Onyiego v Republic (Criminal Appeal 4 of 2017)
[2023] KECA 1095 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KECA 1095 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 4 OF 2017

PO KIAGE, M NGUGI & F TUIYOTT, JJA

SEPTEMBER 22, 2023

BETWEEN

DUNCAN OKOTH ONYIEGO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence of the High Court of Kenya at Homa Bay (H. A. Omondi J) dated 28th July, 2016 in Criminal Appeal No. 12 of 2016)

JUDGMENT

1. The appellant Duncan Okoth Onyiego was charged before the Principal Magistrate's Court in Ogembo with the offence of grievous harm contrary to section 234 of the *Penal Code*. The particulars of the offence are that on the January 14, 2011 at Ruri West Location, Rambwe East Location, Mbita District within Homa Bay County he unlawfully did grievous harm to Patrick Otieno.

2. The prosecution case was presented through six witnesses, and what emerges from their evidence is a portrait of a man embittered by rejection by a woman, eager for revenge on his rival and his erstwhile girlfriend.

3. At about 1.00 am on January 14, 2011, Patrick William Otieno (William, PW1), the complainant, went out of his house to answer a call of nature. He left his second wife of about two months, Zipporah Adhiambo William (PW2), in bed. He did not get to do what he needed to do, however. While he was standing outside, admiring the moon, he saw someone whom he recognised as the appellant emerge from the shadows and confront him with a panga. The appellant cut PW1 on the wrist and he tried to get away from appellant, moving backwards as he screamed loudly. PW1 lost his balance and as he fell, the appellant cut him on the right eye and he passed out. He woke up in hospital. His eye was completely damaged.

4. It was PW1's evidence that he saw the appellant clearly as there was a full moon and he faced him clearly for about five minutes as he moved backwards. He had met the appellant a few days earlier, on the January 5, 2011, when the appellant had come to his home, pretending to be lost, and they had had a discussion.

5. PW2, Zipporah Adhiambo William, was sleeping in the house when her husband, PW1, went outside. She heard a noise as if there was a struggle and she also went outside. She saw PW1 moving backwards, trying to evade his attacker. She saw the appellant, whom she recognised, cut PW1 with a panga on the forehead. She recognised the appellant as he was a former boyfriend with whom she had had a child while in school in 2008. PW2 had married PW1 in November of 2010. She saw and recognised the appellant as there was moonlight.

6. It was PW2's evidence further that after the appellant cut her husband for the second time, he advanced towards her and she screamed while running towards her 'grandmother's' house (probably her mother-in law's house). Her 'grandmother' had by this time opened the door to her house, and the appellant fled.

7. Rosalina Auma Otieno (PW4), the complainant's mother, recalled that the appellant had approached her on January 11, 2011 as she was on her way to the river and asked her whether Zipporah (PW2) was her daughter in-law. When PW4 confirmed that she was, the appellant threatened that PW4 and her son would be harmed, that they 'will see'.

8. A few days later, on January 14, 2011 at 1.00 am, while inside her house, she heard someone crying, saying 'he has cut me.' She went out of the house and found PW1 on the ground. PW2 was running towards her house while the appellant, armed with a panga, was in pursuit. PW4 was able to see the appellant because there was moonlight. She also had a spotlight which she flashed at him. The appellant was not able to catch up with PW2 and he ran away.

9. PW4 described in detail the clothes that the appellant was wearing, stating that he had been wearing the same clothes when she had met him on the previous occasion. PW4 noted that PW1 had a cut on the left arm and a deep cut around the right eye. She confirmed that PW2 had told her that the appellant was her former boyfriend.

10. Imelda Odier (PW3), a clinical officer, examined PW1 at Homa Bay District Hospital where he was admitted after the assault. She confirmed that he lost the right eye and classified the degree of injury as grievous harm.

11. The appellant was arrested at Sindo by Hamisi Said Nyerere (PW5) who acted on information received from Mbita Police Station. In his evidence, the investigating office, PC Peter Wambani (PW6) stated that he had received the initial report on the attack on PW1 from one Morris Onditi, the appellant's brother. PW1 had later gone to the police station and confirmed the report by his brother, stating that he had been attacked by a person known to him, whom he could identify.

12. When placed on his defence, the appellant elected to give an unsworn statement in which he narrated the events of the day of his arrest. He stated that he did not know why he was arrested or why he was brought to court. His wife, Josephine Akoth (DW2) testified that she had received a call from the appellant telling her that he had been arrested and was at Mbita Police Station.

13. Upon considering the prosecution evidence and the defence which we have summarised above, the trial court was satisfied that the prosecution had proved its case beyond reasonable doubt. It therefore convicted the appellant as charged and sentenced him to fifteen years' imprisonment.

