



IN THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

HIGH COURT CRIMINAL APPEAL NO. 174 OF 2017

(Appeal originating from Nyahururu CM's Court Criminal

Case No. 2101 of 2016 by Hon. O. Momanyi – S.R.M)

JIMNAH KAGUCIA WANJAU.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTOR

JUDGMENT

Jimnah Kagucia Wanjau, the appellant, herein, (herein referred to as Kagucia), was convicted of the offence of **Grievous Harm Contrary to Section 234 of the Penal Code.**

The particulars of the charge are that on 15/9/2015 at Nyandarua Farm in Solai Sub County, unlawfully did grievous harm to Stephen Muchori Kirubi. He was sentenced to serve life imprisonment.

Aggrieved by the said conviction and sentence, the appellant filed this appeal through the firm of Waichungo and Co. Advocates. The grounds of appeal are contained in the petition of appeal filed in court on 27/7/2017. The grounds are as follows:

- 1. THAT the Learned Trial Magistrate erred in law and in fact in finding that the Appellant was the complainant's employee whereas no evidence was tendered to proof this.**
- 2. THAT the Learned Trial Magistrate erred in Law and in fact in finding that the complainant's evidence was credible whereas the same was full of glaring contradictions.**
- 3. THAT the Learned Trial Magistrate erred in law and in fact in finding that the evidence of the witnesses which was contradictory and inconsistent corroborated the complainant.**
- 4. THAT the Learned Trial Magistrate erred in law and in fact in finding that the Appellant was positively identified as the person who assaulted the complainant.**
- 5. THAT the Learned Trial Magistrate erred in law and in fact in finding that there was a grudge between the Appellant and the complainant.**
- 6. THAT the Learned Trial Magistrate erred in law in finding that the Prosecution had proved its case beyond reasonable doubt.**
- 7. THAT the Learned Trial Magistrate erred in law and in fact for dismissing the Appellant's defence without analyzing the same**
- 8. THAT the Learned Trial Magistrate erred in law and in fact for melting a very harsh sentence to the Appellant and failing to consider his mitigation.**

The appellant therefore prays that the appeal be allowed, conviction quashed and sentence set aside. The appellants counsel Mr. Waichungo also filed written submission on 13/2/2018.

The State opposed the appeal through learned counsel Mr. Mutembei who made oral submissions.

This is the first appeal and therefore this court has the duty to examine all the evidence tendered before the trial court afresh, analyze it and draw its own conclusions. *See Okeno Vs. Republic (1972) EA 32*. The court however bears in mind the fact that it neither saw nor heard the witnesses who testified before the trial court.

The prosecution called a total of 9 witnesses in support of their case. The complainant **PW1, Stephen Muchori Kirubi**, a resident of Solai was at his home about 3.00 pm on 15/9/2015, attending to his cattle and goats as his herds boy (shamba boy) had gone on off; that he then met the said herds boy, Jimnah Kagucia Wanjau (the appellant) who demanded for the balance of his money since he had been paid on 12/9/2015. At that time, PW1 did not see Kagucia with anything and PW1 informed Kagucia that he was going to get the money from the house. PW1 passed through the kitchen towards his bedroom and when in the corridor, he was hit/cut with a panga on the head from the back. He turned and saw that it was Kagucia, who hit him. He tried to block the panga but he was hit on the hand. He fell down as he shouted calling Ngugi, his other shamba boy; that Kagucia tried to gag him and then stabbed him with the knife twice, claiming he was owed money. PW1 lost consciousness and later came to while at Medihill Hospital; that Kagucia was later arrested and charged for this offence. PW1 said that Kagucia had worked for him for 3 years taking care of his cattle and goats and they had had no disputes.

PW2, Stephen Githinji Ngugi was digging a well at the home of PW1 together with **PW5 Patrick Maina** who was inside the well while PW2 removed the soil. He heard a commotion and somebody shouting calling his name. He went to PW1's house found the door locked and PW1 was shouting, "**Kabuchi you want to kill me?**" PW2 ran to call other people for help leaving PW5 outside the house. On returning, PW5 told him that Kagucia had left the house and the clothes had blood stains. They found that PW1 has blood stained with injuries on the hand, head and chest. They organized to take him to hospital. He identified Kagucia as having been PW1's herdsman but he had not seen him on that day but had seen him the previous day when Kagucia expressed his intention of stopping to work for PW1.

PW3 Gathige Kamithi was at his home on 15/9/2015 about 3.00 pm when he was called by Ngugi and informed that PW1 had been killed; PW3 rushed there, found PW1 on the floor bleeding and saying that his head was hurting; that there was blood all over and he helped get a vehicle to take PW1 to hospital. PW3 used to see Kagucia taking PW1's cattle to the river but did not see him that day.

