Matheka v Republic (Criminal Appeal E028 of 2023)
[2024] KEHC 976 (KLR) (26 January 2024) (Judgment)

Neutral citation: [2024] KEHC 976 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL E028 OF 2023

TM MATHEKA, J

JANUARY 26, 2024

BETWEEN

LEWIS KILONZO MATHEKA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant was charged with the offence of Grievous Harm contrary to section 234 of the *Penal Code*. The particulars of the offence were that on 8th October 2021 at around 800pm at Kathonzweni Market in Kathonzweni Sub Location within Makueni County, the appellant unlawfully did grievous harm to Komo Kiio.

2. After a full trial, the learned trial magistrate convicted and sentenced the appellant to three (3) years imprisonment.

The Appeal

3. Aggrieved by that decision, the appellant filed this appeal and raised the following grounds;

    a. That the learned Magistrate erred in law and fact in convicting the appellant as he did when the evidence on record was manifestly insufficient, inconsistent and had glaring gaps and inadequate hence incapable of sustaining a conviction.

    b. That the learned Magistrate erred in law and fact when he ignored the inconsistencies of the evidence tendered.

    c. That the learned Magistrate erred in law and fact in reaching at conclusions that were not supported by evidence tendered.

d. That the learned Magistrate erred in law and fact by shifting the burden of proof from the respondent to the appellant.

e. That the learned Magistrate erred in law and fact by rejecting the appellant's defence as he did.

f. That the learned Magistrate erred in law and fact in failing to give due and/or adequate consideration to the Appellant's defence.

g. That the learned Magistrate erred in law and fact in convicting the appellant against the weight of the evidence on record

h. That the learned Magistrate erred in law and fact by sentencing the appellant as he did.

i. That the learned Magistrate erred and misdirected herself in law by selectively applying the evidence tendered and thereby aiding the case of the respondent against the appellant.

j. That the learned Magistrate's decision does not conform to the relevant laws.

4. The case for the prosecution was that on 8th October 2021, the complainant was at Fuse bar in Kathonzweni where he wanted to buy beer. He told the court that he had Kshs 200 and when he took it out of his pocket the appellant came to where he was with the intend of taking the Kshs 200. When he noted the appellant's intent he walked out of the bar. It is then that appellant followed him. The appellant hit him with his fist and then took a stone and hit him on the mouth. These actions tore his lip and one incisor tooth fell out. He fell down bleeding from the mouth and later found himself at the hospital. He testified that he identified the appellant by the Mulika Mwizi lights. That when the appellant attacked him he came from the left.

5. On cross examination the complainant told the court that he had known the appellant for many years, he owed the appellant nothing, that there were solar lights outside the bar but near the scene. He said he had not taken beer but was about to buy the beer when he saw the appellant's intention to steal the money, and that is when he went out of the bar. He said he noted the appellant's intention when the appellant put his hand in his (complainant's) pocket.

6. The prosecution called PW3 Charles Musyoka, the complainant's cousin. He testified that he was on his way from work about 8:00pm when he heard creams and rushed where the noise was. His testimony was that he found the appellant on top of the complainant who was unconscious, while armed with a stone. That when complainant saw him he ran away. That he identified him from the lights coming from Kitundo Bar. That he knew the appellant as a person from Kathonzweni. On cross examination he said that the there were no people nearby when he heard the screams. He went and called PW5 Geshion Kieti.

7. Kieti testified that his nephew one Kemani Musyoki came running to tell him that the complainant had been beaten and was about to die. He went and took him to hospital. He alleged that on 23rd October 2021 the appellant went to his mother's home to try and compromise the matter. He did not say what became of the alleged meeting.

8. The Medical Officer (PW1) Dr. Stephen Musembi told the court that he filled the P3 he produced from the treatment notes of the complainant.

9. The Investigating Officer (PW4) No 112308 PC Jinaru Mburu Karanja told the court that he had taken over from the original IO That he had taken over a blood stained shirt and read the IO's statement. The exhibits produced were; P3 Form (P. Ex 1), Treatment Card (P. Ex 2) and a blood stained shirt (P.

Ex 3). The record shows that the complainant was recalled to identify the shirt he was wearing at the time. He said he was wearing a white shirt, the court noted a cream blood stained shirt.

10. The appellant elected to give sworn evidence and not to call any witness. He testified that the complainant was not known to him and only saw him in court. He denied the charges and said that he did not do anything. That he was arrested and informed that he had injured a person. He maintained that he did not know the person who had complained against him. On cross examination he agreed that he drinks beer but denied knowing Fusa bar in Kathonzweni. He denied that he was drinking at Fusa bar on 08th October 2021 at 8.00pm. He denied that he tried to rob Komo Kiio Kshs 200/=. He agreed that Kitindo bar is known to him but denied attacking Komo Kiio at Kitindo bar area. He said that he did not know the complainant and had no problem with him.

11. The parties elected to canvass the appeal through written submissions and appropriate directions were given. Accordingly, the parties complied and filed their respective submissions.

Submissions by the Appellant

12. The appellant's counsel reminded the court of its duty as a first appellate court by citing *Okeno v Republic* (1972) EA 32 and *Kiilu & another v Republic* [2005] eKLR

13. Counsel grouped the grounds of appeal into two.

14. The first was whether the conviction was based on insufficient evidence (grounds 1, 2,3,4 & 7). He summarized the evidence. He then submitted that the evidence begged several questions : if indeed the appellant tried to steal from the complainant while inside Fuse bar, why did the complainant not raise the alarm while inside the bar in the presence of the bar tender or waiter other patrons who would have come to his aid and perhaps throw out the appellant? What was the rationale in the complainant walking out of the bar only for him to scream away from the bar? How come no one from Fuse Bar where the altercation allegedly began heard the commotion and came out to see what was going? How come the screams were heard only bt his cousin who was not nearby? These questions about the circumstances of the offence were not answered by the prosecution.

15. He submitted that there were glaring discrepancies between the P3 form and the testimonies of PW2, 3, 4 and 5. That as readily observed by the trial magistrate in his judgment, the shirt was greyish in colour according to the P3 and the same shirt was white according to the named witnesses. That the P3 does not capture whether the shirt was torn as per the evidence of PW2. Further, he submitted that the P3 mentioned about injuries on the head and neck lacerations while the named witnesses said nothing about such injuries.

16. He submitted that according to PW1, the probable type of weapon was a fist yet PW2 testified that the complainant attacked him with a fist and a stone. He relied on the case of *Musyimi Ndava v R* [2019] eKLR where the Court of Appeal stated;

> "But what is important is whether the discrepancies are of such nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused."

17. Counsel submitted that the discrepancies raise doubt on the prosecution witnesses and that their evidence was hardly enough to prove any case against the appellant on the required standard of proof.

18. As to whether the trial magistrate erred by rejecting the appellant's defence (grounds 5, 6, 8 & 9), Counsel submitted that the trial magistrate casually glossed over the appellant's testimony and simply dismissed yet it raised material concerns. That the appellant's testimony was that he did not know the complainant and did not attempt to steal from him hence raising the question that if indeed he had attempted to steal from the complainant while at the bar, how come there was no eye witness from the bar? That it would have been obvious for him to raise alarm while inside the bar and call attention of the people inside more so the staff. He relied on the case of *Bukenya & others v Uganda* (1972) EA 549 where the court stated;

> " i. i. The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.
>
> ii. That court has a right and duty to call witnesses whose evidence appears essential to the just decision of the case.
>
> iii. Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."

