



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NANYUKI
CRIMINAL APPEALS NOS 54, 53 AND 55 OF 2018
(CONSOLIDATED)

1. BENJAMIN KIMANI GACHANGO (ORIGINAL 5TH ACCUSED)
2. JOHN MWONGERA (ORIGINAL 4TH ACCUSED)
3. ELOILOI NATOR (ORIGINAL 2ND ACCUSED)....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from Convictions and Sentences passed on 12/09/2018 in Nanyuki CM Criminal Case No 1885 of 2017 – Njeri Thuku, PM)

J U D G M E N T

1. The Appellants herein, **BENJAMIN KIMANI GACHANGO, JOHN MWONGERA** and **ELOILOI NATOR** (who were respectively 5th, 4th and 2nd accused before the trial court) were convicted after trial of *conspiracy to defeat justice* contrary to **section 117(c)** of the **Penal Code**. They were each sentenced to 5 years imprisonment.
2. Two of their co-accused (1st and 3rd accused) were similarly convicted. The 1st accused (JOHN MAINA KARIUKI) was similarly sentenced to 5 years imprisonment. It appears he did not appeal. The 3rd accused (GRACE LUWATO) was sentenced to 3 years probation. It appears that she also did not appeal. The other co-accused, JAMES MIRITI (6th accused) was acquitted.
3. The three Appellants have appealed against both conviction and sentence. The 1st and 2nd Appellants were represented by counsel in these appeals. The 3rd Appellant was not.
4. The three Appellants have advanced 3 main grounds of appeal–
 - i. That the charge as laid did not disclose the offence charged and hence was incurably defective.
 - ii. That the charge as laid was incurably defective for duplicity.
 - iii. That even if the charge were proper (which it is not) the same could not have been proved beyond reasonable doubt by the evidence tendered.
5. Learned counsel for the Respondent did not support the convictions.
6. I have considered the submissions of the learned counsels appearing and those of the 3rd Appellant. I have also read the record of the trial court (including the judgment) in order to arrive at my own conclusions regarding the evidence tendered. This is my duty as the first appellate court. I have borne in mind, however, the fact that I did not see and hear the witnesses myself, and I have given due allowance for that fact.
7. In order to fully appreciate the first two grounds of appeal it is necessary to set out fully the provisions of Section 117 of the Penal Code:

“117. Any person who –

a. conspires with any other person to accuse any person falsely of any crime or to do anything to obstruct, prevent, pervert or defeat the course of justice; or

b. in order to obstruct the due course of justice, dissuades, hinders or prevents any person lawfully bound to appear and give evidence as a witness from so appearing and giving evidence, or endeavours to do so; or

c. obstructs or in any way interferes with or knowingly prevents the execution of any legal process, civil or criminal, is guilty of an offence and is liable to imprisonment for five years.”

8. It can be seen immediately that section 117 creates three (3) distinct offences as follows –

i. False accusation of crime and obstruction, prevention, perversion and defeat of the course of justice.

ii. Dissuading, hindering or preventing witnesses from testifying (or endeavouring to do so) in order to obstruct the due course of justice.

iii. Obstructing, interfering with or knowingly preventing execution of any legal process.

9. Now let us look at the charge as laid against the Appellants and their co-accused:

“CHARGE:

Conspiracy to defeat justice and interfere with witnesses contrary to section 117(c) of the Penal Code.

PARTICULARS OF OFFENCE:

On the 22nd day of November, 2017 at Mara Moja area of Nanyuki within Laikipia County, knowingly prevented the execution of criminal process by interfering with the reporting of a defilement case.”

10. As already seen, paragraph (c) of section 117 of the Penal Code creates the offence of obstructing, interference with or knowingly preventing the execution of any legal process, civil or criminal. That is the paragraph that the Appellants were alleged to be afool of. However, the statement of the offence alleged interference with witnesses. That is an offence under paragraph (b), not under paragraph (c) of section 117!

11. As for the particulars of offence given in the charge, the term “*legal process*” is not defined either in the Penal Code or in the *Interpretation and General Provisions Act, Cap 2*. However, in *Black’s Law Dictionary, 10th Edition*, the term “*process*” is defined thus:

“1. The proceedings in any action or prosecution (due process of law).

2. A summons or writ, esp. to appear or respond in court.”

And the same Dictionary defines “*legal process*” thus –

“process validly issued.”

12. It is clear from these definitions that the reporting of a complaint to the police and subsequent investigation by the police cannot be termed a legal process. That is a police investigation. Any judicial proceeding resulting from that investigation, and any warrants, summons, etc issued therein is what will be a legal process. The particulars of offence given in the charge against the Appellants therefore did not disclose an offence under section 117(c) of the Penal Code. Those particulars may have disclosed an offence of obstructing, preventing, perverting or defeating the course of justice under section 117(a). However, the Appellants were not charged under that paragraph of section 117.

13. As it is, the charge was never amended. I find that the charge as laid against the Appellant was incurably defective for one, not disclosing the offence charged, and two, for duplicity. It was not possible to know with any degree of certainty which of the three distinct and separate offences under section 117 of the Penal Code the Appellants were facing in order to mount proper defences.

14. Having found the charge as laid to be incurably defective, I need not closely examine the evidence laid before the trial court. Suffice it to say that the evidence did not disclose any interference with a criminal process for the simple reason that there was not yet any criminal process in place. Nobody had been charged yet. Preventing someone from reporting a crime to the police may amount to obstruction, prevention, perversion or defeat of the course of justice, an offence under paragraph (a) of section 117 of the Penal Code. But it cannot be obstruction, interference with or prevention of execution of any legal process under paragraph (c) of section 117 where there is not yet any legal process afoot. And, as already seen, there was no amendment of the charge.

15. Learned counsel for the Respondent properly conceded these appeals.

16. The upshot is that the three appeals are hereby allowed in their entirety. The Appellants’ convictions are hereby quashed and the

sentences meted out against them set aside. They shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 11TH DAY OF MARCH 2020

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 12TH DAY OF MARCH 2020