



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NUMBER 220 OF 2013

STEPHEN MAKUMBA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in Criminal Case Number 462 of 2012 in the Senior Resident Magistrate's Court at Butali delivered by Hon. M.L.Nabibya (SRM) on 18th November, 2013)

JUDGMENT

Background

1. **STEPHEN MAKUMBA**, the appellant herein has filed this appeal against conviction and Kshs. 30,000/- fine and in default to serve 4 years imprisonment on a charge of causing grievous harm contrary to Section 234 of the Penal Code.

The prosecution's case

2. The prosecution called 5 witnesses in support of the charge. **PW1, Gerishom Ngaira Molika**, the complainant herein stated that on 20.8.11 at about 9.00 pm, he was going home when he found the appellant and 6 others standing beside the road. It was his evidence that the appellant cut him on the head with a pangaas the others joined in attacking him with sharp objects. He stated that before he was attacked, he had lit his torch and was able to identify the appellant and others with the lights of an oncoming motor cycle. **PW2 Joseph KwomaCheto** stated that on the material date at about 9.00 pm, he was a pillion passenger on a motor cycle that passed by where people were struggling with the complainant who was lying on the ground. He stated that he was able to identify the appellant among others. **PW3 AlfayoChitiavi** from whose home the complainant was walking home from stated that he was attracted to the scene of crime by screams and that he rushed to the scene and managed to identify the appellant among other persons that attacked the complainant. **PW4 Sifuna Kizito**, a clinical officer examined complainant on 20.8.11 and filled a P3 form PEXH. 1 which shows that he had deep cuts on various parts of his body and deformity of right small finger. He assessed the degree of injury as maim. **PW5 Reuben Makunda** escorted complainant to hospital for treatment on the night of 20.8.11.

3. When put on his defence, the appellant gave an unsworn testimony in which he denied the offence. He stated that on 20.8.11 while he was sleeping, he was informed by his wife that the complainant had been injured.

The Appeal

4. The conviction and sentence provoked this appeal. In his grounds of appeal filed on 3.7.17, appellant raised 7 grounds of appeal which I have summarized into 3 grounds as follows:-

1. That he was not properly identified

2. That his defence was not considered

3. That the sentence is too harsh

5. When the appeal came up for hearing on 5.9.18, appellant gave oral submission in support of his grounds of appeal.

6. Mr. Juma, learned State Counsel opposed the appeal and stated that he was relying on the evidence on record.

Analysis and Determination

7. This being a first Appeal, this Court has a duty to evaluate the evidence, analyse it afresh and draw its own conclusion, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses testify as did the trial Court, and give due allowance for that. (See Okeno v Republic [1972] EA 32).

8. I have considered the appeal in the light of the evidence on record, the grounds of appeal and the oral submissions by the appellant.

9. In dealing with this appeal, I will address the 3 grounds summarized above as follows: -

Was complainant injured?

10. Complainant stated he was injured. His evidence is corroborated by the P3 form PEXH. 1 which shows that he had deep cuts on various parts of his body and deformity of right small finger. The degree of injury was assessed the degree of injury as maim.

Did complainant identify his assailants or any one of them

11. It is on record that the incident occurred at night and more specifically about 9.00 pm. Complainant was alone when he was attacked. He told court that he identified the appellant by the light of his torch. PW2 who was a pillion passenger on a motor cycle that passed by the scene stated that he was able to identify the appellant with the assistance of the motor cycle lights. PW3 also alleged that he identified the appellant but did not disclose if there was any light at the scene.

12. The significance of accurate visual identification was underscored in the case of R v Turnbull, (1976) 3 All ER 551 where Lord Widgery CJ observed as follows on identification: -

“First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, 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 the accused under observation" At what distance" In what light" Was the observation impeded in any way, as for example by passing traffic or a press of people" 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 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 the actual appearance”.

13. This position was restated in the recent case of John Muriithi Nyagah v Republic [2014] eKLR, where the Court of Appeal held: -

“In testing the reliability of the evidence of identification at night, it is essential to make an inquiry of the relevant circumstances such as the nature of the light, the strength of the light, its size, its position relative to the suspects etc.”

14. The evidence on record shows that neither the investigating officer nor the court made an inquiry of the relevant circumstances such as the nature of the torch and headlight, the strength of the lights, their sizes and their position relative to the appellant.

15. The learned trial magistrate in her judgment did not warn herself of the dangers of relying of such evidence in circumstances that created a possibility of mistaken identity. In the case of Maitanyi –vs- Republic (1986) KLR 198 the Court of Appeal stated: -

“.....That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into.

16. From the foregoing decision, I find that the trial court failed in its duty to make an inquiry of the relevant circumstances relating to light that may have enabled complainant to identify the appellant. Consequently, I find that the complainant’s evidence of identification was not free from the possibility of error. The quality of identification evidence was critical and the trial magistrate erred in placing reliance on identification that was flawed.

Was the appellant’s defence considered?

17. Appellant raised an alibi and stated that he was not at the scene of crime. The Court of Appeal in the case of Kiarie v Republic [1984] KLR held as follows:-

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge 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.”

18. Section 309 of the Criminal Procedure Code provides: -

“If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.”

19. While considering the defence of alibi, the Court of Appeal in the case of Victor Mwendwa Mulinge Vs Republic [2014] eKLR held that even if the appellant raised the defence of alibi for the first time during the trial, the prosecution ought to have applied to adduce further evidence in accordance with Section 309 of the Criminal Procedure Code to rebut the appellant’s defence.

20. In the case of Kiarie v Republic [1984] KLR the Court of Appeal held: -

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge 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. The judge had erred in accepting the trial magistrate’s finding on the alibi because the finding was not supported by any reasons”.

21. The prosecution in the case before me did not apply to the court to obtain evidence for the purpose of rebutting the alibi of the appellant. This puts the case of the prosecution in doubt considering that the evidence tendered against the appellant cannot be said to be overwhelming.

Decision

22. I have considered the evidence on record and I am in agreement with the appellant that he was not properly identified and that the trial court might have arrived at a different decision had it considered the evidence relating to identification and appellant’s alibi.

25. I thus find and hold that the conviction and sentence were unsafe. Accordingly, the conviction is quashed and sentence set aside. Unless otherwise lawfully held, it is hereby ordered that appellant shall be set at liberty forthwith.

DATED AND SIGNED AT KAKAMEGA THIS 7th DAY OF September, 2018

T. W. CHERERE

JUDGE

In the presence of-

Court Assistants - George & Erick

Appellant - In person

For the State - Mr. Juma