14. Dissatisfied with both his conviction and sentence, the appellant filed an appeal before the High Court in Homa Bay in which he raised five grounds of appeal in the memorandum of appeal dated April 26, 2016. Upon re-evaluating the evidence before the trial court and considering the appellant's grounds of appeal, the High Court framed two issues for determination: whether there was conclusive evidence regarding identification of the appellant; and whether the trial court ought to have given the appellant the option of a fine.

15. The High Court determined the first issue in the affirmative, and the second in the negative. It noted that while the offence took place at night, both PW1 and PW2 were able to see and identify the appellant with the aid of moonlight, with PW2 describing it as a full moon. It noted that their evidence was confirmed by that of PW4 who testified that she also had a spotlight which she used to flash on the appellant. Further, that the evidence before the court was one of recognition, not identification.

16. Regarding sentence, the first appellate court observed that the penalty for the offence of grievous harm under section 234 of the Penal Code is life imprisonment. In its view, the sentence of fifteen years' imprisonment meted out on the appellant was neither harsh nor excessive. The first appellate court accordingly affirmed both the conviction and sentence.

17. The appellant has now come before us with his memorandum of appeal which is undated but was filed in this Court on April 19, 2022. The memorandum of appeal contains eleven grounds of appeal. Bearing in mind that this is a second appeal whose remit is confined to a consideration of matters of law as provided under section 361(a) of the *Criminal Procedure Code*, the grounds of appeal which can be said to fall within this Court's remit are:

    i. That the appellant's identification was not proper;

    ii. That the trial Magistrate and the first appellate court erred by failing to realize that the moon light intensity was not sufficient to aid night visibility;

    iii. That the trial Magistrate and the first appellate Court failed to grant him a fine as an alternative as stipulated in the *Constitution*.

18. In his other grounds of appeal, the appellant argues that the burden of proof was shifted to him, which is against the law; that the trial court and first appellate court erred by dismissing his alibi defence; and that his right to fair trial under Article 50(2) was violated. These grounds, however, are being raised for the first time before this Court, and we shall not therefore consider them, save to observe that from a close reading of the proceedings and judgments of the courts below, they do not have any merit.

19. The appellant expounds on his grounds of appeal in his written submissions. He contends that his identification was not proper as there was material contradiction on the colour of the clothing that he was wearing on the material day. Further, that the moonlight alleged was not sufficient lighting to warrant a positive identification.

20. The appellant further submits that the courts erred by ignoring his alibi defence, and for shifting the burden of proof to him. It is also his submission that the courts should have considered a fine as an alternative sentence. He submits that the term sentence meted against him was contrary to Article 50 (2) of the *Constitution* on fair trial.

21. Mr Okango, learned Prosecution Counsel, opposed the appeal on behalf of the state. He relied on submissions dated May 6, 2022 and asked this Court to uphold both the appellant's conviction and sentence. The respondent submits that the evidence of identification before the trial court was that of recognition. PW1, PW2, and PW4 testified that they were able to identify the appellant during the

attack as there was a full moon and enough light was available. In addition, PW4 provided a detailed description of the clothing the appellant was wearing on the night of the attack.

22. Regarding the contention that the appellant's alibi defence was ignored, the respondent submits that it was not raised by the appellant during trial. It was his wife, DW2, who raised it and on cross-examination, she stated that she could not recall the date of the incident.

23. Regarding sentence, the respondent notes that the appellant was sentenced to fifteen years' imprisonment yet the maximum sentence for the offence of grievous harm is life imprisonment. It is the respondent's position that a term of imprisonment for fifteen years is not excessive and was lenient in the circumstances, considering that the attack resulted in total blindness in the victim's right eye.

24. This appeal raises two issues for determination. The first relates to the appellant's identification, and specifically, whether the conditions under which the offence occurred were conducive for positive identification of the appellant as the perpetrator of the offence. The second relates to the sentence imposed on the appellant, and whether or not the court should have imposed a fine rather than a term of imprisonment.

25. In determining that the appellant had been properly identified, the first appellate court considered the holding in *Charles O Maitanyi v R (1986) KLR 198* with regard to what a court should consider when dealing with the issue of identification under difficult circumstances. The first appellate court also considered the holding in *Karanja & Another v R [2004] 2 KLR 140.*

26. The case of *Wamunga vs Republic [1989] KLR, 424* enjoins courts to carefully examine evidence of identification or recognition in determining whether a case has been established against an accused person. In that case, the court stated:

> ' It is trite law that where the only evidence against a defendant is 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 the possibility of error before it can safely make it the basis of a conviction.'

