IN THE COURT OF APPEAL

AT NYERI

SITTING IN MERU

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CRIMINAL APPEAL NO. 47 OF 2016

BETWEEN

GILBERT MUKUNDI RUBARUA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from a conviction of the High Court of Kenya at Meru (R. Wendo, J) dated 2nd February, 2015 ***in H. C. Cr. A. No. 9 of 2012)***

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JUDGMENT OF THE COURT

1. The appellant faced two counts of causing grievous harm to his wife and mother- in-law contrary to ***Section 234*** of the **Penal Code**, on 10th August, 2010 at Makandune Village in Meru Central District in Meru County. He was tried before Nkubu Resident Magistrate **(C. N. Ndubi)** who convicted him on the two offences and sentenced him to concurrent terms of life imprisonment. He was dissatisfied with that decision and appealed to the High Court in Meru **(Wendoh, J.)** which dismissed the appeal and affirmed the sentence. He is now before us on the second and final appeal, challenging the conviction only, since the legality of the sentence is not in issue and the severity of it would, in any event, be a question of fact.

2. The facts were brief:

> It all started on 6th August, 2010 when a dispute arose between the appellant and his wife, **Norline Kirakito (PW1)** on allegations of his attempted poisoning by her. The complaint was taken before Kiamuri Police Patrol Base for investigation and they were called to the Base on 10th August, 2010. After hearing them out, the police advised them to go home and call elders to hear and determine the dispute. Accompanying Norline was her mother **Rosemary Kabatia (PW2)** and her father **Benson Muthukuru Buaru (PW3).** The appellant was also accompanied by his father and mother.

3. As Norline and her parents walked towards their home at about 3 p.m, the appellant followed them on a bicycle and caught up with them at a point near Ndera river. The appellant stopped, took out a *panga* and set on Norline cutting her on the back. Rosemary tried to intervene and she was cut on the hand. Norline tried to escape but he followed her and cut her on the head and she fell. As she lay on the

ground he cut her severally on the head again, hands, neck and ear and she lost consciousness. As both women were brutally attacked and kept screaming for help, Benson retreated screaming for help, reasoning that if he intervened and was attacked too, no one would help the three of them. The appellant threw down the panga and ran away. Their screams attracted members of the public who came and assisted to take the injured women to Chaaria Hospital. Later they were taken to Chogoria Mission Hospital where they were admitted for specialized treatment, Norline's lasting for 5 months and Rosemary's 3 days.

4. The incident was reported by Benson to **P.C Sebastian Leka Mpure (PW4)** of Kiamore Police Post at 4 p.m the same day and he handed over the offending panga which he had collected from the scene. A moment later, the appellant appeared in the same police post and headed to the cells saying that he had killed someone. He surrendered himself and PC Mpure locked him up before proceeding to see the injured women at about 5 p.m.

5. **Dr. Makandi Mutwiri** (PW5) of Meru Level 5 Hospital examined Norline and Rosemary and completed their P3 forms. On Norline he found: multiple deep cut wounds on the head, 8 cm; long cut wound on right side of neck; deep cut wound on right forearm to the dorsum of hand with multiple tendon severed with fracture and deformity; deep cut wound on left forearm with tendon involvement and bone fracture. He classified the injuries as 'grievous harm' and determined the weapon used as a 'sharp object'. On Rosemary he found: a deep cut wound on the left hand unable to flex the middle three fingers which he also classified as 'grievous harm' caused by a 'sharp object'.

6. The appellant gave sworn testimony in his defence stating how on the night of 6th August, 2010, his wife Norline woke up at night and told him she wanted to die. He screamed as she went for some wire to hang herself and his mother came. The mother went out to call the area Assistant Chief who came with an Elder at 1 a.m and told them whoever wanted to die should be let free to die and they left. The following morning, Norline made tea for him, the Assistant Chief and the Elder who returned to see how they had slept. They all took the tea before dispersing, the appellant going to look for grass for his cows. At about 8.30 a.m, he took the tea that remained in the flask and set off to go to Marimanti market. As he walked to the bus stage his stomach started aching and he asked a neighbour to take him to a nearby hospital where he was given medication.

7. The following day he reported to Kiamuri Police Post about having been poisoned by Norline and she was brought to the Post where she admitted the attempt to poison the appellant. She was bonded to appear at the police post on 10th August, 2010 and that is how the two, together with their parents, found themselves at the Police Post. The officers tried to persuade Norline's father (Benson) to refund the medical expenses incurred by the appellant in order to settle the matter but the father refused, offering only Sh. 2500. The police officers then chased them away telling them the case was over, and that they should go home and settle it. They all walked away together talking peacefully to Kiamuru Market where they went to different hotels for lunch. As he walked away from the market later, a motor bike carrying some injured people stopped near him and Benson lifted a panga threatening him. That is when he ran off to the Police Post and was locked up by PC Mpure. Cross examined, he denied injuring his wife and mother-in-law although they were not mad people to allege that he did.

8. It was on those facts that the two courts below found the prosecution case proved beyond doubt. The appellant drew up his own memorandum of appeal raising seven grounds but an order was made by this Court for provision of legal aid to him as he was serving a life sentence. Learned counsel appointed thereafter, **Mr. Mutegi Mugambi** abandoned the original memorandum of appeal and filed a supplementary one raising three grounds as follows:

> "***(a) The learned Judge erred in law in confirming the appellant's conviction which was based on inconsistent evidence.***
>
> ***(b) The learned judge erred in law in failing to take into consideration the appellant's defence.***
>
> ***(c) THAT the learned judge erred in law by failing to observe that failure to call independent***

witnesses present at the scene by the prosecution was not** (sic) **important in the trial."