PW4, David Wathenya recalled the 15/9/2015 about 3.00 pm when he was called from home and informed that PW1 was being killed. He went to PW1's home, found him in the bedroom and he was seriously injured on the hands and head and there was blood on the corridors and walls. PW4 knew Kagucia as an employee of PW1.

PW5, Patrick Maina Munyi was with PW2 at PW1's home digging a well. PW2 told him that PW1 was being beaten and he got out of the well, and went to PW1's house which he found locked; that PW2 went to call the neighbors while he remained behind and that Kagucia came out of PW1's house with a blood stained shirt. PW5 enquired why the shirt was stained, and Kagucia said that they were shouting while he wanted his money; that Kagucia took out the shirt and threw it and the panga and knife that he had and went away. He went to call another neighbour while PW2 returned with another neighbor, they entered PW1's bedroom, found he was seriously injured on the chest, hands and shoulders. He knew Kagucia as PW1's employee.

PW6 Dr. Njoroje produced the P3 form which was authored by Dr. Mutura who examined the complainant. The doctor found that PW1 had multiple healed lacerations on the scalp and head; compound fractures of the skull, lacerations of earlobe, fractured teeth, fractured healed lacerations on the anterior chest; dislocation of the carpal, multiple fractures of the phalanges, fracture on right hand. He also produced the medical records from Medihill hospital in Nakuru.

PC Edward Sang (PW7) a scene of crime officer was asked to make 5 photographs from a DVD which PC Omutelema had; the photographs showed injuries to PW1's hands and head.

PW8 Alex Mugambi Muturi a son to the complainant recalled that on 6/9/2016 he got information that Kagucia was at Boiman near Nyahururu. He informed the DCI Subukia to help arrest him. He identified Kagucia to police officers who arrested him.

PW9 PC Japhet Omutelema was the investigating officer in this case. He was asked to proceed to Nyahururu on 6/9/2016 where he met PW8 who went to show him where Kagucia was hiding. On the way to Kosoro Village, PW8 pointed out Kagucia who was walking while armed with a panga. After arrest, he was taken to Subukia police station and was charged.

When called upon to defend himself, the appellant testified on oath that on 12/9/2015, he called the complainant to come home from where he lived because he wanted to leave the employment on 13/9/2015; that they took an inventory and all was in order, that the complainant owed him Kshs 25,000/=; that the complainant promised to pay him when he come back from church and after checking he found the money owed to be Kshs 18,000/=; that he was paid all the money and he left for Wangombe where Peter took him to another job on 14th. That he was employed by Wandaye Murage and on 15/9/2016, when going for lunch, he was arrested and taken to Subukia Police Station. He said that all the witnesses lied to the court.

Mr. Waichungo counsel for the appellant argued grounds 1 – 6 which touch on identification. He urged that conditions for identification were not favourable because the incident took place in a corridor and PW1 was opening his bedroom, and was attacked from behind; that PW2 heard the complainant saying that "**Kabuchi**" wanted to kill him and that Kabuchi is not the appellant. Mr. Mutembei in opposing the appeal submitted that Kagucia went back to the complainant's home to collect his balance on 15/9/2015. It was day time and the complainant was able to identify the appellant. Apart from PW7 and the police officers, PW2, PW3, PW4, PW5 and PW8 all knew the appellant as an employee of PW1. The appellant was therefore not a stranger to PW1 and the witness.

PW1 told the court that although the appellant had told him that he was on off, he found him in at his home about 3.00 pm on 15/9/2015. They had a conversation whereby the appellant demanded his balance from PW1 and PW1 went to the house to get the money but was attacked when on the corridor of the house. Although PW1 told the court that he was first hit from the back, he turned and saw Kagucia

who continued to cut him on the hands as he tried to protect himself. PW1 also said that when he fell, the appellant tried to gag him. Under the circumstances, I am satisfied that PW1 was able to see the assailant, who was Kagucia. PW1 had just been with Kagucia a few minutes earlier.

PW1 further testified that after he was hit on the back of the head, he turned and was injured when facing the assailant and this testimony was corroborated by the doctor's evidence (PW6) who found that PW1 was injured on the face, hands and the pattern of injuries indicated that the attack was from the front and that the complainant may have been trying to defend himself. I am satisfied that PW1 faced Kagucia, saw him well and identified him.

The appellant's counsel also submitted that the person that PW1 saw was "**Kabuchi**". I have seen the court record which shows that PW2 said PW1 was saying that "**Kabuchi you want to kill me**". Later on, PW2 again said "**Kabuchi**" was the herdsman and that, "**when I came back, my colleague told me that Kagucia had left the house and he had blood stains**". Later on in cross examination, PW2 said **Kagucia** was an employee of PW1. PW5 who was working in PW1's home with PW2 said that after hearing the shouts and rushing to the house, they found PW1's house locked but that Jimmy (meaning the appellant) came out with a blood stained shirt which he removed and threw it there. In the same testimony he referred to the appellant as Kagucia.