19. He submitted that failure by the trial magistrate to give adequate consideration to the appellant's defence and the discrepancies in the evidence of PW1 and 2 shifted the burden of proof to the appellant. He cited *Meshack Mutisya Muasya v Republic* [2021] eKLR where Odunga J. as he then was quoted *Ayub Muchele v Republic* [1980]KLR 44 Trevelyan & Sachdeva, JJ who held:

> 'Just as animosity is a factor which is properly to be taken into account where required, so is lack of animosity. We see nothing wrong in an appropriate case for the court to ask "What reason had the witness to lie"...the fact that people have no grudge against someone does not mean that they cannot at the same time be mistaken or, for that matter , deliberately untruthful...there are spiteful people about."

20. He also relied on *Lukas Okinyi Soki v Republic*; Kisumu Criminal Appeal No 26 of 2004 where the Court of Appeal noted that;

> " The appellant also claimed that the complaint was made as a result of grudge between the complainant and the appellant's father over a piece of land that was in dispute between the two. The learned trial magistrate did not consider this defence and never made any finding on it. The superior court dismissed it stating that the issue was introduced by the appellant late and was not afforded an opportunity to be tested and countered... the court ended its observation by saying that the trial magistrate must have seen the issue was of no probative value. It did not make any decision on the issue and in our humble opinion, abdicated its role of analyzing that evidence (considering that the appellant was unrepresented and that the appellant was facing a serious charge which carried death sentence) and making its own conclusion on the same. As it stands, all that the superior court did was to state that the matter was introduced late and as there was no opportunity to cross examine on it, the trial court found it was not of probative value. That evidence was on record and deserved to be fully considered and either dismissed or accepted."

21. Counsel submitted that the learned trial magistrate selectively applied the evidence tendered, failed to comprehensively analyse the evidence of the appellant and in the process aided the case for the prosecution. That ultimately the prosecution failed to prove its charges against the appellant.

Submissions by the Respondent

22. The State, through Prosecution Counsel Ms. Nyakibia Mburu, opposed the appeal in its entirety. She submitted that the prosecution proved its case to the required standard. She relied on sections 4 and 234 of the *Penal Code* on the ingredients of the offence of grievous harm.

23. That the evidence of the medical officer confirmed that the complainant suffered a permanent disfigurement and the eye witnesses corroborated the account of PW1.

24. She submitted that the trial court rightly convicted the appellant as the appellant's defence raised no doubts in the prosecution's case. That the defence was a mere denial as the appellant did not tender any evidence or produce any document. She submitted that the prosecution's case was weighty and all the evidence pointed to the appellant as the culprit. It was also her submission that the sentence imposed is lawful.

Analysis & Determination

25. AS a first appellate court, it is now settled that the duty is to reevaluate, analyse, scrutinized, weigh- all the evidence o record and draw its own conclusions. In doing so the court must always keep in mind that it never saw nor heard the witnesses.

26. Upon careful consideration of the submissions, the evidence and the grounds of appeal, it appears to me that the only issue for determination is whether the prosecution proved its case beyond reasonable doubt

Whether the offence of grievous harm was proved to the required standard.

27. Section 234 of the *Penal Code* which is the punishment section. The section provides that;

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

28. From 234 of the *Penal Code*), the elements of the offence can be distilled as;

    a. The victim sustained grievous harm.

    b. The accused caused or participated in causing the grievous harm.

    c. The harm was caused unlawfully.

29. The complainant testified that the appellant hit him on the mouth with his fist and a stone. That he fell down and bled from the mouth and later found himself in the hospital. The P3 form indicates that the complainant had lacerations on the inner lower lip and a missing upper incisor tooth. The injury was categorized as 'grievous harm'.

30. As to whether the grievous harm was caused by the appellant, the complainant, PW2, testified that on 18th October 2021 at 8.00pm, he was at Fuse bar and had Kshs 200/= with which he intended to buy one cup. He went on to testify that;

> " When I saw his intention, I went out and Matheka followed me. He hit me by fist and took a stone and hit me on the mouth. The place had illumination from electricity from 'Mulika Mwizi' the market lights. I saw the accused well. He appeared from the left side."

