



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NANYUKI
CRIMINAL APPEAL NO. 27 OF 2015

JOHN GIKUNDI MURUNGI APPLICANT

VERSUS

REPUBLIC RESPONDENT

*(Being an appeal from the original conviction and sentence by Hon. C. K. OBARA – SENIOR
RESIDENT MAGISTRATE dated 9th October 2012 in Nanyuki Chief Magistrate’s Court Criminal
Case No. 520 of 2012)*

JUDGMENT

1. **GEORGE MWITI** the complainant in a **Criminal Case No. 520 of 2012** was in the early hours of 4th May 2012 grievously injured. The clinical officer who gave evidence in that criminal trial stated that the complainant sustained injuries on his upper limbs. He stated that the complainant suffered traumatic amputation of his forefingers of his left hand. He also suffered deep cuts wounds on his right arm which exposed his carpal bone. Further that the complainant suffered a cut on his right ankle joint. The complainant bled profusely from his injuries and on being admitted at Nanyuki hospital was found to be sick looking, in shock and semi-conscious. The clinical officer classified the injuries as **grievous**.

2. **JOHN GIKUNDI MURUNGI** the appellant herein was convicted before the Chief Magistrate’s Court Nanyuki with the **offence of grievous harm contrary to section 234 of the Penal Code**. He was sentenced to serve 12 years imprisonment. He has appealed against his conviction and sentence.

3. This is the first appellate court. As such this court is mandated to reconsider and re-evaluate the trial court’s evidence bearing in mind that this court did not have the opportunity to see and hear the witnesses that testified at the trial. See the case of **OKENO-v-REPUBLIC (1972)E.A 32**.

4. The grounds of the appellant’s appeal raise the following issues for

Consideration:-

(a) Did the prosecution meet the criminal standard of proof or did the trial court shift the burden of proof on the appellant?

(b) Did the trial court consider the appellant’s defence?

(c) Was the appellant sentence excessive?

5. On the first issue Mr. Chweya acting on behalf of the appellant submitted that the prosecution failed to

prove the case against the appellant beyond reasonable doubt. He also submitted that the trial court relied on insufficient and uncollaborated evidence whilst convicting the appellant.

6. Mr. Tanui the principal prosecuting counsel opposed the appeal. He submitted that the prosecution proved the case against the appellant on the required standard of proof.

WHAT WAS THE PROSECUTION'S EVIDENCE?

7. The complainant had on the 3rd of May 2012 gone to visit his friend Mwenda. He did not find Mwenda at home but found Mwenda's sister called Muthoni. He said that Muthoni persuaded him to wait for Mwenda. He also stated that he kept speaking to Mwenda, presumably on phone, and Mwenda told him that he was on his way. Whilst he waited for Mwenda and at 4.30 p.m. he said that he saw the appellant peeping into the house then disappear. The complainant said that he waited for Mwenda but Mwenda did not arrive. When it became late he decided to sleep at that home. At 3.30 a.m. he heard somebody call Muthoni. Muthoni went and opened the door. It was then that he said that the appellant entered into the house and slapped him with the flat part of the panga (*simis*). The appellant then placed the complainant's left hand on the table and cut off 4 of his fingers. The trial court indeed noted that the complainant's four fingers were missing. The complainant further stated that the appellant asked him to place the other hand on the table but he refused to do so. It was then that the appellant cut his right hand and right leg. He stated that the appellant threatened to kill him if he screamed. The appellant took Kshs.3,800 from his pocket. In his testimony the complainant stated that he saw the appellant clean the panga using grass presumably clean out the blood. The complainant after the attack sought the assistance of George Gitonga PW 2 and John Kinyua PW 3. As he sought their assistance he became unconscious and later found himself at Nanyuki hospital. It was his evidence that he had known the appellant for about 8 years. He also testified that the appellant on the night he was attacked had not concealed his identity. On that night there was moonlight and the appellant had a torch. On being asked by the complainant why he was attacking him, the appellant responded by saying, "***I want to kill you***".

8. Appellant on cross examining the complainant only questioned him relating to the supply of *changaa* (local brew). All the other evidence that he was the attacker remained unchallenged.