I am therefore satisfied that it is the trial magistrate who wrongly recorded the appellant's name as "**Kabuchi**" and "**Kabuchia**" but it is evident that in the same statement, the appellant was referred to as Jimmy (short for Jimnah) or Kagucia. I am satisfied that PW5 did see Kagucia leave PW1's house after they heard screams from PW1. PW5's testimony did corroborate PW1's evidence that it is indeed Kagucia who assaulted PW1 because Kagucia left PW1's house soon after the attack.

I am also satisfied that PW2 and PW5 were truthful witnesses because their testimonies were consistent in all material particulars. The trial court also observed the same. I am satisfied that the appellant was identified by PW1 as the assailant, PW2 heard PW1 shout that it was Kagucia who was killing him and PW5 saw Kagucia leave PW1's house. The evidence placed Kagucia at the scene of crime.

Kagucia raised a defence of alibi. Mr. Waichungo submitted that the same was not considered because the appellant claimed to have left PW1's employment on 13/9/2015 and that he was working for one Wandaye Murage till his arrest. To support that submission on the defence of alibi, counsel relied on the decision of **Uganda Vrs Sebyala (1969) EA 204; Kiarie Vs Republic (1984) KLR 739**. In reply, Mr. Mutembei submitted that the appellant was still working for PW1 and that even when his employer was summoned, he did not appear.

An alibi is a defence where an accused claims to have been at a different location when the offence was allegedly committed. Even when an accused raises the defence of alibi, he does not assume any duty to prove the truth of the alibi. It is upon the prosecution to disprove the truth of the alibi. In **Uganda Vrs Sebyala (supra)** the court said

"The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution."

Again in **Kiarie Vs. Rep (supra)** the court said:

An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge preferred against him 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 not unreasonable".

I have read the judgment of the trial court where it observed that the defence did not punch any holes in the prosecution case and that the appellant did not place himself elsewhere but at the home of the complainant.

Kagucia claims to have been employed by one Murage as of 15/9/2015 when the offence was allegedly committed. The appellant himself asked for an adjournment to call the witness but he failed to come. It is apparent that Kagucia raised this alibi for the first time, during his defence. The prosecution could not have called evidence to rebut the alibi earlier. However, **Under Section 212 Criminal Procedure Code**, if an accused raises anything new in his defence, the prosecution may apply to call further evidence to counter it. The prosecution did not seek to adduce any further evidence. Despite that, I find that PW1 satisfactorily identified Kagucia whom he knew very well and whom he had seen and talked to a few minutes earlier. PW5 then saw Kagucia leave PW1's house soon after the attack placing Kagucia at the scene. I would agree with the trial court's finding that the prosecution witnesses were credible, consistent, and evidence was seamless and hence believable. The alibi did not introduce any doubt in the prosecution evidence. In the end, I find that the trial court arrived at the correct conclusion that the prosecution had proved its case beyond any doubt and that it is Kagucia who assaulted and seriously injured PW1. The conviction is well founded and I confirm it.

The appellant also challenged the sentence of life imprisonment as being excessive. PW7 produced in evidence photographs taken from a DVD that was taken of the complainant after the attack. They were a gory sight. PW1 received very serious injuries. He sustained skull fractures, 7 extracted teeth, healed lacerations on the chest. On the upper limbs, he suffered multiple fractures of the phalanges, carpal dislocation and amputations. PW6 told the court that PW1 had to undergo reconstruction of right hand. The injuries sustained are evidence that Kagucia intended to end PW1's life but may have been stopped by the arrival of PW2 and PW5. On sentence, Counsel relied on the decision of **Peter Nyaga Ruigi Vrs Rep C.R. Appeal 118/2006** which I have considered. In my view, the complainant herein received more serious injuries than the cited case. The court considered the appellant's mitigation that he was remorseful and had a family that depends on him. In passing sentence, the court gave the maximum sentence but should have taken into account the fact that he was a first offender.

Being a first offender, the sentence was on the higher side and in exercise of my discretion, I hereby reduce the sentence to 20 years imprisonment to be served from the date the sentence was imposed by the lower court. It is so ordered.

Dated, signed and delivered at NYAHURURU this 6TH day of July, 2018.

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R.V.P WENDOH

JUDGE

PRESENT:-

Mr. Rugut - Prosecution Counsel

Shiundu - Court Assistant

Ms Wanjiru Holding brief Mr. Waichungo - For the appellant

Appellant - present