31. Evidently the questions raised by the appellant in his submissions are valid. Why did the complainant walk out of the bar instead of raising alarm inside? Why if indeed the appellant had put his hand into the complainant's pocket had the complainant not raised alarm?

32. There is no logical explanation and the complainant did not give any explanation why he walked out of the bar instead of raising alarm inside.

33. It is also noteworthy from the evidence that if indeed the appellant was with the complainant inside the bar, he did not follow him immediately, and the attack did not happen right outside Fuse Bar. It appears from the evidence that the complainant had walked some distance from Fuse Bar, and was attacked by a person who, according to him, who appeared from his left. This person hit him with the fist and according to him, he fell down bleeding from the mouth and lost consciousness. It is not clear at what time he was able to identify the person, because he made weather of the existence of the Mulika Mwizi light in the market. However, it was not established how far he was from all the light sources he alluded to. The I.O never visited the scene and if he did so there was no evidence of his findings. It is also not reasonable that no one from Fuse Bar was called as a witness to the fact that the complainant and the appellant were in that bar minutes before the alleged attack. There were no investigations conducted and the alleged weapon was not recovered. It is also noteworthy that as per the complainant the whole thing was about the appellant robbing him of the Kshs 200 he had. The whole incident started while he was at that bar counter about to buy his beer. There was a witness there at the counter but this issue of the attempted robbery was not followed up, neither is there evidence that even after being over powered by the alleged thief, that the complainant lost his Kshs 200. This is one of the glaring gaps in the case for the prosecution.

34. The events that followed after the assault are also inconsistent. The complainant testified that; "...when I was beaten, I was first taken to the hospital. It was my cousin who took me to the police station and thereafter to the hospital". The said cousin was Charles Musyoka (PW3) and his evidence was that, "I called Gideon Mutisya and we took him to Kathonzweni Health Centre and we were referred to Wote. We went to Makueni Referral Hospital. He was treated and we went home. I took him to the police station after the hospital. It was Kathonzweni Police station. It was the same date (18/10/2021)" On cross examination, he said that "We took the complainant to the police station Kathonzweni and we were referred for treatment first." The two witnesses seemed not to be sure on where the complainant went first. Was it the police station or the hospital? Their accounts should have been very consistent because they were together when the events unfolded. In fact, PW3 seemed to suggest that they went home after the hospital.

35. Further, there was the evidence of PW5 whose name is indicated as Geshion Kieti. Is he the same as the witness referred to by PW3 as Gideon Mutisya? His evidence was that the matter was taken to his attention by his nephew and on cross examination, he (PW5) said " I was called by Musyoka. When I went to the scene, I found the victim lying down and unable to control himself." The prosecution made no effort to clarify whether these were the same people as it creates inconsistencies in their case. PW5 was Geshion Kieti. PW3 said "I called Gideon Mutisya and we took him to Kathonzweni Health Centre ..." PW5 testified that "Regarding this case on 08/10/2021 at 8.50 pm. I had been called by a friend to a bar. While my nephew came while running, my nephew is Kemani Musyoki. He told me Komu had been beaten and he was lying down about to die. I went there with a friend and found him lying down." Who was Kemani Musyoka?

36. It is PW5 who made reference to the person by the name Kemani Musyoki yet the record shows that PW3 was Charles Musyoka hence the question whether Kemani Musyoki and Charles Musyoka is one person. This was not settled by the prosecution and there in no way of knowing. Otherwise it begs

the question as to who was this PW5's nephew, how did he know about the assault and the physical location of PW5 in order to go running to him to report? And if indeed it was Charles Musyoka, how did he know that PW5 who testified that a friend had just called him to a bar, was in that specific bar at that time yet the record does not show that the two had any prior communication.

37. In addition, there was also inconsistency in the evidence as to who took the complainant to hospital and at what point in the scheme of things. The complainant himself testified that he found himself in hospital and that it was his cousin, the one who responded to his distress call who took him to the hospital. The cousin (PW3) testified that he called one Gideon Mutisya and they (he and the said Gideon) took the complainant to the hospital. PW5 testified that upon being called by his nephew he went to the scene with a friend and found the complainant lying down. That he sought assistance to put him in the vehicle and took him to the hospital. Neither the cousin nor the complainant mention PW5 anywhere in their testimonies.

38. I have carefully perused the documentary evidence. The P3 form was completed on 18th October 2021. It shows that Komo Kiio aged 33 years old was sent to hospital on the 11th October 2021 under the escort of his uncle. He had a checked, greyish blood stained shirt, and gave history that he was "assaulted in a bar after a quarrel". It shows that the likely weapon was a fist, and the treatment received was analgesics

39. The treatment card shows that he was in hospital on the 8th October 2021. His age is 28 years it simply shows that he had a dental review and stitching under local anesthesia. Other than that there is no evidence on the treatment card that he lost a tooth or just had a tooth ache, or where the stitching was done.

40. It is noteworthy that the appellant asked the age of the complainant under oath and he said it was 28 years. There is no explanation why it is 33 on the P3,

41. On the history, the complainant told the court that he walked out of the bar and was assaulted outside. He told the doctor that he was assaulted inside the bar after a quarrel. Not that he was being robbed of his money, but after a quarrel.

42. The treatment card indicates stitching but the P3 speaks about pain killers. There is no loss of tooth in the initial treatment card but there is loss of tooth in the P3.

43. The complainant testified that he was wearing a white shirt when he was assaulted. The shirt was produced and the court indicated 'cream blood stained shirt produced exhibit 3'. On the other hand, the P3 form described the shirt as 'blood stained checked (greyish) shirt'. It is possible that the mention of white, cream and greyish was just a question of perception by different people of colours but the mention of 'checked' in the P3 changed the whole narrative. The Concise *Oxford English Dictionary*, 12th Edition defines the word 'checked' as, 'having a pattern of small squares'. I doubt that the learned trial magistrate would have missed that obvious aspect. From the evidence before me, the shirt produced in court was different from the one seen by the doctor who filled the P3 form. It is also noteworthy that the complainant testified that "the accused also tore my shirt on the left side". The P3 however did not mention such thing. I doubt that the doctor would have missed this because he was required to indicate the state of clothing in the P3.

44. There is also the issue of the scene of crime. Where did the offence occur? Was it right outside Fuse Bar or outside Kitindo Bar? PW3 testified that it was near Kitindo Bar. The record did not shed any light on the proximity of the two bars hence I cannot conclude that the two witnesses were talking about the same crime scene. This confirms that the complainant had moved away from Fuse Bar.

45. In addition, the evidence of PW3 appears to exaggerate what happened. There is nowhere the complainant said that the attacker sat on him. He simply stated that he was hit with a fist and a stone and he fell down. Yet this witness testified that he found the appellant on top of the complainant. Further, it is noteworthy that the evidence does not shed light on how and when the appellant was arrested.

46. These inconsistencies are not idle. They speak to the credibility of the evidence on record, to the standard of proof of the ingredients of the alleged offence, to the identity of the offender and whether or not the offence was committed as alleged.

47. I am persuaded that this case falls squarely within the purview of the view of the Court of Appeal in *Philip Nzaka Watu v Republic* [2016] eKLR where the Court had this to say:

> "The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self-contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt.

48. The appellant denied the offence. He could have chosen to remain silent. He maintained that he was innocent. The prosecution had the duty to establish his guilt. He had no obligation to establish his innocence. What the prosecution presented ought to have stood the test of beyond a reasonable doubt. It is my view that it did not.

49. In the circumstances I find the appeal merited. I allow the appeal, quash the conviction and set aside the sentence.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 26TH JANUARY 2024

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MUMBUA T MATHEKA

JUDGE

Court Assistant Ms. Barasa

Appellant Present

For the Appellant Ms. Kellen

For the State Ms. Omollo