holes into the Prosecution's case. Counsel reiterated that there was sufficient Security Light and the Victim knew the Appellant, her husband very well. That the Appellant stood at the scene before and after the incident. Counsel for the Respondent urged this court to find that there were no contradictions in the Prosecution evidence, and dismiss the appeal.

36. In a brief rejoinder, Mr. Mungau submitted that there was no evidence of any acrimony or misunderstanding that existed between the Victim and Appellant for the latter to attack the Victim. He submitted that there was no evidence on how frequent PW2 saw the Appellant at the Victim's house for him to identify him. He maintained that there was no record of a vengeful affair, or attitude of revenge from the Appellant.

37. On the weight of the evidence of the defence witnesses, the appellant's counsel submitted that they testified on the alibi defence of the defence and that, that evidence was never shaken during cross-examination.

38. He reiterated that there was doubt as to the identity of the Victim's attacker and that therefore the Appellant should have been given as benefit of doubt.

39. On sentence, counsel submitted that 7 years imprisonment is extremely harsh in the circumstances.

DETERMINATION

40. I have considered the evidence adduced before the trial court both for the prosecution and the defence. I have also considered the grounds of appeal and submissions for and against the appeal. Before delving into the main issues for determination, I must point out that grounds 3 and 4 are nonstarters as the plea was not that of guilty hence the idea that the plea was equivocal or that the appellant did not understand the plea is not sustainable. It is also not in dispute that the complainant sustained serious burns in her body as per the P3 form produced in evidence and the treatment notes. It is also not in dispute that the complainant and appellant were husband and wife but that they were at the material time separated and living apart. The complainant was living at Nango market in a rented house. Having stated the undisputed facts, in my humble view, the issues for determination are:

i. Whether the complainant's assailant was positively identified

ii. Whether the defence was considered

iii. Whether the prosecution proved its case against the appellant beyond reasonable doubt

iv. Whether sentence meted out on the appellant was manifestly excessive

41. On the first issue of whether the complainant's assailant was positively identified, the evidence on record is in respect of **visual identification at night** by PW1 and PW2. PW1 testified that on the material night at about midnight, she was in her house asleep when she heard some movements from outside her house. She moved to the door which is wooden and with some spaces in between. She saw the appellant standing outside using the security light which was outside. As she was trying to open the door, the appellant poured some liquid at her and fire broke out and engulfed her burning her seriously. She screamed for help and she was rescued by PW2 her neighbour. She stated that she had issues with the appellant who was her estranged husband and that they had separated and that before that night he had called her and told her that he would visit her. She stated that she was seriously burnt all over her body and that she was hospitalized for long. Evidence of serious injuries involving burns was confirmed by PW3 who examined the complainant and established that she had sustained serious burns but he could not tell the exact substance which was used to burn her.

42. PW2 testified that at about midnight on the material night, he was in his house when he heard noises outside and so he woke up and switched on security lights outside and he saw the complainant's husband running away from the complainant's door. He went and found her door open and he opened it and saw her burning so he put some clothing on her and the landlord took her to hospital.

43. PW4 the investigating officer received a report on the complainant and instigated investigations and established that the appellant had been married and separated from the complainant twice and that they had marital problems. He told the court that they visited the scene of crime and took photographs and also visited the complainant in hospital. He testified that the complainant told them that she suspected her estranged husband to have been the one who burnt her. He could not tell what substance was used to burn the complainant.

44. The Court of Appeal in the case of **Wamunga Vs Republic (1989) KLR 426** stated:

"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is

enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.”

45. In **Nzaro vs Republic (1991) KAR 212 and Kiarie vs Republic (1984) KLR 739** the Court of Appeal further held that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

46. In **R –vs- Turnbull & Others (1976) 3 ALL ER 549**, which decision has been generally accepted and greatly used in the Kenya’s system, the English Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

“... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

47. The above decision does not say that there cannot be safe recognition even at night. The Court of Appeal in **Douglas Muthanwa Ntoribi vs Republic (2014) eKLR** in upholding the evidence of recognition at night held as follows:-

“On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified:-

“I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant.”

The Learned Judge further noted that the complainant testified that he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error...”

48. In **Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs Republic (unreported)** the Court of Appeal had this to say on the evidence of recognition at night:-

“We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as ‘neighbours from the village’, that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non- recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants.”

49. PW1 heard movements outside her house and went to peep through the gaps in her wooden door and she saw the appellant standing outside. The appellant, according to PW1, poured liquid at her as she was opening the door.

50. She however does not say at what distance the appellant was standing that she was able to recognize him positively. She also does not state how he was dressed on that material night and whether he was holding anything. She further stated that as she was trying to open the door, he poured liquid at her and the house burst into flames. She does not state whether the liquid was poured at her directly or through the gaps in the wooden door and neither does the complainant state how large the gaps were such that she was able to see the assailant very well without mistaking him for someone else.

51. On the part of PW2, he testified that when he heard noises outside, he switched on the lights and that he saw the complainant’s husband running away from the complainant’s house. He went and found the door locked from outside. This witness does not state that PW1 was screaming asking her husband why he wanted to kill her. He does not state that he immediately reported the incident to the police. PW1 stated that it is her brothers who reported the incident to the police. PW4 on the other hand, the investigating officer stated that it was the sisters to the complainant who went and reported the incident to the police.

52. It is not clear why PW2 did not report the incident immediately, having seen the appellant leave the scene of crime. In addition, PW4 testified that PW2 saw the appellant after going to the complainant’s door and finding it locked from outside contrary to what PW2 stated that he saw the appellant running away from the door of the complainant. PW4 stated that PW2 told him that he heard screams coming from the complainant’s house which prompted him to proceed to the scene where he found the complainant’s house locked from outside and so he managed to break *open and shortly afterwards, he saw the suspect.*

53. PW4 also testified in chief and in cross examination that PW1 told him that she suspected her husband to be the person who poured the liquid at her. he did not say that PW1 told him that she was her husband on that material night standing outside her house and or that she went to open the door and he poured the liquid at her.

54. In my humble view, there were material contradictions in the evidence of PW1, PW2 and PW4 which contradictions went to the core of the prosecutions’ case and which create doubt as to whether the complainant and PW2 saw the person of the appellant on the material night.

55. In my humble view, the prosecution evidence was not watertight on the identification or recognition of the complainant's assailant on that material night. The prosecution did not tie all the loose ends and let the witnesses testify in a very casual manner without firmly tying up the loose ends, thereby creating lacunae, which lacunae could not be filled by the defence as the burden of proof lies on the prosecution throughout the trial and does not shift to the defence to explain away or fill the gaps. This was the case in this matter.

56. This is not to say that the complainant framed the appellant with the offence but that in criminal cases, suspicion however strong cannot sustain a conviction.

57. PW4 the investigating officer testified in chief and in cross examination that the complainant only suspected her estranged husband to have been responsible.

58. If the investigating officer had been told that it was the appellant who attacked the complainant, nothing stopped him from saying so in his testimony. The fact that he maintained throughout his testimony in chief and in cross examination that the complainant told him that she suspected her husband and not that she told him that she saw her husband attack her that night means that the appellant was charged with the offence because he was suspected especially because he had issues with his estranged wife.

59. The complainant never testified that the appellant had threatened to harm her. Her allegation that he had called her and said he would visit her was not proved beyond reasonable doubt by way of production of phone call log and whether that self-invitation was motivated by the intention to harm her.

60. It follows that from the evidence on record, the only reason why the appellant was charged with the offence was because he was separated from the complainant after they had had disagreements as a couple otherwise my humble view is that there was no sufficient evidence to show that the complainant or PW2 properly connected the appellant with the offence. The trial court in my view misapprehended the evidence as adduced by PW1 and in his judgment stated, quite erroneously, contrary to the evidence on record: "as there was ample light and *she categorically stated that when she opened the door, the appellant poured to her some liquid which subsequently led to fire.*" It was a misapprehension of evidence of PW1 because she stated that *as she was opening the door, not when she opened the door.*

61. Further, PW2 stated that he found the door locked from outside therefore where did the trial magistrate find this aspect of opening of the door and therefore which evidence should the court go with? Whether PW1 opened the door, or whether she did not open the door or whether PW2 is the one who broke the door after he found it locked from the outside?

62. In my humble view, there is no evidence of how close the complainant was from the assailant for the trial court to state that: ***"It shows that the parties were close to each other."***

63. The other aspect of the trial court's judgment that does not agree with the evidence adduced is where he stated: ***"PW2 who was PW1's neighbour and who used to see the appellant visiting the complainant, stated that he clearly saw the appellant running away from the complainant's house and when he rushed to the scene, he found PW1 on fire. He said he was able to identify the appellant with the help of security lights."***

64. PW4 stated that PW2 told him that he saw the appellant running away after opening the complainant's door. PW2 told the court that he saw the appellant running away then he went to rescue the complainant only to find the door locked from the outside.

65. I find no corroboration in the prosecution evidence on recognition of the appellant by PW1 and PW2 as told to PW4 the investigating officer.

66. For the foregoing reasons that the recognition of the appellant was doubtful, I find and hold that the conviction of the appellant was unsafe. I hereby quash it and set aside the sentence of seven years imprisonment meted out on him. Unless otherwise lawfully held, the appellant is hereby set at liberty.

67. Having found that there was no watertight evidence of identification of the appellant as the complainant's assailant, I find no reason to delve into the other issues framed for determination.

68. On the whole, the appellant's appeal is hereby allowed.

Dated, signed and Delivered at Siaya this 13th day of November, 2019.

R.E. ABURILI

JUDGE

In the presence of:

The Appellant in person

Mr. Okachi Senior Principal Counsel for the Respondent

CA: Brenda and Modestar