



REPUBLIC OF KENYA



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**Turere v Republic (Criminal Appeal 97 of 2015)
[2016] KEHC 4747 (KLR) (13 May 2016) (Judgment)**

Sailel Turere v Republic [2016] eKLR

Neutral citation: [2016] KEHC 4747 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL APPEAL 97 OF 2015**

CW MEOLI, J

MAY 13, 2016

BETWEEN

SAILEL TURERE APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the conviction and sentence in
Narok Criminal Case No. 147/2012- Sitati, SRM)*

JUDGMENT

1. In the lower court, the Appellant was represented by Mr. Ole Yenko. The Appellant was following a full trial convicted for the offence of causing grievous harm contrary to section 234 of the Penal Code; in that on 7th February, 2012 at Oloroito area of Narok North, he unlawfully did grievous harm to Suyanga Subasha. He was sentenced to life imprisonment.
2. He now appeals to this court against the conviction and sentence. His amended grounds of appeal are as follows:
 1. That the learned trial magistrate erred in law and facts in convicting the Appellant to serve an unconstitutional sentence of life in contravention of article 24 of the current constitution.
 2. That he erred in law and facts in convicting in reliance of a defective charge sheet.
 3. That he erred in law and facts in not finding the prosecution case was marred with a lot of contradictions and inconsistencies.
 4. That he erred in law and facts in not finding that the charges were motivated by a grudge over land issues, but not actual commission as alleged.



5. That he erred in law in not finding that or else not informing the Appellant of his constitutional rights, neither note that his rights as provided under article 49 (1) were grossly violated during his arrest.
 6. That he erred in law and facts in not finding that the exhibits MF1-4 were irregularly produced in court.
 7. That he erred in law and facts in not considering my defence to find that the same far out weighed the weak prosecution case.”
3. In written submissions the Appellant argues that the sentence meted out on him contravenes the Constitution; that the charge sheet was defective by its failure to indicate that there were other assailants who ‘jointly’ assaulted the deceased as per the evidence of eye witnesses. Further, that there were inconsistencies in the evidence of the Complainant and eye witnesses, PW1 and PW3 respectively regarding the presence of a 3rd man and/or the son of PW1 during the assault. And therefore the evidence should have been rejected.
 4. The Appellant also takes issue with the nature of investigations conducted and asserts that essential witnesses including PW1’s son and the doctor who first treated the complainant were not called to testify.

Reiterating his innocence, the Appellant asserts that the charges were motivated by a grudge over land, that his defence was not given due consideration. That his rights under Article 49 (1) and 50 (2) (g) & (h) of the Constitution were violated on arrest and during trial. Regarding the exhibits, he submits that while the sword tendered was not subjected to analysis, the P3 form was completed by an unqualified person and produced in contravention of Section 35 and 48 of the Evidence Act.

5. The appeal was opposed by the DPP. On his behalf, Miss Waweru submitted that the incident occurred in daylight at 5.00 p.m. and that PW3 witnessed the Appellant and 2 others assaulting the Complainant. That PW3’s evidence confirmed the Complainant’s testimony. On the injuries sustained by the complainant, Miss Waweru reiterated the evidence of PW3 and also the P3 form completed in that regard. She stated that the motive of attack was the land dispute between the Complainant and the Appellant; that the defence of the Appellant was dislodged by the prosecution evidence and therefore properly dismissed.
6. The duty of the first appellate court was stated in *Okenho -vs- Republic (1973) E.A. 32* as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya –Vs- R [1957] EA 336*) and to the Appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M. Ruwala –Vs- R [1957] EA 570*). It is not the function of the first appellate court merely to scrutinize the evidence to see there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters –Vs- Sunday Post [1958] EA 424*.”

And in the case of *R -vs- Oyier (1983) KLR 353* the court held that the Appellate court will not interfere with the findings of fact made by the trial court based on the credibility of witnesses unless “it is clear that no reasonable tribunal could make such a finding, or that the finding is clearly wrong”



7. The Prosecution case was that the Appellant and the Complainant Suyanga Subasha (PW1) were stepbrothers in a polygamous family of three wives. Their father is deceased. The sons lived on the same land in their homes several hundred meters apart. Prior to the assault on the Complainant there was a dispute between the Appellant and his brothers over their respective shares of the land inherited from their father and on which they lived. In particular there was a dispute arising from the Appellants alleged leasing of a portion of the land without the consent of his brothers.
8. On 7/2/12 at about 5.00 p.m. the Complainant was resting outside his home when he was accosted by the Appellant who was armed with a simi (sword) and accompanied by his 20 year old son Tobola. They questioned him concerning the land he was ploughing and the case regarding the land. Suddenly, the Appellant started to slash the complainant with the simi (sword), with the help of the Appellant's son.
9. The Complainant raised an alarm and a step-brother Ngoigo Sipaash (PW3) who was working on his tomato patch rushed to the scene to find the Appellant, his son Tobola and one Ntimama surrounding the complainant, assaulting him. On seeing the witness, they fled the scene leaving the Complainant bleeding from severe cut wounds. When police were called to the scene the Appellant took cover in his house. He was eventually arrested and the sword recovered, while the Complainant was rushed to hospital at Narok and later Tenwek where he was in ICU for 8 days. The Complainant's injuries included complete amputation of the Right Hand's 4th & 5th fingers, and multiple deep cuts to the torso, head, neck and the upper and lower limbs. The degree of injury was classified as grievous harm.
10. In his defence, the Appellant elected to make a sworn statement. To the effect that on the material date he was out herding his cattle, returning home at 5.00 p.m. He lay down to sleep and was woken up by police who bundled him into a police vehicle without explanation. He said that he was framed up by the complainant arising from the existing land dispute between them. He denied assaulting the deceased or even that the sword displayed in court was his. He surmised that the complainant was assaulted in a drunken brawl . Thus the injuries were not disputed.
11. It did appear that the Appellant in this appeal nonetheless took issue with the evidence in respect of the P3 form tendered in proof of the complainant's injuries. In particular he challenged the production of the P3 form and other medical records by Enock Kotikot (PW2) the clinical officer, Narok District Hospital. Firstly, the objections being raised in appeal were not raised at the time of the evidence of PW2. Be that as it may, PW2 stated that he is the one who completed the P3 form, using treatment notes and discharge summary from Tenwek Hospital where the complainant had been admitted following initial treatment at Narok District Hospital. He also examined the complainant.
12. PW2 said that he is the one who completed the P3 form Exhibit 3. Obviously since the same is dated 20/2/12, the record of evidence showing that he completed it on 7/2/12, the date of assault, must be an error. The witness did not only rely on the records from Narok and Tenwek hospitals, but he testified that he examined the Complainant before completing the P3 form. Hence the injuries and surgical stitches noted in the report. It is not clear to the court why the Appellant claims that PW2 was not qualified to make the report.
13. In an appeal where a similar objection had been raised based on Section 48 of the Evidence Act, the Court of Appeal stated in *Fappyton Mutuku Ngui -vs- Republic (2014) e KLR* that:

“PW5 is a clinical officer who testified on behalf of his colleague..... who examined and treated PW2 at Matuu District Hospital. In our opinion, a clinical officer is qualified to fill a P3 form. This is an areas of his competence (See Raphael Kavoi Kiilu -vs- Republic Criminal



Application No. 198/2008; Section 2 of the clinical officers (Training, Registration and Licencing) Act, Cap 260.....”

That objection has no legal basis.

14. Similarly the record shows that the Complainant had identified the P3 form and treatment notes in his evidence, contrary to the assertions of the Appellant. I do agree with him, however that no basis was laid by the prosecution under Section 77 of the Evidence Act before PW2 tendered the treatment notes from Narok and Tenwek hospitals (exhibit 1 & 2). Even if the treatment notes are disregarded the evidence of PW2 clearly establishes the extent of the Complainant’s injury, as similarly outlined by the Complainant himself, his brother PW3 and the first police officer to arrive at the scene PC Ernest Okubasu (PW4).
15. Apart from the evidence of the Complainant himself on the identity of the assailant, the sole eye witness called by the prosecution was the step-brother PW3. A son of the Complainant who was allegedly with him at the time of attack was not called. It was not clear what his age may have been at the time but the Complainant said his wife had taken the other younger child to the clinic for medical check up. For whatever reason, the prosecution did not call the son who was in the company of the deceased, nor did the defence make an issue of this matter during the trial. Besides under Section 143 of the Evidence Act the prosecution was not under any duty to call a multiplicity of witnesses in proof of their case.
16. In this case, I think the location of the offence is relevant to the identity of the assailants. The evidence of PW1 was that he was lying down outside his house when the assailants came and attacked him. PW3 confirmed the scene of attack to be at the home of the victim. The investigating officer, PW4 stated in his evidence that moments after receiving the assault report a reportee came to the office. He stated further:

