



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
(CORAM: CHERERE-J)
CRIMINAL APPEAL NUMBER 155 OF 2014

BETWEEN

CALISTUS BARASA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against Conviction and Sentence imposed in Bungoma Chief Magistrate's Court Criminal Case No. 461 of 2013 by Hon. P.N.Areri (PM) on 19.12.14)

JUDGMENT

The Trial

1. The Appellant herein **CALISTUS BARASA** has filed this appeal against conviction and sentence on a charge of grievous harm contrary to section 234 of the Penal Code Cap 63 Laws of Kenya. The particulars of the offence were that:-

On 25.1.13 at Nang'eni village in Bungoma County did grievous harm to Barnice Shiraku Marauni

2. The prosecution called a total of five (5) witnesses in support of their case. PW1, the complainant stated that she was pregnant when the incident occurred. She recalled that on the material date at about 11.00 am, she was in her shop at Nang'eni when the appellant went there and for no apparent reason attacked her by kicks on her abdomen as a result of which she started to bleed and discharge water. She said that she was rescued by Kennedy and Emmanuel who took the appellant out of her shop. PW2 Kennedy Wanyonyi was attracted to complainant's shop by screams. He said he rushed to the shop and found the appellant in the shop whereas complainant who was lying on the floor told him that the appellant had assaulted her. PW3 Emmanuel Wangila Simiyu was attracted to complainant's shop by noise and he rushed there and found the appellant assaulting the complainant with kicks on her pregnant abdomen. PW4 Elias Adoka, a clinical officer examined complainant who was 7 months pregnant and found that she was draining amniotic fluid and had vaginal bleeding. He produced complainant's P3 form in which he classified the degree of injury as grievous harm as **PEXH. 1**. PW5 PC Victor Cheboi received complainant's report on 25.1.13 and after investigations arrested the appellant and had him charged.

3. At the close of the prosecution case, the appellant was ruled to have a case to answer and was placed on his defence. Appellant raised an alibi and stated that he was admitted at Bungoma District Hospital on the date that the offence is alleged to have been committed. In support thereof, he produced two cards issued at Bungoma District Hospital on 10.2.13 and 15.10.13 respectively.

4. The learned trial magistrate made a finding that the cards tendered by the appellant in his defence were falsified, rejected them, convicted and sentenced appellant to serve 5 years imprisonment.

The appeal

5. Aggrieved by this decision, the appellant lodged the instant appeal. From the 7 grounds of appeal and written submissions filed on 6th November, 2018, I have deduced the main issue for determination to be rejection of appellant's alibi.

6. When the appeal came up for hearing on 5.11.18, Mr. Juma appearing for the appellant chose to wholly rely on the grounds of appeal and also on the written submission in which the grounds of appeal are reiterated.

7. Mr. Oimbo, Learned Counsel for the state opposed the appeal and submitted that the complainant's evidence was corroborated by PW2 and PW3 and that the clinical officer confirmed that complainant suffered grievous harm.

Analysis and determination

8. This is the first appellate court and as such I am guided by the principles set out in the case **David Njuguna Wairimu V Republic [2010] eKLR** where the Court of Appeal stated:

“The duty of the first appellate court is to analyse the re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

9. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions on behalf of both the appellant and the state.

10. The appellant faults the trial court for disregarding his alibi. On alibi evidence, the Court of Appeal in the case of **Kiarie v Republic [1984] KLR** 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.”

11. It is on record that the appellant produced a hospital card which shows that he was at the Bungoma District Hospital on the date the offence was allegedly committed. No evidence was called to rebut the defence case.

12. In the case of **Victor Mwendwa Mulinge vs Republic [2014] eKLR** in which the Court of Appeal held:-

“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”.

13. 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.”

14. In **Wangombe versus R (1980) KLR 119**, it was held that if an accused person raises an alibi as an answer to a charge against him, he assumes no burden of proof and the burden of proving his guilt remains on the prosecution. 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. Instead, the trial court took upon the investigations of the cards and without any evidence from the hospital or an expert witness made a finding that the hospital cards were falsified.

15. With due respect, a judge/magistrate is obviously not justified in getting into the realm of investigations which is reserved for the Director of Public Prosecutions. A court should be an independent arbiter with fidelity to the Constitution and to enter into the realm of an investigator in a matter before it is not within its mandate. Obviously, the trial magistrate fell into error.

16. I have considered the judgment of the trial court and I find that the appellant’s defence of alibi was not appropriately considered. I am of the considered opinion that the learned trial magistrate ought to have given the appellant the benefit of the doubt.

Disposition

17. In the end; I hereby reach a conclusion that the case against the appellant was not proved beyond any reasonable doubt rendering the conviction unsafe. Accordingly, the conviction is hereby quashed and the sentence set aside. The appellant is set at liberty unless otherwise lawfully held. It is hereby so ordered.

DELIVERED AND SIGNED AT BUNGOMA THIS 9th DAY OF November 2018

T. W. CHERERE

JUDGE

In the presence of-

Court Assistants - Ribba & Diannah

Appellant -

