



## REPUBLIC OF KENYA

### IN THE HIGH COURT OF KENYA AT BUSIA

#### CRIMINAL APPEAL NO. 17 OF 2019

1. JOHN NEWTON ODONGO

2. VICENT OUMA NGALA.....APPELLANTS

VERSUS

REPUBLIC.....REPUBLIC

*(From the original conviction and sentence in Criminal case No.1645 of 2015 of the Chief Magistrate's Court at Busia by Hon. S.O Temu Maragia– Principal Magistrate)*

#### JUDGMENT

1. **John Newton Odongo**, the first appellant was convicted in two counts for the offences of assault causing actual bodily harm contrary to section 251 of the Penal Code while **Vincent Ouma Ngala**, the second appellant herein, was convicted in one count for the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code.

2. The particulars of the offence in count one were that on 13<sup>th</sup> July 2015 at the County Government of Busia offices in Township location of Busia County, jointly and unlawfully assaulted **John Oduor Mondoh** occasioning him actual bodily harm.

3. The particulars of the offence in count two were that The first appellant on 13<sup>th</sup> July 2015 at the County Government of Busia offices in Township location of Busia County, unlawfully assaulted **Franklin Bwire Were** occasioning him actual bodily harm.

4. After trial both were convicted and each was committed to six months' probation. They have appealed against both conviction and sentence. The appellant were represented by the firm of J.P. Makokha & Company Advocates. They raised sixteen grounds of appeal which I have summarized as follows:

- a) That the learned trial magistrate erred in law and in fact by relying on contradictory evidence.
- b) That the learned trial magistrate erred in law and in fact by failing to consider the alibi defence of the appellant.
- c) That the learned trial magistrate erred in law and in fact by sentencing the second appellant when he had not convicted him.

5. The state opposed the appeal through Mr. Mayaba, the learned counsel who contended that sufficient evidence was adduced by the prosecution.

6. The facts of the prosecution case were briefly as follows:

The two complainants had gone to the County Government offices to follow up a story. The accused persons unlawfully battered them.

7. In their defence the appellant denied any involvement in the offence, and pleaded an alibi.

8. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32**.

9. Franklin Bwire (PW1) testified that on 13<sup>th</sup> July 2015 he was at the Busia County offices where he had gone to see Mr. Ombibira. He was with John Mondo, a fellow media man. Though the record is incoherent as to what transpired, there is an indication that at one point he

parted with John Mondo (PW2). PW2 returned where he was crying and said he had been beaten. He said PW2 informed him that while he was waiting, some security for the governor beat him up and confiscated his microphone and mobile phone.

10. When PW1 was going to report to Mr. Ombibira, he met John Newton Odongo and Opiyo. John Newton Odongo ordered him to leave, grabbed him by the neck and punched him on the mouth from where he bled.

11. John Odua Mondo (PW2) on his part testified that Franklin Bwire (PW1) left for the County Communications office. As he was waiting, the two appellants found him. They grabbed him and slapped him. They dragged him to the Chief of Staff reception where they continued to beat him.

12. From the cross examination it emerged that the two complainants had an issue of mentioning their assailants. PW1 admitted that in his entire statement he did not mention John Newton Odongo in spite of saying he had known him since 2010. He also conceded that he did not mention Vincent Ngala in his statement.

13. PW1 testified that John Odua Mondo (PW2) informed him that he was beaten by twin brothers whom he identified as Opiyo and Odongo. If we assume that Odongo is John Newton Odongo, an assumption we cannot make for Odongo is a very common name, then we are left wondering who Opiyo is.

14. John Odua Mondo (PW2) while recording his statement, he referred to his assailants as two security officers from the governor's office. He later referred to them as the two accused persons. At the time of recording his statement, the two appellants had not been charged. So which accused persons was he referring to? This raises doubts whether he knew who beat him. In his admission, he said he had known the first appellant before he (1<sup>st</sup> appellant) joined the County Government. The natural and logical way of referring to people one knows is by name. Like his co-complainant, he never mentioned any of the two appellants by name.

15. The appellants raised an alibi defence. In the case of **Kiarie vs. Republic [1984] KLR** where the Court of Appeal held:

**An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.**

16. In view of the issues of the identity of the attackers I have raised and discussed, the learned trial magistrate ought to have made a finding that the alibi defence was plausible.

17. It was contended that the second appellant was sentenced though not convicted. This is not entirely correct. I however find that the construction of the paragraph was not clear but on the issue of conviction it was. This is what the learned trial magistrate said:

**I thus find the accused guilty and convict them for the offence of assault as charged under section 251 of the Penal Code on count 1 and 2 for 1<sup>st</sup> accused and count 1 for 1<sup>st</sup> accused as charged.**

The appeal cannot turn on this ground.

18. The upshot of the foregoing analysis of the evidence on record, I find that there was no sufficient evidence to convict either of the accused. I quash the conviction and set aside the probation order. Each appellant is set at liberty unless if otherwise lawfully held.

**DELIVERED and SIGNED at BUSIA this 24<sup>th</sup> Day of March, 2020**

**KIARIE WAWERU KIARIE**

**JUDGE**