27. The first appellate court found that the appellant had been properly identified by recognition. It observed that:

> ' 31. The appellant was not a stranger to PW1, PW2 and PW3. PW2 had known him well enough as at one time they were lovers and even had a child.
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> 32. PW1 met the appellant just on January 5, 2011 at 1700hrs when he went to the former's home, pretending to be lost and they had had a discussion. Apart from that initial meeting, on the night of the attack, with the aid of the moonlight, the witness saw the appellant very well as they stood facing each other, at arms length and the incident lasted 5 minutes as the appellant attacked PW1 who kept moving backwards.
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> 33. PW4 had also met the appellant on January 11, 2011 at 10.00 am when he confronted her on her way from the river and demanded to know whether Zipporah was her daughter-in-law and warned of due consequence. So when she next saw him on the night of the attack she recognized him.
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> 34. The three prosecution witnesses who identified appellant were categorical that the appellant was not a stranger to them – so it was more than ample first time

identification. It was recognition of someone they knew and had encountered. This link of evidence was not challenged by the defence at the trial.'

28. We agree with these observations by the trial court. We note, further, that as the trial court and the first appellate court found, the prosecution witnesses had given descriptions of the way the appellant was dressed at the time of his attack on PW1, the same way that he had been dressed when he accosted and threatened PW4 on the morning of January 11, 2011, about three days before the attack. The first appellate court further rendered itself as follows with respect to the recognition of the appellant:

> ' 35. Secondly all the witnesses said they recognized the clothing he wore, which were the same ones he had worn during their earlier encounters. PW1 described them as a green jumper with a half hood, a muffin with writings 'Athens Boys 2000' and dark grey trouser, black sports shoes with white stripes.
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> 36. PW2 had a further opportunity of seeing the appellant as he cut her husband then charged towards her and as he began chasing her, PW4 saw him as she had come out of the house, having been attracted by the noise outside. She described on cross examination that the appellant wore a black trouser and a black T-shirt.
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> 37. PW4 described those clothes as a red T-shirt with open neck, and a grey trouser. Although there were slight discrepancies in the colour of clothing, I take note that the clothes did not form the sole basis of identification and I also take note that individual's percept of colour is relative – some people in rural Kenya, especially when using vernacular refer to grey and black as black.'

29. We are satisfied that the first appellate court properly considered and reached the correct finding with regard to the identification of the appellant. The prosecution witnesses were categorical that there was a full moon on the night of the attack on the complainant. The appellant was not a stranger to any of them- they had all met him at least once, and spoken to him. He was a former boyfriend of PW2, and they had a child together. PW1 saw the appellant clearly as he faced him, trying to move backwards to escape from the appellant's vicious attack with a panga. PW1's mother, PW4, had met him during broad daylight when he threatened her and her son. On the night of the attack, she saw him chasing her daughter in law with a panga. It was a moonlit night, but she also had a spotlight which she shone on him and was able to see him clearly. This was not a case of identification but of recognition.

30. In *Ali Mohammed Wanjala v Republic [2015] eKLR* this Court cited the case of *Peter Musau v Republic (2008) eKLR* and stated that:

> ' We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him, and thus to put a difference between recognition and identification of a stranger. He must show for example that the suspect had been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness in serving the suspect at the time of the offence, can recall very well having seen him before the incident in question.'

31. We therefore find no basis for interfering with the findings of the courts below with regard to the identification of the appellant as the perpetrator of the attack against PW1.

32. The appellant has also raised the issue of sentence. His contention is that the courts below erred in not sentencing him to a fine, and that the 15 years' imprisonment imposed upon him by the trial court and affirmed by the first appellate court is contrary to article 50 (2) of the *Constitution* on fair trial.

33. This, we believe, is an unsustainable argument given the facts and circumstances of the case before the trial court. The appellant was charged with the offence of causing grievous harm contrary to section 234 of the Penal Code which provides that:

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

34. The offence with which the appellant was charged, as the section above indicates, is a felony, attracting a maximum punishment of life imprisonment. However, the penalty imposed under section 234 set out above is not mandatory, as the use of the term 'is liable' indicates. The provisions vest in the trial court the discretion to impose a sentence up to the maximum provided by law, which is a life sentence. A first appellate court will only interfere with a sentence if it finds that the trial court took into consideration irrelevant factors, applied wrong principles or generally, that the sentence is excessive.

35. In this case, the trial court found that the appropriate and proportionate sentence in the circumstances of the case was 15 years' imprisonment. The first appellate court found no reason to interfere with the sentence. The complainant suffered a vicious attack at the hands of the appellant, an attack apparently fuelled by revenge and sour grapes- that the complainant had married PW2, whom the appellant had impregnated, then abandoned. As a result of the attack, the complainant lost the use of one eye. Given the ferocious nature of the attack which could have easily resulted in death, we take the view that the sentence meted out on the appellant was proportionate and fair in the circumstances.

36. In any event, under section 36 (1) (a) of the Criminal Procedure Act, severity of sentence is a matter of fact over which there is no jurisdiction on a second appeal such as this.

37. We therefore find no reason to interfere with the decision of the first appellate court, and we affirm both the appellant's conviction and sentence.

DATED AND DELIVERED AT KISUMU THIS 22ND DAY OF SEPTEMBER, 2023.

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR