



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.21 OF 2014

(An appeal from original conviction and sentence of Ogembo PM'S C Criminal Case No. 822 of 2012 by Hon. D.O. OGOLA CM dated 19TH February, 2014)

RICHARD GWAKO & JOB GWAKO - - - - -APPELLANTS

VERSUS

REPUBLIC - - - - - RESPONDENT

JUDGMENT

1. The Appellants herein, **RICHARD NYAMBOGA GWAKO and JOB OKONGO GWAKO** were jointly charged with the offence of **GRIEVOUS HARM** contrary to **Section 234 of the Penal Code**. The particulars of the offence were that on the night of 16th May 2012 at Boochi Sub-location in Gucha District within Kisii County, jointly with another not before the court unlawfully did grievous harm to **RUTH BOSIBORI**.

2. The appellants pleaded not guilty to the charge and a trial followed thereafter in which the prosecution called a total of 7 witnesses and at the close of the trial, the appellants were convicted and both sentenced to life imprisonment.

3. The appellants have now appealed against both the conviction and sentence and have set forth the following grounds of appeal in their petition of appeal.

1. The trial magistrate erred in law and fact in convicting the appellants as he did even when the prosecution had not established a Prima Facie case and yet the evidence tendered by the appellants in their defense gave a good account of their movements on the material night and completely rebutted the prosecution evidence.

2. The trial magistrate erred in law and fact in convicting the appellants as he did even when the evidence tendered before the court showed that the alleged offence took place at night under circumstances that would hinder a proper identification and/or recognition of the assailants.

3. The trial magistrate in convicting the appellants took into consideration irrelevancies and hearsay evidence which are in admissible.

4. The trial magistrate erred in law and fact in accepting and considering the evidence relating to the panga that was produced as an exhibit even when that panga was not dusted for fingerprints and/or the blood clots on the panga taken for test to confirm the veracity of

the evidence.

5. The trial magistrate in convicting the Appellants did not consider the evidence of PW5 (Keresensia Nyambeka) which evidence had he considered he would not have convicted the appellants as he did.

6. The sentence that was meted was manifestly excessive.

4. When the appeal came up for hearing on 30th June 2016, parties agreed to canvass their arguments by way of written submission.

Appellants written submissions

5. Through their advocate M/s Mainga & Co. Advocates, the appellants submitted that the prosecution's case was not proved to the required standards as the appellants gave evidence that rebutted the evidence of the prosecution's witnesses.

6. The appellants also submitted that the medical evidence tendered by the prosecution's witnesses was contradictory and was not sufficient to prove the injuries alleged to have been suffered by the complainant.

7. The appellants contended the trial court erred in convicting the appellants based on irrelevant and inadmissible hearsay evidence tendered by the prosecution witnesses. It was the appellants' case that the trial court over relied on the testimonies of **PW1, PW2 and PW4** which evidence was not clear on who caused grievous harm to the complainant yet **PW7**, the investigating officer did not carry out any investigations but relied only on the report that he received from the area chief, (PW3), Robert Isoe.

8. According to the appellants, the testimony of PW5 was clear that the complainant's assailant was their brother one Dominic alias Isaac who went underground after the attack and has remained at large to-date.

9. The appellants faulted the trial magistrate for accepting as an exhibit, a panga which was produced as Pexhibit 2 yet the said panga was not dusted for fingerprints and the alleged blood stains on it subjected to forensic evidence to confirm it the blood belonged to the complainant.

10. On sentence, the appellants submitted that the same was manifestly excessive while relying on the case of **James Kiotee Jackson vs Republic Machokos HCCRA No. 146 of 2009** in which it was held that the court may on appeal increase or reduce the sentence or alter the nature of the sentence even though the maximum sentence is life imprisonment.

Respondent's submissions

11. Mr. Otieno, counsel for the state submitted that the ingredients of the charge of grievous harm as set out under **Section 234 of the Penal Code** and as established in the case of **John Oketch Abonyo vs Republic [2000] eKLR** were proved to the required standards by the prosecution.