9. Counsel urged grounds 1 and 2 together on the basis that the case was full of inconsistencies which were not reconciled and therefore the conviction was prejudicial to the appellant. The inconsistency alluded to was that Benson (PW3) was not mentioned by Norline or Rosemary as having been at the scene of the crime but his evidence was assessed by the two courts below as if he was an eye witness to the crime. According to counsel, Benson was not at the scene. The appellant's defence, which was not properly evaluated, he contended, established that Benson was seen by the appellant waving a panga at him as the injured women were being transported away. That was not at the scene of the crime. The defence further established that there was a dispute between the appellant and his wife which the police referred to amicable settlement by elders and the appellant, according to counsel, was agreeable to that. He went home on foot and there was no bicycle produced in evidence to show that he had one when he allegedly attacked the complainants. He was not at the scene of the crime and the High Court erred in failing to find that there was a conspiracy between Norline and her mother Rosemary to have the appellant jailed for life, he concluded.

10. On the last ground, counsel submitted that there was no independent witness called to support the charge. According to him, the villagers who answered the screams, came to the scene and saw the appellant drop the panga which they collected and gave to the police, should have been called to support the eye witness account. He relied on the decision of this Court in ***Martin Ndegwa Kabocho vs Republic [2015] eKLR*** where this Court rejected the evidence of recent possession of a stolen item by the appellant for the reason that the owner of the premises where the item was recovered was not called to testify.

11. Responding to those submissions, learned Senior Assistant Director of Public Prosecutions **Mr. Onderi** submitted that the High Court properly re-evaluated the evidence and had no reason to doubt the veracity of the evidence of the two women and Benson. He observed that the crime was committed in broad daylight soon after the appellant and the three witnesses left Kiamuri Police Post for the hearing of a dispute filed there by the appellant. Benson was present at the scene and he explained the role he played including taking the offending panga to

The police. The appellant never put any question to Benson in cross examination to suggest that he was not present at the scene. In his submissions, the defence was an afterthought, since the investigating officer confirmed that the appellant surrendered himself for arrest soon after the complaint was lodged.

12. We have considered the record of appeal, the grounds of appeal and the submissions of counsel. On the face of it, the grounds do not strictly raise issues of law which is the jurisdiction exercisable by this Court on second appeal by dint of ***section 361 (1)*** of the **Criminal Procedure Code**. As stated by this Court in ***Chemagong vs Republic (1984) KLR 213*** at page 219:

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did. (Reuben Karari s/o Karanja vs Republic 17 EACA 146)."***

We shall be reluctant therefore to interfere with factual findings unless there is a compelling reason for doing so, and the only compelling reason is that they *were perverse and therefore bad in law. See* ***Christopher Nyoike Kangethe vs Republic [2010] eKLR***.

13. It is not clear to us what inconsistencies the appellant complains about which the High Court failed to reconcile, but the one highlighted relating to Benson being a false witness who was not present at the scene cannot avail the appellant. That is because there was nothing put to the witness in cross examination to suggest that he was never at the scene of the crime. He swore that he was walking together with his wife and daughter when they were attacked and was believed on that evidence by the two courts below. Furthermore, he was put on the scene by the appellant himself who acknowledged that they were together at the Police Post negotiating settlement of a dispute. The appellant also testified that

Benson brandished a panga at him before he (the appellant) ran off to take refuge at the Police Post. By all accounts Benson was at the scene of the crime and gave support to the account of events as narrated by the two complainants and medical evidence. The defence put forward by the appellant was, to say the least not easy to follow, and was rightly rejected as untruthful. We reject the first ground of appeal.

14. The last ground takes the appeal no further.The independent witnesses referred to were members of the public who came in response to screams from the complainants and Benson. None of them came forward to say they witnessed the commission of the offence and the investigating officer found no one at the scene to record a statement from. As correctly submitted by Mr. Onderi, the five witnesses who testified gave cogent evidence to prove the charge and there was no necessity for calling a multiplicity of witnesses. It would have been different if only scanty or barely adequate evidence was put on record leaving out crucial evidence, for then, an adverse inference would have been drawn against the prosecution. See ***Bukenya & Others vs Uganda [1972] EA 549***. That is what happened in the ***Martin Ndegwa Kabocho case*** (supra) relied on by the appellant, which is distinguishable.

15. That case was on robbery with violence and the only evidence relied on to convict the appellant was the alleged recent possession of the stolen item. But the item was not found in the physical possession of the appellant but in premises of one Ngugi who was not called as a witness to connect the appellant with it. In those circumstances, the court held:-

> ***"..there is no law that requires a certain number of witnesses to prove a fact. However, the appellant was facing serious charges and, it was necessary that all relevant evidence be availed to the court. In the circumstances, Ngugi, the bar owner and particularly the butchery owner, were crucial witnesses in regard to the possession of the recovered item. We emphasize that the evidence of the butchery owner was vital because he should have told the court that indeed the appellant took the tool box to his butchery and he handed it over to PW1 in the presence of the appellant. At no moment are we suggesting that PW1's testimony was not truthful or reliable. But only that in such a case, it was necessary that the bar owner testify that the appellant took the tool box to his butchery. That would have provided support for PW1's evidence and the nexus between the appellant and the recovered tool box, leading to the inescapable conclusion that the appellant was in constructive possession of it. The failure to call this crucial evidence, weakened the prosecution case with regard to the constructive possession, creating a doubt the benefit of which must be given to the appellant. We find that the appellant's conviction was not safe and cannot be upheld."***

16. The upshot is that this appeal is lacking in merit and we order that it be and is hereby dismissed.

Dated and delivered at Meru this 10th day of October, 2017.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR