



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 24 OF 2017

GEORGE VOLLINS.....APPELLANT

-VERSUS-

REPUBLIC..... RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. R. Odenyo, Senior Principal Magistrate in Migori Chief Magistrate's Criminal Case No. 93 of 2016 delivered on 20/07/2017)

JUDGMENT

1. On 15/02/2016, the Appellant herein, **George Vollins**, was charged with the offence of **Grievous Harm** contrary to **Section 234** of the **Penal Code, Cap. 63** of the Laws of Kenya. The particulars of the offence were that '*on the 9th February 2016 at Bondeni in Migori County in the Republic of Kenya unlawfully did grievous harm to JANE AWUOR.*' He denied the offence and a trial followed.

2. The prosecution called 6 witnesses. **PW1** was the complainant one **Jane Awuor Agwenge**. **PW2** was the father to PW1. He was **David Agwenge Obwanda**. PW2 was a Bishop with Community Gospel Ministry and the proprietor of Shepherd Valley Secondary School (hereinafter referred to as '**the School**') in Migori town. **PW3** was the Secretary at the School **one Saida Akinyi** whereas **PW5** was a Teacher at the School. He was one **Humphrey Kioko**. **PW4** was a Clinical Officer at Isebania Sub-County Hospital and the investigating officer was **No. 70665 PC John Muiha** from Migori Police Station testified as **PW6**. The Appellant was a cousin to PW1 hence PW2 was the Appellant's uncle. The Appellant was also the Principal of the School. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified before the trial court. The Appellant was unrepresented during the trial.

3. It was the prosecution's case that on 09/02/2016 at around 08:40pm PW1 was at her home and wanted to prepare tea. That, as she walked from the main house to the kitchen which was just adjacent to the main house to get a jiko and a sufuria she heard footsteps behind her. That, PW1 turned to see who it was and by the aid of a gas lamp that was outside the kitchen she noticed that it was the Appellant whom she had been with just a while ago at the School with PW2. That, in a split of a second some liquid was poured on her face and the Appellant disappeared. PW1 screamed as she ran into the main house. PW1 was rushed to Akidiva Memorial Hospital by PW2 where she was admitted and discharged four days later. PW1 underwent further treatment at Tenwek Mission Hospital and later at Kenyatta Hospital in Nairobi. At the time PW1 testified before the trial court she was still undergoing treatment at Oasis Hospital in Kisumu.

4. PW2 reported the matter to Migori Police Station on the following morning. PW3 testified that on 09/02/2016 at around 03:00pm she witnessed one **Pauline** (not a witness) mopping the office floor and on enquiry Pauline told her that she had been instructed by the Appellant to clean the floor as some Sulphuric Acid acid had spilled. PW2 walked into the office when Pauline was still cleaning the floor and on enquiry from the Appellant why the office was being cleaned at such a time the Appellant told him that some acid had spilled on the floor. PW5 had been given two-days off by the Appellant and on return on 09/02/2016 he found the Appellant in the laboratory mixing Hydrochloric Acid with an indicator. On enquiry, the Appellant just kept quiet. PW5 stated that he spotted some acid dots on the face of the Appellant on the following day in the morning and again PW5 asked the Appellant what had happened and once again the Appellant kept quiet.

5. PW4 produced a P3 Form and treatment notes which confirmed that PW1 has suffered serious burns likely to have been caused by an acid and classified the injury as grievous harm.

6. PW6 visited the scene as well as PW1 while she was still admitted in hospital. He interviewed PW1 who told her it was the Appellant who had injured her. PW6 was also informed of the threatening messages PW1 had received from her estranged husband on the day she was injured. PW6 recorded statements from various witnesses and issued PW1 with a P3 Form which was accordingly filled. He then charged the Appellant.

7. At the close of the prosecution's case, the trial court placed the Appellant on his defence. The Appellant opted for and gave sworn testimony and called no witness. The Appellant denied committing the offence and stated that he spent the material day at the School until when the Appellant came to see PW2 and him at around 08:00pm where she complained of the threatening messages from her estranged

husband. That after a brief talk in the office, PW1 and PW2 left for their home as he also went to his home. On reaching home he received a phone call from a former teacher at the School that something had happened at PW2's home. The Appellant called PW1 but she did not pick his two calls. Awhile later PW1's mother called the Appellant and informed him of the incident on PW1 and that PW2 had taken PW1 to hospital. That, the Appellant rushed to the hospital with his wife and arrived before PW1 and PW2 arrived. That, the Appellant was the one who stayed with PW1 that night in hospital where PW1 painfully asked why Dan had done that to her. That, the following day he went to work and on return to the hospital in the evening he was restrained from seeing PW1. He was later arrested that night by police officers who were led to his home by PW2. At the close of the defence case the matter was scheduled for judgment.

8. By a judgment rendered on 20/07/2017 the trial court found the Appellant guilty as charged and convicted him. The appellant was sentenced to 14 years in prison.

9. Being dissatisfied with the conviction and sentence, the Appellant lodged an appeal through Messrs. Ojode & Udoto Advocates. The Appellant raised the following five grounds of appeal as follows: -

1. The learned magistrate erred in law and in fact and misdirected himself by holding that identification by recognition was conclusive yet the conditions for identification were unfavorable.

2. The learned magistrate erred in law and in fact in relying on the evidence of recognition to convict the appellant without considering the report made, apparently to the police before the appellant was arrested.

3. The learned magistrate erred in law in relying upon the evidence of witnesses who had not recorded their statements before the appellant's arrest.

4. The appellant's defence was not given any due weight and consideration but was dismissed without any reason.

5. There was no credible evidence adduced to sustain a conviction consequent to which the conviction is unsafe and illegal.

10. The Prosecution filed a Notice of Enhancement of Sentence. The appeal was heard by way of oral submissions where Learned Counsel for the Appellant **Mr. Ojode** expounded on the grounds and referred to several decisions in urging this Court to allow the appeal and set the Appellant at liberty. **Mr. Okaka** Learned Counsel for the State opposed the appeal and called for its dismissal while relying on some decisions as well.

11. As this is the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

12. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offence of grievous harm were proved and as so required in law; beyond any reasonable doubt and that it was the Appellant who was the assailant. To that end I have carefully perused the proceedings and the judgment of the trial court and understood the parties' submissions.

13. The main issue for determination in this appeal remain the one which the trial court properly framed being that of the identity of the assailant. That being the case, I will first deal with that issue. There is no dispute that the identity of the attacker in this case was by a single witness, PW1. It is also not in dispute that the attack took place in the night and that several witnesses knew the Appellant well. The identification therefore was by way of recognition.

14. As I have held in previous decisions, the circumstances under which a witness alleges to have identified an attacker, even in cases where the witness knew the attacker, must always be clear from any possibility of error otherwise that can cause an injustice to an accused person charged as the possible attacker. The principles for consideration in such instances are by now well settled by precedent. The Court of Appeal in the case of **Wamunga vs Republic (1989) KLR 426** held as under: -

"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."

15. It was also held in **Nzaro vs Republic (1991) KAR 212** and **Kiarie vs Republic (1984) KLR 739** by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

16. In **R -vs- Turnbull & Others (1973) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court stated that: -

"... 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.”

17. **Section 124 of the Evidence Act, Cap. 80** of the Laws of Kenya calls for corroboration of evidence except in sexual offences. I must however state that there can still be a legal conviction in instances of single witness identification even without any corroboration. However, before a Court convicts on such evidence, the Judge must really warn himself/herself of the dangers of relying on such evidence. This issue has been a subject of consideration in various cases including one before the Court of Appeal of Uganda in **Obwana & Others v. Uganda (2009)2 EA 333** where the Court presented itself thus:

“It is now trite law that when visual identification of an accused person is made by a witness in difficult conditions like at night, such evidence should not ordinarily be acted upon to convict the accused in the absence of other evidence to corroborate it.This need for corroboration, however, does not mean that no conviction can be based on visual identification evidence of a sole identifying witness in the absence of corroboration. Courts have powers to act on such evidence in absence of corroboration. But visual identification evidence made under difficult conditions can only be acted on and form a basis of conviction in the absence of corroboration if the presiding judge warns himself/herself and the assessors of the dangers of acting on such evidence.”

18. I have carefully addressed my mind to the facts and the law in this case alongside the defense tendered. From the evidence the attack on PW1 was indeed sudden. PW1 testified that she heard the footsteps of someone walking towards her as she was from the main house to the kitchen house. That there was a gas lamp outside the kitchen and as the attacker was about 2-3 metres from the lamp PW1 turned to see who it was. It was when she was spilled with a corrosive liquid, but that was before she saw and recognized the attacker as the Appellant. As rightly found by the trial court PW1 did not state how far she was from the lamp neither did she describe the brightness of the lamp. According to PW1 the attacker approached her from the side of the house. PW1 stated that when she was spilled with the corrosive liquid she felt extra-ordinary pain and immediately screamed as she ran into the main house. PW1 did not mention the name of the attacker as she ran into the house.

19. At the time of the attack PW2 was inside the main house. According to him she heard a bag of charcoal dropping and a loud scream from PW1. He then heard PW1 asking why Vollins had done that to her as PW1 ran into the house. PW1 was therefore carrying a bag of charcoal which dropped. The size of the bag of charcoal was not given neither did PW1 state how she carried it. Was PW1 carrying the bag on the head or by hands? If PW2 who was inside the house heard a bag of charcoal dropping, then the bag must certainly have not been next to the ground. It must have been a certain distance from the ground as to produce such a sound. Could the bag have obstructed PW1 from clearly seeing the attacker? Was it reasonably possible for PW1 who was carrying the bag to turn, see and recognize the attacker who suddenly emerged from the side of the house and splashed a corrosive substance on her and immediately disappeared?

20. I am not persuaded by the evidence of PW2 that he heard PW1 call out the name of the attacker while she was still out of the house. I say so since PW1 did not state as such. If that was the case I do not see why PW1 would not have told the police as well as the trial court. I therefore find and hold that PW1 did not name the attacker at the time of attack.

21. A careful analysis of the evidence of PW1 does not support a case of a clear recognition free from any possibility of error. There are several unanswered questions as to whether the Appellant was the attacker. The brightness of the gas lamp and the distance PW1 was from the lamp remain some of the very key elements which were not settled in favour of PW1. This Court can only return a finding, which it hereby does, that the circumstances in this case as yielded by the prosecution’s evidence as juxtaposed with the Appellant’s defense and in line with the above legal guidance do not support the position that the Appellant was properly identified by recognition as the attacker.

22. Apart from the issue of identification, the case was generally ill-investigated in many aspects. For instance, the corrosive liquid was not proved to be an acid. PW3 stated that what Pauline mopped was Sulphuric Acid whereas PW5 who was the teacher in-charge of the School laboratory stated that he saw the Appellant mixing Hydrochloric acid with an indicator. PW6 ought to have led evidence in the first instance to confirm that PW1 was injured using an acid and not any other liquid. It was hence incumbent upon the prosecution to carry out an analysis of the acid which was in the School to ascertain whether it had properties that could cause such injuries like those suffered by PW1 more so after having been mixed with the indicator. Such analysis would also have settled whether the liquid was Hydrochloric acid or Sulphuric Acid and what the resultant outcome of the reaction with the indicator was. There was also the unsettled issue on where the acid at the School was usually kept. Was it in the office or in the laboratory?

23. A very conspicuous aspect which could have greatly aided the prosecution was also not pursued. It was on the threatening phone messages and call which PW1 received from her estranged husband on the day she was attacked. This Court is at a loss as to why investigations were not carried out on the issue.

24. There was also the contention that the police recovered a bunch of keys for the Appellant at PW2’s compound the following day after the incident whereas the Appellant did not visit PW2’s homestead during the day the attack took place at night. Such an important aspect was not investigated. Could it be true that the alleged keys belonged to the Appellant? Why were they not produced in evidence?

25. There was also the issue raised by PW5. He stated that in the morning after PW1 was attacked he saw the Appellant at the School with some acid dots on the face and on asking him what had happened the Appellant kept quiet. Why didn’t PW5 pass such crucial information to the police who would possibly have taken the Appellant for examination to confirm such?

26. With such a state of affairs a Court of law properly addressing itself to the circumstances and the law will find it extremely difficult to sustain a conviction. Although there may be suspicion that the Appellant may have inflicted the injuries on PW1, suspicion alone however strong cannot be basis of a conviction. The Court of Appeal in the case of **James Tinenga Omwenga v. Republic (2014) eKLR** clearly stated that: -

“20. Based on the evidence on record, we find that the only thing that connects the appellant to the offence is suspicion.....”

It is trite law that suspicion alone cannot be the basis for inferring guilty. In Mary Wanjiku Gichira vs. Republic - Criminal Appeal No. 17 of 1998, the court held,

'suspicion however strong cannot provide a basis for inferring guilty which must be proved by evidence.'

See also this Court's decision in Sawe vs. Republic (2003) eKLR 364.

27. As I come to the end of this judgement I fully associate myself with the words of **Lord Denning M.R.** that it is better to acquit ten guilty persons rather than to convict one innocent person. The state of the evidence in this case does not point to the guilty of the Appellant beyond any reasonable doubt.

28. Further, and for completeness of the record and for good order I hereby direct the Deputy Registrar of this Court to ensure that the evidence of PW5 is typed and be made part of the typed proceedings. I had to use the handwritten proceedings for the evidence of PW5 in this appeal.

29. Lastly, the upshot is that the appeal is allowed, conviction quashed and the sentence set-aside. The Appellant shall forthwith be set at liberty unless otherwise lawfully held.

30. Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 19th day of July 2018.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. Philip Ojode Counsel for the Appellant.

Mr. Okaka Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Evelyne Nyauke – Court Assistant