“ Before proceeding to the area the witness who has just testified (PW3) got to the station. We went with him to the scene where he led us all the way to the scene of assault. On arrival we found an elderly man lying near bush. He had several cuts all over his body. He was unconscious 2 of his fingers had been completely chopped off.....The suspect was hiding in his house when we got to the crime scene. We did accost him at the house. His brother was present.....(he) came out holding the weapon....”.
17. This evidence was not challenged during the trial, nor the suggestion of attack at a different locale made in cross-examination of PW1, 3 and 4 by the defence counsel. Contrary to the submissions of the Appellant in support of ground No. 5, the prosecution evidence on the scene of attack shows that the attack occurred in the homestead of the Complainant, where he was also found lying on the ground by PW4. This dislodges the suggestion that the complainant was assaulted elsewhere.
18. Equally, police upon arriving at the scene, took in the Appellant, after PW3 the reportee identified him as the assailant. He was found in his house, armed with the weapon, used in the assault and which was produced in court. Indeed PW3 told the court:

“ when the accused saw the officers, he took cover inside the house. I pointed out the accused to the 3 police officers.....the accused remained inside. He was holding a maasai sword in his hand but we eventually overcame him.”
19. The Appellant was indeed identified to be the person who assaulted the Complainant in broad day light while accompanied by his son Tobola.



The fact that PW3 named the two men and another by the name Ntimama while PW1 only mentioned the former duo does not in my view detract from the evidence of the witnesses. After all once the assault by the former duo commenced, it was not possible for the complainant to see who else joined the assault as he became unconscious. He was unconscious on admission at did not even know how he got to Tenwek Hospital. He could not tell who rescued him during the assault. The fact that PW3 immediately identified the Appellant at the scene of scene of crime to police, and the fact that he was found armed with a simi confirms the evidence of identification.

20. Both PW1 and PW3 and indeed the brothers of the homestead were involved in a land dispute regarding the alleged unauthorized leasing of land to the third parties by the Appellant. While the Appellant has emphasized an existing grudge between him and PW1, he stated during is evidence that he has no grudge with any of the other brothers, including PW3. Thus, while it was clear there was a land dispute in the home, it seemed that in relation to the assault, the appellant and PW1 had a special issue. The Appellant claimed to have been framed but it is not clear why PW3 would join such a plan. What seemed to have led to the particular assault was the Appellant's displeasure that the Complainant had ploughed land, possibly exceeding the limits of his boundary onto the common parcel the Appellant had supposedly hired out without authority, hence the existing case between the brothers.
21. In view of the foregoing, grounds 2-5,7,8 of the appeal have no merit. The trial magistrate correctly weighed the prosecution and defence evidence and arrived at a proper conclusion. His finding that the Appellant was properly identified as the assailant cannot be faulted. He was, in the circumstances entitled to dismiss the defence of the Appellant to the effect that the Complainant was assaulted by unknown third parties, away from home.
22. Nothing turns on ground six which raises an allegation of violation of the Appellant's rights by police on arrest. The authority cited, Albanus Mutua Mwanzia -vs- R has long been discarded since the decision of the Court of Appeal in Julius Kamau Mbugua -vs- Republic (2010) eKLR. I do not understand how the sentence meted out on the Appellant can be said to contravene Article 24 of the Constitution as it is a lawful sentence. Hence ground one appears misplaced.
23. On the severity of the sentence, the trial magistrate in his notes on sentence gave reasons for imposing the life sentence. He noted that the Appellant, though a first offender showed no remorse for the offence committed. The injuries inflicted on the Complainant were very severe and it is a miracle that he survived. Clearly the offence was pre-meditated as pointed out by the trial court. I cannot find any basis for interfering with the sentence. In the result the appeal against conviction and sentence must fail. The appeal is dismissed in its entirety.

DELIVERED AT NAIVASHA THIS 13TH DAY OF MAY 2016.

C. MEOLI

JUDGE

Appellant In person

For the DPP Mr. Koima

Court Clerk Mr. Barasa

