Gwako & another v Republic (Criminal Appeal 20 of 2017)
[2022] KECA 1081 (KLR) (7 October 2022) (Judgment)

Neutral citation: [2022] KECA 1081 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 20 OF 2017

PO KIAGE, M NGUGI & F TUIYOTT, JJA

OCTOBER 7, 2022

BETWEEN

RICHARD NYAMBUGA GWAKO ..... 1ST APPELLANT

JOB OKONGO GWAKO ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Kisii, (W. A. Okwany J.) dated 7th November, 2016 in Kisii High Court Criminal Appeal No. 21 of 2014)

JUDGMENT

1. The appellants, Richard Nyamboga Gwako and Job Okongo Gwako were jointly charged with the offence of assault causing grievous harm contrary to section 234 of the *Penal Code*. The particulars of the offence were that on the night of May 16, 2012 at Boochi Sub-location in Gucha District within Kisii County, jointly with another not before the court, they unlawfully did grievous harm to Ruth Bosibori. They were tried and convicted by the Principal Magistrate's Court in Ogembo and were both sentenced to life imprisonment.

2. Dissatisfied with both their conviction and sentence, the appellants preferred an appeal before the High Court in Kisii. Upon considering the six grounds of appeal raised before it against the evidence presented before the trial court which it re-evaluated; and noting the brutal manner in which the appellants executed their attack on the complainant which attack disfigured her face and also led to the traumatic amputation of her left arm that was chopped off during the attack, the first appellate court dismissed their appeal and affirmed both their conviction and sentence.

3. The appellants have now preferred the present appeal before this Court in which they raise four grounds of appeal. These are that the courts below failed: to observe that the evidence of identification was unsound given the unfavorable conditions at the scene hence unsafe to base a conviction upon;

to observe that the investigation was shoddy and hence could not gather enough evidence to support the alleged offence; to consider that the sentence imposed was unconstitutional due to its mandatory nature; to give due consideration to the defence which was supported by the evidence of PW5 and was not shaken by the prosecution case.

4. Briefly, the evidence presented before the trial court was as follows. PW1, the complainant, aged 14 at the time of the attack, was on May 16, 2012 at about midnight, sleeping in their house in the company of Linet Boyani (PW2) and Rosa Bitengo Oroba (PW4) who are her sister and mother, respectively. The appellants, whom she knew very well as her cousins and close neighbours, came to their house and knocked at their door, claiming that they were police officers. They then broke the door open and when PW1 attempted to escape, the 1st appellant got hold of her.

5. PW1 was able to identify the appellants as they had torches which they were flashing around. The assailants were all armed with pangas. PW1 asked the appellants why they were attacking her and the 1st appellant told her that they wanted to finish her. It is at this point that one Dominic suddenly appeared and cut her on the forehead as the 1st appellant chopped her left hand off while the 2nd appellant cut her left leg as she lay down. PW1 lost consciousness only to regain it one week later at Tabaka Hospital.

6. Linet Boyani (PW2), the elder sister of PW1, confirmed that she was with PW1 in their mother's house on the night of the attack. She saw the 1st appellant chop off the complainant's left arm, one Dominic cut the complainant on the face while the 2nd appellant cut her leg. PW2 also testified that she was able to see and recognize the appellants as they had torches which they flashed around. She also spoke to the 1st appellant while the 2nd appellant taunted and boasted to her the following morning, stating that even though they had cut PW1, they would not run away as no action could be taken against them since the complainant's brothers were away.

7. PW3, Robert Isoe, the Assistant Chief of the area, testified that the morning following the incident, he visited the scene of the incident where he found a huge crowd baying for the appellants' blood. He arrested them in order to save them from the mob that was threatening to lynch them in connection with their alleged involvement in the assault on PW1. PW3 confirmed that he knew the appellants and the complainant as first cousins as their fathers were brothers.

8. Ruth Bitengo Oroba PW4 the mother of PW1 and PW2 was with the complainant and PW2 on the night of the attack. It was her testimony that she saw and recognized the appellants and one Dominic who escaped after the attack. She stated that the 1st appellant talked to her at the time of the attack and asked her why she was screaming. PW4 escaped and ran into the tea bushes where she stayed till morning. She returned home at 6 a.m. and found that PW1 had been badly injured and had been taken to Tabaka Hospital.

9. The mother of the appellants and Dominic (who appears to also be known as Isaac), Keresensia Nyambeka (PW5) testified that on the material night, her son Isaac came to her house at about 11 p.m. He asked her for food but rejected what she gave him, complaining that it was too little. He then grabbed a lantern and threw it at her. She escaped and hid inside a tea plantation after which she heard Isaac (Dominic) say that he would pursue her to the home of PW4. Shortly thereafter, she heard the children of PW4 screaming. It was her testimony that Isaac (Dominic) was fond of assaulting her every time he came home drunk and that she would seek refuge in the home of PW4.

10. The testimony of Wycliffe Atamba (PW6), a clinical officer at Gucha Level 6 Hospital was that the complainant sustained a fracture of the lower mandible, an amputated left forearm, cut wound on the left and right forearms and a fracture of the left ankle joint. She also lost four (4) teeth. He classified the injuries as grievous harm.

11. The investigating officer, Zackayo Kipcheum (PW7), who was attached to Ogembo Police Station, had received the appellants who were brought to the station by PW3. He also visited the complainant at the hospital, recorded witness statements and issued the complainant with a P3 form. He produced a panga that had allegedly been used in the attack.

12. On the basis of these facts and upon considering the appellants' defences in which they denied perpetrating the attack on the complainant, the trial court was satisfied that the prosecution had proved its case beyond reasonable doubt, a conclusion that the first appellate court agreed with.

13. At the hearing of their appeal, the appellants, who appeared in person, indicated that they would rely on the written submissions filed before this Court. There was no appearance for the State.

14. In their written submissions, the appellants contend that the prosecution did not prove its case beyond reasonable doubt. They submit that there was no proper evidence of identification; the incident took place at night and the only source of light was torches; and the witnesses did not clearly state the direction of the torches.

15. Regarding the sentence, the appellants submit that the Supreme Court in *Francis Karioko Muruatetu & Another vs Republic* (2017) eKLR declared mandatory sentences unconstitutional. The sentence that was imposed on them by the trial court was therefore excessive in the circumstances.

16. It is their submission, finally, that the trial court did not consider their alibi defence. They submit that while PW5 clearly stated that they were sleeping in the house when the incident occurred, the trial court unjustifiably dismissed the evidence.

17. This being a second appeal, the Court is confined to a consideration of issues of law as provided under section 361(a) of the *Criminal Procedure Code*. The appeal before us raises two issues of law: the identification of the appellants, and the legality of the sentence imposed on them.

18. In its decision, the first appellate court observed as follows regarding the identity of the persons who assaulted the complainant:

> "From the evidence tendered by PW1, PW2 and PW4, it is crystal clear to me that the appellants were not strangers to the complainant her sister (PW2) and her mother (PW4). They were not only close relatives, but also neighbors.
>
> It came out clearly in evidence that the two families had no grudge or differences that could have prompted the witnesses to falsely implicate the appellants in this case. I am therefore satisfied that the 3 witnesses positively identified the appellants as their attackers. Their evidence on identification was credible, consistent and was not impeached on cross examination by the appellants.
>
> Besides, PW5, the mother of the appellants confirmed that on the material night, her son Dominic assaulted her before going to the home of PW4 from where she heard screams emanating shortly thereafter. The testimony of PW5 lends credence to the testimonies of PW1, PW2, and PW4 that the said Dominic was in the company of the appellants at the time they invaded their home.

19. The identity of the persons who attacked PW1 and inflicted the grievous injuries that she sustained was not by identification but by recognition. The prosecution witnesses were all consistent in their evidence that it was the appellants and their brother, Dominic, who appears to have escaped arrest, who carried out the heinous crime against a defenceless child.

20. The appellants' own mother, PW5, albeit reluctantly as observed by the trial court, corroborated the evidence of the complainant, her sibling and her mother: she had been assaulted by her son, Dominic, then she had heard him say that he was going to the house of PW4, where PW5 used to hide when assaulted by her son, and she had heard Dominic and his brothers, the appellants, go to the house that the complainant occupied with her siblings and mother. Thereafter, she heard the screams of the complainant and her family as they were attacked by the appellants.

21. The present case is one of recognition, not identification, which is more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. In *Ali Mohammed Wanjala v Republic* [2015] eKLR this Court, in addressing how recognition evidence should be considered, cited with approval 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 sometime, 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."

22. Regarding the conditions prevailing at the time of identification or recognition, this Court in *Wamunga vs Republic* [1989] KLR, 424 stated that:

> "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 favorable and free from the possibility of error before it can safely make it the basis of a conviction."

23. The complainant, her sister and mother knew the appellants, who were their close relatives. The appellants spoke to the complainant, PW2 and PW4, in the course of the attack. The appellants were holding torches which they flashed about as they perpetrated the attack. The 1st appellant boasted to PW2, the day following the attack, that nothing would be done to them as the complainant's and PW2's brother were not around. There can be no doubt that the evidence before the trial court, being evidence of recognition, was sufficient to establish that the appellants were the perpetrators of the heinous attack on the complainant. We are satisfied that the first appellate court did not fall into error in finding that the trail court was correct in reaching the conclusion that the prosecution had established its case against the appellants beyond reasonable doubt and in dismissing their appeal against conviction.

24. The appellants have also appealed against the life sentence imposed upon them by the trial court and affirmed by the first appellate court. They have cited in support the decision of the Supreme Court in Francis Karioko Muruatetu & Anor v Republic [2017] eKLR.

25. The appellants were charged with the offence of causing grievous harm contrary to section 231 of the Penal Code. This offence is a felony, attracting a maximum punishment of life imprisonment. The section, which is titled "Acts intended to cause grievous harm or to prevent arrest" provides as follows:

> " Any person who, with intent to maim, disfigure or disable any person, or to do some grievous harm to any person, ...
>
> (a) unlawfully wounds or does any grievous harm to any person by any means whatever; or... is guilty of a felony and is liable to imprisonment for life. (Emphasis added).

26. The penalty imposed under section 231 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. What sentence the trial court will impose will depend on the facts and circumstances of the case, and the view that the court takes of such circumstances. It is trite law that the first appellate court, as the High Court was in this appeal, will only interfere with the exercise of discretion if it is shown that the trial court took into consideration irrelevant factors, applied wrong principles or generally, that the sentence is excessive. It is also the law that on a second appeal to this Court, as we have stated, the Court will not entertain an appeal on sentence merely for its severity, our jurisdiction going only as far as legality of sentence.

27. In exercising discretion in sentencing, a court is required to consider the provisions of The Judiciary Sentencing Guidelines, which provide for proportionality as one of the principles underpinning the sentencing process at p. 12 as follows:

> " 3. Proportionality:
>
> 1 The sentence meted out must be proportionate to the offending behaviour. The punishment must not be more or less than is merited in view of the gravity of the offence. Proportionality of the sentence to the offending behaviour is weighed in view of the actual, foreseeable and intended impact of the offence as well as the responsibility of the offender." While exercising its discretion in sentencing, the Court should bear in mind the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, mitigating and aggravating factors should also be considered.

28. The trial court in this case found that the appropriate and proportionate sentence in the circumstances of the case was life imprisonment. The first appellate court found no reason to interfere with the sentence, observing as follows with respect thereto in dismissing the appellants' appeal against sentence:

> " 45. I have similarly considered the brutal manner in which the appellants executed their attack on the young and defenseless complainant which attack did not only totally disfigure her face, but also led to the traumatic amputation of her left arm that was chopped off during the attack. In view of the above observations, I find that the trial court took into account relevant factors during sentencing, the sentence was lawful and in tandem with the law under which the appellants had been charged and I find no reason whatsoever to interfere with the trial courts exercise of discretion on sentencing."

29. We find no basis to fault the first appellate court in the decision it reached on the appellants' sentence. A young girl, at the cusp of womanhood, was left physically scarred, disabled, her left forearm amputated traumatically, and with four teeth missing, following a vicious attack by the appellants, her first cousins. One would have expected that the appellants, her cousins, in African culture, her brothers, rather than being responsible for scarring her physically and emotionally for life, would have been her guardians and protectors against harm. The sentence imposed on them for their acts is, in our view, fully merited.

30. We find no basis to interfere with the decision of the High Court, and we hereby dismiss the appellants' appeal and uphold both their conviction and sentence.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF OCTOBER, 2022.

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