9. PW 2 and 3 together with Fredrick Kariuki PW 4 took the complainant to Nanyuki hospital. It is important to note that PW 4 on being cross examined by the appellant stated:-

"I arrested you (the appellant) because you told me that you are the one who cut him (complainant). You told me that he was armed with a knife and he is a very bad boy."

10. Muthoni who was present when the incident occurred did not attend the trial. The investigating officer said that he had been unable to trace her in order to get her evidence.

FIRST ISSUE

11. On whether or not the prosecution proved its case on the required standard of proof that the appellant was the one who committed the offence must be considered in the light of the fact that the complainant knew the appellant for 8 years. More than that they conversed as the attack took place. The one who attacked the complainant told him that he wanted to kill him. Whereas the case law is very clear that care should be taken by a court when the evidence is one of identification by a witness under difficult circumstances it is important to note that this is a case of recognition. In the case of **ODHIAMBO VS. REPUBLIC [2002] 1 KLR 241** the Court of Appeal had this to say:-

"1. Courts should receive evidence on identification with the great circumspection particularly where circumstances are difficult and to not favour accurate identification.

2. Where evidence of identification rests on a single witness and circumstances of identification are known to be difficult, what is needed is other evidence, either direct or circumstantial, pointing to the guilt of the accused person from which, the court may reasonably conclude that

identification is accurate and free from the possibility of error.”

12. The courts have also been careful to note that mistakes can also occur when it is a case of recognition. This was clearly stated in the

Case **R -v- TUNBULL & OTHERS 1976 3 ALL ER 549** the court had this to say in respect to recognition:-

"Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made..."

All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger."

13. In this court's view although the circumstances of identification or rather recognition were difficult the complainant stated that there was moonlight. The appellant also had a torch. The appellant and the complainant conversed as the attack took place. The complainant knew the appellant for 8 years. After the attack the complainant saw the appellant cleaning the panga. All of these are pointers that the recognition of the appellant was safe.

14. However the most damning evidence against the appellant was adduced by PW 4 who stated that he arrested the appellant after he admitted attacking the complainant. Bearing in mind the evidence of recognition and the evidence of the appellant's admission of committing the offence that in this court's view was sufficient evidence which proved that the appellant was the attacker. That evidence was not challenged by the appellant in cross examination.

15. The appellant by his defence admitted that he was present at the scene. He stated; "***I was present at the scene...***" He however said he did not know who committed the offence. He suggested that the offence could have been committed by Muthoni.

16. On my evaluation of the defence, I find that it does not displace the prosecution's evidence. In this court's view prosecution proved its case beyond reasonable doubt and the trial court was in this court's view correct in convicting the appellant.

SECOND ISSUE

17. The trial magistrate interrogated the appellant's defence. It is obvious from her considered judgment. There is therefore no basis of raising the second issue.

THIRD ISSUE

18. The sentence provided under **section 234** of **cap 63** is a maximum of life sentence. The appellant was sentenced to serve 12 years imprisonment. That sentence should be understood in the background that the complainant lost 4 fingers and suffered deep cut wounds in other parts of the body. He was hospitalised for a period in excess of a month. The sentence of 12 years bearing those injuries was not excessive.

19. Before concluding this judgment I will respond to the appellant's submission that the trial court erred in asking the appellant questions when he testified in his defence. The appellant chose to give evidence in his defence not under oath. In the appellant's view the trial court should therefore not have asked him any questions since he did not take the oath.

20. The trial court at the close of the prosecution's case found that the appellant had a case to answer. The trial court then complied with the provisions of **section 211** of the **Criminal Procedure Code Cap 75**. That section provides as follows:-

“211(1) At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).”

21. That section provides that an accused person can only be cross examined when his defence is under oath. It ought to be noted that the trial court is at all times entitled to ask questions. This is what the trial magistrate did when the appellant gave his defence. The trial magistrate therefore cannot be faulted in asking those questions and she therefore did not err.

22. In the end this court finds there is no merit in the appellant’s appeal against conviction and sentence. The appellant’s appeal is dismissed and the trial court conviction is upheld and the sentence is confirmed.

DATED AND DELIVERED THIS 8TH DAY OF MARCH 2017.

MARY KASANGO

JUDGE

CORAM

Before Justice Mary Kasango

Court Assistant: Njue

Appellant: John Gikundi Murungi

For the State:

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE