Wahome v Republic (Criminal Appeal 189 of 2019)
[2025] KECA 434 (KLR) (28 February 2025) (Judgment)

Neutral citation: [2025] KECA 434 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 189 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

FEBRUARY 28, 2025

BETWEEN

COLLINS WAFULA WAHOME ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgement and Order of the High Court of Kenya at Bungoma (Sitati, J) Dated 6th May, 2019 in HCCRA No. 87 of 2018)

JUDGMENT

1. Collins Wafula Wahome, the appellant herein, was tried before the Chief Magistrate's Court at Bungoma for the offence of causing grievous harm contrary to Section to 234 of the *Penal Code*. The particulars of the charge stated that on 25th April, 2013, in Kikweti village, within Bungoma County, with others not before the court, he inflicted grievous harm to Winrose Nasimiyu Wangila.

2. During the trial, five witnesses testified in proof of the prosecution case. These were: the complainant, Winrose Nasimiyu Wangila (Winrose), who testified that the appellant cut her with a panga on her right hand while Erick Nyongesa, who was also with the appellant, cut her with a panga on the left hand and that she lost consciousness but was also cut on the head, hip joint and left leg. Tobias Wekesa Mawachi (Tobias), also testified that he was, on the material night, cut with a panga on the neck by the appellant, who also hit him on the mouth with a hammer, causing him to lose four teeth.

3. Frida Wasike (Frida) also testified that on the material night she heard her son, Erick Wahome Barasa Wasike (Barasa), screaming in the farm, and upon going to check on her son, she met the appellant. She asked the appellant what had happened to her son, but the appellant pushed her and cut her on the head with a panga. She identified the appellant as her grandson, while Winrose is her daughter-in-law. She testified that Winrose was injured and that her right hand was severed.

4. Dr. Elias Adoka Emondang (Dr. Elias), was at the material time working at Bungoma Referral Hospital. He recalled filling a P3 Form for Winrose. Upon examination, she had a wound on the head, back and right hip joint and her right hand was completely cut off. Corporal Kennedy Omwamba (Cpl. Omwamba), who was the investigating officer, testified that on the material night a report was made at the police station, acting on which he proceeded with other officers to Kikwechi village where they found many villagers who had been cut with pangas and beaten with rungus. He identified Winrose as one of those who had been injured. They escorted her to Bungoma County Referral Hospital. Winrose mentioned the appellant and one Erick Nyongesa as those who had attacked her. Cpl. Omwamba arrested the appellant three years later after Winrose and her husband spotted him and alerted the police.

5. The appellant gave a sworn statement in which he explained how he was arrested from his place of work on 26th April, 2016. He was forced to accompany the officers to the police station and was kept in the cells for one week. He was charged, but denied the charges. Under cross examination he admitted knowing the complainant, but maintained that he knew nothing about the offence. He stated that on the night of 25th April, 2013, he was at his place.

6. The trial court upon considering the evidence, delivered a judgment in which it found the appellant guilty of the offence, convicted him and sentenced him to serve twenty years imprisonment.

7. Being aggrieved, the appellant has appealed the judgment of the High Court, raising four grounds in his memorandum of appeal. The grounds include, the trial court and the learned Judge of the High Court having erred, in convicting him on a defective charge sheet; in convicting him with grievous harm when the evidence was marred by inconsistencies and contradictions; in convicting him, when crucial witnesses who were at the scene of crime were not called to testify; and in convicting him when the prosecution case was not proved beyond reasonable doubt.

8. In support of the appeal, the appellant has filed written submissions which he prepared in person. He contends that the charge against him was defective as there was no OB Number, date, month or year indicated on the charge sheet to show that the incident was reported and booked. He maintains that there was no evidence that the incident was reported or booked; that no weapon that was used to cause the grievous harm was indicated on the charge sheet; and that according to Cpl. Omwamba, he was investigating a robbery case.

9. The appellant further contended that the prosecution evidence was marred with inconsistencies and contradictions. For instance,the complainant did not state when the offence was committed, while Tobias indicated it was around midnight and Frida stated it was around 11 pm. In addition, there was inconsistency between the evidence of Winrose and that of Frida. He pointed out that while Winrose stated that Erick Nyongesa also cut her with a panga, Frida stated that her son Barasa was screaming, so it was not clear whose evidence should be believed.

10. The appellant pointed out that there were several crucial witnesses who were not called to testify. These included Mzee Mutabo, Linet Wambati and Augustine Wambati, who were all mentioned. He relied on Bukenya & others v Uganda [1972] EA 549.

    Finally, the appellant urged the Court to consider remitting the matter back to the High Court for resentencing.

11. The appellant filed a second set of submissions in which he reiterated that the charge sheet was defective. He also added that he was unlawfully detained as he was produced in court more than 24 hours after his arrest. He added that prosecution witnesses' statements were not availed to him and that his defence of alibi which was not shaken by the prosecution evidence, was improperly rejected without

evaluation. He stated that the prosecution case was unfairly investigated and was unfit to warrant a conviction.

12. The respondent also filed written submissions through a prosecution counsel, Ayeka Shakwila. He argued that the charge sheet as drafted was not defective and that even if it was, the same has not occasioned any failure of justice and is curable by Section 382 of the *Criminal Procedure Code*. Counsel submitted that the evidence as adduced by the prosecution in the trial court was consistent as the complainant, Tobias and Frida, all identified the appellant who was known to them, and who was cutting them with a panga. Counsel argued that the conditions were favourable for a positive identification as there was sufficient moonlight, and that the inconsistencies regarding the time of the offence did not render the evidence at variance.

13. As regards the witnesses who were not called to testify, counsel referred to Section 143 of the *Evidence Act* which provides that no particular number of witnesses shall in the absence of any provisions of law to the contrary be required for the proof of any fact. Counsel maintained that the evidence adduced was sufficient to prove the offence with which the appellant was charged, and there was nothing preventing the appellant from calling the witnesses he says were not called, to testify on his behalf.

14. With regards to the appellant's request for resentencing, counsel submitted that the conduct of the appellant showed that he was not only a violent person, but also a venomous person, who should be kept away from the society for the longest time possible, noting that the complainant was his neighbour. The Court was therefore urged to dismiss the appeal.

15. During the plenary hearing, the appellant was in person, while the respondent was represented by Ms. Busienei, Senior Prosecution Counsel from the office of the Director of Public Prosecutions (ODPP). The appellant took a different position from that which he had indicated in his appeal and his submissions. He informed the Court that he wanted the Court to consider only reducing his sentence. Questioned by the Court, the appellant asserted that he was not pursuing the appeal against conviction, but only wanted the Court to consider reducing his sentence.

16. On her part Ms. Busienei opposed the appeal against sentence.

    Learned counsel pointed out that the appellant had completely severed the complaint's arm, and, therefore, caused her a permanent injury which has affected her life. She argued that the prison term of twenty years imposed on the appellant was commensurate with the circumstances of the offence and should not therefore be reduced.

17. This being a second appeal, the Court's jurisdiction is confined to considerations of issues of law only as provided under Section 361(1)(a) of the *Criminal Procedure Code*. Under that section, severity of sentence is specifically identified as a matter of fact and is therefore not open to this Court for consideration.

18. As explained above the appellant has in effect withdrawn his appeal against conviction, and only pleads that his sentence be reduced. The appellant was charged with the offence of causing grievous harm contrary to Section 234 of the *Penal Code*. Section 234 of the *Penal Code* provides for the offence of Grievous Harm as follows:

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

19. Section 4 of the *Penal Code* defines grievous harm as follows: -

> "'grievous harm' means any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement, or any permanent or serious injury to any external or internal organ, membrane or sense."

20. From the above exposition, the offence of grievous harm is committed when the accused person subjects the complainant to an assault that results inter alia to maim or permanent injury of the complainant. The maximum penalty provided for the offence is life imprisonment. The complainant herein suffered a permanent injury and the appellant was sentenced to the maximum penalty of twenty years imprisonment. Does the Court have jurisdiction to intervene and reduce the appellant's sentence as he pleads?

21. In Bernard Kimani Gacheru v Republic [2002] KECA 94, the Court of Appeal, (Chunga, CJ, Shah & Bosire, JJA) asserted:

> "It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless anyone of the matters already stated is shown to exist."

22. Sentencing is a matter which is an exercise of discretion by the trial court. Such discretion must be exercised judicially in accordance with the circumstances before the trial Court and the law. The general principle is that an appellate court would not normally intervene where a trial court has exercised its discretion unless it is established that such discretion has not been exercised judicially because either a material fact has been overlooked, or the trial court has considered an irrelevant factor, or given the circumstances, the sentence is either too harsh or too lenient as to constitute an obvious error of principle.

23. The circumstances of this case were that the appellant, without any provocation, attacked the complainant and caused her serious injuries including severing her right arm, thereby leaving her with a permanent disability. In sentencing the appellant, the trial court who had called for a probation report stated as follows:

> "I have considered the report by the probation officer dated 13th August, 2018, the fact that the prosecution is in agreement with the report and prays for a harsh sentence against the accused. I have also considered the mitigation by the accused and the fact that the accused has no prior record. I have also considered the heinous act meted to the complainant who is not missing her right hand.
>
> I therefore sentence the accused to serve twenty years imprisonment.

24. The first appellate court found no reason to interfere with the sentence. In dismissing the appeal, the learned judge observed that:

> " There is no doubt in this case that chopping off the whole of PW1's hand amounted to grievous harm. The medical evidence by PW4 confirms the same fact. The flat denial by the appellant that he knew nothing about the offence is what can properly be described as a frivolous response. The appellant acted savagely on the material night as if he was high on some substance or possessed or had simply decided with all his working faculties that he was going to do what he did, and he did it.
>
> In light of the above, I am satisfied that the prosecution proved its case against the appellant beyond any reasonable doubt and the trial court appropriately sentenced the appellant. What it means is that the appellant's appeal has no merit on both conviction and sentence..."

25. It is clear that the trial magistrate appropriately considered the facts before him, and applied the law in imposing the sentence of twenty years imprisonment. Although the sentence is the maximum sentence provided for the offence, in the circumstances in which the offence was committed, and given the injury suffered by the complainant, the trial magistrate cannot be faulted. We, therefore, find no justification for this Court to interfere with the sentence.

26. The upshot of the above is that the appeal against sentence has no merit. We uphold the judgment of the High Court and dismiss the appeal in its totality.

DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF FEBRUARY, 2025.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H.A. OMONDI

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR