Ndonji v Republic (Criminal Appeal E055 of 2023)
[2025] KEHC 4841 (KLR) (25 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4841 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CRIMINAL APPEAL E055 OF 2023

DK KEMEI, J

APRIL 25, 2025

BETWEEN

APELES OMULO NDONJI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of Hon. B. Limo (PM) delivered on 27th October 2023 and sentence on 15th November 2023)

JUDGMENT

1. The Appellant herein Apeles Omulo Ndonji appeals to this court over the conviction and sentence of Hon. B. Limo (PM) in Siaya CM Cr. No. E254 of 2020, wherein the Appellant was ordered to serve a probation sentence for six months.

2. Being aggrieve by the said conviction and sentence, the Appellant filed a Memorandum of Appeal dated 27/11/2023 wherein she raised the following grounds of appeal namely;

    i. That the learned trial magistrate erred in law and fact by finding that the Appellant had committed the offence of grievous harm inspite the medical report (P3 form) indicating that the probable type of weapon to be a sharp object and the injury to be a fracture on the right clavicle.

    ii. That the learned trial magistrate erred in law and fact by finding the offence of grievous harm had been sufficiently proved in the absence of X-ray films produced by the doctor or complainant.

    iii. That the learned trial magistrate erred in law by failing to consider the effect of having the prosecution's case closed without the evidence of the investigating officer.

iv. That the learned trial magistrate erred in fact by failing to consider that considering the age of the Appellant there was no way she could have caused grievous harm on the complainant.

The Appellant thereafter prayed that the conviction be quashed and sentence set aside and that Appellant be unconditionally set at liberty unless otherwise lawfully held.

3. This being the first appellate court, its duty is well spelt out namely, to re-evaluate the evidence tendered before the trial court and subject it to an independent conclusion s to whether or not to uphold the decision of the trial court. The court should also take into consideration the fact that it neither saw nor heard the witnesses as they testified. See OKENO VS. R [1972] EA 32.

4. Beatrice Anyango (PW1) testified that she was at the farm with her child when she heard the Appellant herein who is her mother-in-law hurl abusive words about the complainant's mother's genitalia. That when the Appellant reached where she (PW1) was, she snatched a jembe (hoe) that she had and proceeded to assault her with it. That she pleaded with her and sought for forgiveness as her son rushed home to alert her brother Duncan who managed to restraint the Appellant from further assaulting her. That she was taken to Yala Sub County Hospital for treatment. That she was later issued with a P3 form from Mutumbu Police Station.

   On cross examination, she stated inter alia; that she is aged 25 years old while the Appellant is 70 years; that she had placed the jembe (hoe) down before the Appellant took it; that she did not defend herself; that she did not give the x-ray film to the prosecution; that she was advised by the doctors to wear an arm sling for one year.

5. Duncan Ouma (PW2) testified that he was at the home of the complainant when he was alerted of the incident by one of the complainant's children. That he rushed to the scene and found the Appellant sitting on top of the complainant and beating her and that he pushed the Appellant off the complainant and later alerted the complainant's father and brother and thereafter they took her to hospital.

   On cross examination, he stated that the complainant is his niece.

6. Audrey Apiyo (PW3) testified that she is a clinical officer at Yala Sub County Hospital. That the P3 form was filled by her colleague Jackline Kerubo with whom she had worked for five years. That the injuries suffered by the complainant were assessed as grievous harm and that the weapon used was a sharp object. She produced the P3 form as Exhibit 1.

   On cross examination, she stated that the assault weapon was a jembe which is a sharp object. That she did not know if a sharp object was used.

7. The trial court later established that a prima facie case had been established by the prosecution. The Appellant was thus placed on her defence. She opted to give a sworn testimony and called two witnesses.

8. Apeles Omulo Ndonji (DW1) testified that she does not know the complainant and that she did not assault anyone. That it was one Loraine who fought with the complainant.

   On cross examination, she stated inter alia; that she knows Beatrice Anyango as the complainant; that she did not assault anyone; she does not know Duncan (PW2); that she did not use a jembe to assault the complainant.

   On re-examination, she stated that Anne who had been bruised could come to court to testify.

9. Ann Akoth (DW2) testified that the Appellant is her grandmother while the complainant is her aunt. That on the material date, she, Loraine and complainant had fought. That the complainant hit her on the head and that Loraine came to her rescue. That the Appellant did not beat the complainant as she is weak physically.

On cross examination, she stated that the Appellant is her grandmother while the complainant is her aunt.

10. Loraine Atieno (DW3) testified that the Appellant is her grandmother while the complainant is her aunt. That she and Ann had fought with the complainant. She stated that she hit the complainant for beating Ann (DW2) and that the complainant went away and took a jembe. That she lives with the Appellant who is weak physically.

    On cross examination, she stated that she had beaten the complainant with a stick as she had assaulted Ann (DW2).

    On re-examination, she stated that it was her duty to clean the toilet but had refused as there were faeces left behind by the complainant's child.

11. The appeal was canvassed by way of written submissions. It is only the Appellant who complied.

12. I have given due consideration to the evidence tendered before the trial court as well as the submissions filed. I find the only issue for determination is whether the Respondent had proved its case against the Appellant beyond any reasonable doubt.

13. It is noted that the Appellant was charged with an offence of grievous harm contrary to Section 234 of the *Penal Code*. Under the said provision, the Respondent was under a duty to prove the essential ingredients of the offence. It is trite that in all criminal cases the duty to prove the guilt of an accused rests squarely on the shoulders of the prosecution and which does not shift to the accused person. See Woolmington Vs. DPP [1935] AC 462. The ingredients of the offence are inter alia; that the victim sustained grievous harm; that the bodily harm was caused unlawfully and that the Appellant caused or participated in causing the grievous harm.

14. As regards the first ingredient, the complainant testified that she sustained injuries after being attacked by the Appellant. The said injuries were conformed by the clinical officer (PW3) and more particularly the right shoulder which forced the complainant to use a sling for support. The clinical officer opined that the weapon used was a sharp object. Even though the Appellant's counsel has taken issue with the type of weapon, it is noted from the P3 form that there was a fracture of the right clavicle and that the weapon was a jembe. The Appellant has also taken issue with the failure of the prosecution to avail the X-ray films which were issued to the complainant. However, the failure did not prejudice the Respondent's case regarding the fact that the injuries in nature were grievous in nature. Indeed, the evidence of the Appellant's witness Loraine Atieno (DW3) confirmed that the complainant's wound was bandaged and that she used to change the ame from left to right and vice versa. Iam satisfied that the Respondent proved that the complainant sustained grievous harm.

15. As regards the second ingredient, the evidence of the Respondent is that the Appellant went to a farm where the complainant was and hit her with a jembe. The Appellant and her witnesses have maintained that the complainant had fought with DW2 and DW3 and that the Appellant did not touch the complainant as alleged. I find the injuries sustained were caused unlawfully as the complainant had been in good health prior to the incident. Again, the injuries were not sustained as a result of a game mutually undertaken by the complainant and others so as to import the doctrine of "volenti non fit injuria" (voluntary assumption of risk). The issue of an alleged fight between the complainant, DW2 and DW3 did not indicate whether any of the combatants sustained injuries as no medical evidence was availed to court and thus the issue of injuries that have been backed by medical evidence are those presented by the complainant. I am satisfied that the Respondent proved the ingredient beyond any reasonable doubt.

16. As regards the last ingredient, it is noted that the Appellant in her evidence in chief denied knowing the complainant but she later confirmed that she knew her. The incident took place in broad daylight and that the witnesses for both prosecution and defence come from the same family and hence the issue of identification was by way of recognition. It was the evidence of the complainant that upon being attacked by the Appellant using a jembe, one of the relatives Duncan Ouma (PW2) who is an uncle to the complainant, rushed to the scene and found the Appellant atop the complainant and beating her and that he managed to remove the Appellant and then alerted other relatives who took the complainant to hospital. Nothing in the evidence transpired that there were differences between PW2 and the Appellant to suggest a frame up. The Appellant has sought to contend that the only fight that is the one involving the complainant, DW2 and DW3. However, the evidence of PW2 is that DW2 and DW3 were not at the scene when he went to rescue the complainant. Indeed, DW3 confirmed in her evidence that after the fight between the complainant DW2 and herself, the complainant picked up a jembe and went away. It is thus clear that the complainant was attacked at the farm while in possession of the jembe and that the Appellant went to the farm and used the same jembe to attack the complainant. It is also obvious that the Appellant was incensed by the fighting which had involved the complainant, DW2 and DW3 and that is why she pursued the complainant to the farm and attacked her. I find the Appellant's defence regarding the issue of her identity and participation has not dislodged the prosecution's evidence which clearly placed the Appellant at the scene. Finally, it has been contended by the Appellant and her witnesses that she is an elderly person who is physically weak and therefore cannot hurt a fly. I am not persuaded by the said assertion in that the Appellant was found having overpowered the complainant and beating her and that PW2 had to physically extricate her from the complainant. There is not hard and fast rule that a person aged over 70 years does not have energy to engage in physical activities. It is instructive that the Appellant has been attending court all along with little difficulty and hence the feeble claim that she is physically weak holds no water.

17. The Appellant has contended that the prosecution failed to call the investigating officer to testify. It is noted that the Respondent closed its case after calling the complainant and two witnesses. Ordinarily, the prosecution is at liberty to call witnesses as are required to establish its case. Indeed, there is no hard and fast rule that the prosecution must call a fluidity of witnesses in a bid to prove its case. Under Section 143 of the *Evidence Act*, the prosecution is under no obligation to call a certain number of witnesses to prove a fact. On the other hand, the prosecution can be seen in bad light and that an adverse assumption could be made that had they called the investigating officer, his evidence would have been adverse to their case. However, the record did not indicate that some exhibits were to be produced by the said witnesses. Looking at the evidence, it is noted that the crucial documents are those which were produced by the doctor (PW3). That being the position, the investigating officer who was not a witness could hardly bring up weightier evidence to support that of the three witnesses. Hence, the failure to call the investigating officer was not fatal to the prosecution's case. The Appellant's appeal on this ground must fail.

18. An analysis of the entire evidence leaves no doubt that the Appellant's defence evidence did not cast doubt or shake that of the prosecution which was overwhelming against her. I am satisfied that the finding on conviction by the learned trial magistrate was quite sound and must be upheld.

19. As regards sentence, Section 234 of the *Penal Code* provides for a sentence of life imprisonment upon conviction. It is noted that the trial court called for a pre-sentence report. The same was availed and is dated 10/11/2023, and which proposed for a probationary sentence of six months. Indeed, the Respondent's counsel did not file a notice of enhancement of sentence. I will therefore not find fault with the Respondent for that. The Appellant is reported to be elderly. I find the sentence under probation for six months was appropriate in the circumstances. I uphold the same.

20. In view of the foregoing observations, it is my finding that the appeal lacks merit. The same is dismissed. The trial court's conviction and sentence is upheld.

DATED AND DELIVERED AT SIAYA THIS 25TH DAY OF APRIL, 2025.

D. KEMEI

JUDGE

In the presence of:

Apeles Omulo Ndonji.....Appellant

N/A Ochanyo.....for Appellant

M/s Mumu.....for Respondent

Mboya.....Court Assistant