12. The respondent further submitted that the appellants were properly identified by PW1, PW2 and PW4 as their attackers since the appellants had torches which aided and enabled the said witnesses to identify them. It was the respondent's case that the said identification was further reinforced by the fact that the appellants were close relatives of PW1, PW2 and PW4 who recognized them by their appearance and voices.

Evidence

13. I have considered the grounds of appeal and the parties respective submissions filed herein. The primary duty of the first appellate court is to re-evaluate the evidence tendered before the trial court with a view to arriving at its own independent conclusion while bearing in mind the fact that it neither heard

nor saw the witnesses testify. See **Okeno vs Republic [1972] E.A 32.**

14. The prosecution called a total of 7 witnesses as follows:

PW1, Ruth Bosibori Oroba, the complainant, who was at the time of the attack aged 14 years testified that she was, on 16th May 2012 at about midnight, sleeping in their house in the company of PW2 Linet Boyani and PW4 Rosa Bitengo Oroba who are her sister and mother respectively when the appellants, whom she knew very well as her cousins and close neighbours came to their house and knocked at their door while claiming that they were police officers. The attackers then broke the door open and when PW1 attempted to escape, the 1st appellant got hold of her and she was able to identify the appellants as they had torches which they were flashing around. She stated that the appellants were all armed with pangas and she recognized them as her cousins and asked them why they were attacking her. The 1st appellant told her that they wanted to finish her and it is at this point that one Dominic suddenly appeared and cut her on the forehead as the 1st appellant chopped her left hand off while the 2nd appellant cut her left leg as she lay down. PW1 lost consciousness only regain it one week later at Tabaka Hospital.

15. PW2 was Linet Boyani the elder sister of PW1. She confirmed that she was with PW1 in their mother's house on the night of the attack and that she saw the 1st appellant chop off the complainant's left hand while one Dominic cut the complainant on the face as the 2nd appellant cut her leg. She confirmed that she was able to see and recognize the appellants as they had torches which they flashed around and that she spoke to the 1st appellant. PW2 added that the 2nd appellant taunted and boasted to her the following morning while stating that even though they had cut PW1, they would not run away as no action could be taken against them since the complainant's brothers were away.

16. PW3 Robert Isoe was the area assistant chief whose evidence was in respect to the information he received from a village elder the morning after the attack on PW1. PW3 testified that he visited the scene of the incident where he found a huge crowd baying for the appellants' blood thereby prompting him to arrest the appellants in order to save them from the mob that was threatening to lynch them in connection to their alleged involvement in the assault on PW1. PW3 confirmed that he knew the appellants and the complainant as first cousins as their fathers were brothers.

17. PW4 Ruth Bitengo Oroba, the mother of PW1 and PW2 confirmed that she was with the complainant and PW2 on the night of the attack and that she saw and recognized the appellants and one Dominic who escaped after the attack. She stated that the 1st appellant talked to her at the time of the attack and asked her why she was screaming. PW4 stated that she escaped and ran into the tea bushes where she stayed till morning only to return at 6 a.m. and find that PW1 had been badly injured and had been taken to Tabaka Hospital.

18. PW5 Keresensia Nyambeka was the mother of the appellants and the escapee, Dominic. Her testimony was that on the fateful night her son Dominic came to her house at about 11 p.m. ask her for food which food he rejected while complaining that it was too little before he grabbed a lantern and threw it at her. She escaped and hid inside the tea plantation after which she heard Dominic say that he would pursue her to the home of PW4 and shortly thereafter, she heard the children of PW4 screaming. PW5 stated that Dominic was fond of assaulting her every time he came home drunk and that she would seek refuge in the home of PW4.

19. PW6 was Wycliffe Atamba, the clinical officer at Gucha Level 6 Hospital who produced the complainant's P3 form as PExhibit 1. His testimony was that the complainant sustained fracture of the lower mandible, an amputated left forearm, cut wound on the left and right forearms and fracture of the left ankle joint. He classified the injuries as grievous harm.

20. PW7 Zackayo Kipcheum was the investigating officer attached to Ogembo police Station who testified on how he received the appellants having been brought to the station by PW3. He also visited the complainant at the Hospital, recorded witness statements and issued the complainant with the P3 form. He

produced a panga that had allegedly been used in the attack as PExhibit 2.

21. When placed on their defence after the close of the prosecution's case, the 1st appellant gave an unsworn defence in which he gave an account on how he was arrested while washing a motor cycle. He denied having attacked PW1.

22. The 2nd appellant similarly gave an unsworn statement in his defence in which he basically denied any involvement in the crime while stating that the real attacker was not in court. The appellants did not call any witnesses.

Analysis and determination

23. I have duly considered the evidence tendered before the trial court, the grounds of appeal and the parties respective submissions.

24. I note that the following issues require my determination.

a. Whether the offence of grievous harm was proved against the appellants beyond reasonable doubt and whether the appellants were positively and properly identified as the complainant's assailants.

b. Whether the sentence passed was manifestly excessive.

25. On the first issue of proof of the prosecution's case beyond reasonable doubt, I find that there was overwhelming evidence, both oral and documentary, to prove that the complainant was attacked on the night in question and that she sustained very serious injuries that resulted in her loss of consciousness for about one week and the amputation of her left hand. PW6, the clinical officer, produced the P3 form as PExhibit 1 which showed that the complainant sustained the following injuries:

i. A deep cut wound on the left cheek involving the ear, and the jaw measuring 30cm long.

ii. A fracture of the lower mandible.

iii. Amputation of the left forearm.

iv. Multiple cut wounds on the left and right forearms.

26. On the identification of the Appellants herein I note that there exists an array of numerous decided cases over the same some of which I will highlight in this judgement as follows: In the case of **Wamunga Vs Republic (1989) KLR 426** the Court of Appeal stated as under:-

"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."

27. It was also held in **Nzaro vs Republic (1991) KAR 212** and **Kiarie vs Republic (1984) KLR 739** by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

28. In **R -vs- Turnbull & Others (1976) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

"... 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 with the Accused

under observation? At what distance? In what light? Was the observation impeded in any way....? 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 the 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 his actual appearance?.... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

29. The above does not mean that there cannot be safe recognition even at night. The Court of Appeal in **Douglas Muthanwa Ntoribi vs Republic (2014) eKLR** in upholding the evidence of recognition at night held as follows:-

“On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified:-

“I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant.”

The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error...”

30. Again the Court of Appeal in **Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs Republic (unreported)** had this to say on the evidence of recognition at night:-

“We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as ‘neighbours from the village’, that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non-recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants.”

31. In the instant case, the appellants were identified by PW1, PW2 and PW4 who recognized them as their relatives who lived in their neighborhood. The appellants were therefore well known to the three prosecution witnesses who experienced and witnessed the brutal attack on the complainant first hand. Even though the incident took place at night, the witnesses testified that the appellants had torches which they flashed around and this enabled them to see their assailants. Under the above circumstances I find no reason to disturb the trial court’s findings on identification by recognition.

32. PW1, PW2 and PW4 testified that they were able to physically identify the appellants using light from the torches that the appellants had and they also recognized their voices because the appellants talked to them during the attack.

33. PW1 had the following to say upon being cross examined by the 2nd appellant.

“You cut me and it is for you to say why. I saw you with my own eyes while you held a panga. I do not know where the panga is. The 2 of you cut me. Dominic who was with you escaped to date. I saw you well after I woke up as you had torches you were flashing around.... I have no reason to falsely accuse you.”

34. PW2 testified as follows on her identification of the appellants upon being cross-examined by the 1st

appellant.

“We are cousins. It is you to say why you attacked us. I am sure it was you because I spoke to you face to face as I asked you why you were cutting her. My whole evidence is truthful. You attacked us at midnight. I had been awake as I was feeding my twins. You looked drunk. I know you had been drinking next to Matongo. You came shouting that you were police officers.”

35. PW4 corroborated the testimonies of PW1 and PW2 and confirmed that she saw the appellants break into her house on the fateful night.

36. From the evidence tendered by PW1, PW2 and PW4, it is crystal clear to me that the appellants were not strangers to the complainant her sister (PW2) and her mother (PW4). They were not only close relatives, but also neighbors.

37. It came out clearly in evidence that the two families had no grudge or differences that could have prompted the witnesses to falsely implicate the appellants in this case. I am therefore satisfied that the 3 witnesses positively identified the appellants as their attackers. Their evidence on identification was credible, consistent and was not impeached on cross examination by the appellants.

38. Besides, PW5, the mother of the appellants confirmed that on the material night, her son Dominic assaulted her before going to the home of PW4 from where she heard screams emanating shortly thereafter. The testimony of PW5 lends credence to the testimonies of PW1, PW2, and PW4 that the said Dominic was in the company of the appellants at the time they invaded their home.

39. Turning to the issue regarding sentence, **Section 234 of the Penal Code** under which the appellants were charged provides as follows:

Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.”

40. Sentence is essentially a discretionary function of the trial court but one which should be exercised upon taking into account all the relevant factors while leaving out irrelevant matters. In the case of **Felix Nthiwa vs Republic CA No. 187 of 2000**, it was held that an appellate court with the exercise of that discretion where it is shown that the court whose discretion is impugned has either not taken into account a relevant factor or has taken into account an irrelevant factor or that short of those two, the exercise of the discretion is plainly wrong.

41. In the case of **Diego vs Republic (1985) KLR 621** and **Dismas vs Republic (1984) KLR 634**, the courts held that an appellate court interfere with the discretion by a trial court on sentence except in such cases where it appears that in assessing the sentence, the court acted on some wrong principle or has imposed a sentence which is manifestly inadequate or manifestly excessive.

42. **Section 354 (3) (b) of the Criminal Procedure Code** provides as follows:

“In an appeal against sentence, the court may increase or reduce the sentence or alter the nature of the sentence.”

43. In the case of **Macharia vs Republic (2003) KLR 115**, the court held that the discretion to increase or reduce the sentence or alter the nature of the sentence must be exercised judiciously, and the court pronounced itself as follows:

“The court does not alter a sentence on the mere ground that if the member of the court had been trying the appellant, they might have passed a somewhat different sentence...”

The court will also not ordinarily interfere with discretion on exercised by a trial judge unless

as was held in James vs Republic (1950) EA 147, it is evident that the judge acted upon some wrong principles or overlooked some material facts.”

44. In the instant case, even though the appellants were treated as first offenders and in mitigation, sought the leniency of the court, the trial court sentenced both appellants to life imprisonment after considering the gravity and permanent nature of the injuries they had inflicted on the complainant who was at the time of the judgment, a young girl aged only 17 years. The trial court further observed that the complainant could have easily lost her life following the attack.

45. I have similarly considered the brutal manner in which the appellants executed their attack on the young and defenseless complainant which attack did not only totally disfigure her face, but also led to the traumatic amputation of her left arm that was chopped off during the attack. In view of the above observations I find that the trial court took into account relevant factors during sentencing, the sentence was lawful and in tandem with the law under which the appellants had been charged and I find no reason whatsoever to interfere with the trial courts exercise of discretion on sentencing.

46. In sum therefore, having found that the prosecution’s case was proved beyond reasonable doubt and having found that the life sentence imposed on the appellants was lawful, the order that commends itself to me is the order to dismiss the appeal on both conviction and sentence.

Dated, signed and delivered in open court this 7th day of November, 2016

HON. W. A. OKWANY

JUDGE

In the presence of:

- Mr. Otieno for the State
- Appellant in person for the Appellant
- Omwoyo court clerk