



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CRIMINAL APPEAL NO 80 OF 2019**

**JOASH OMBATI ANDAMO alias BONCHOKA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in*

*Criminal Case No 2653 of 2018 at senior Principal Magistrate's*

*court at Ogembo, Hon. G.N Barasah Resident Magistrate dated 13<sup>th</sup> August 2019)*

**JUDGEMENT**

1. This is an appeal filed by JOASH OMBATI ANDAMO alias BONCHOKA ('the appellant') against the decision of the Hon. G.N Barasah.
2. The first count was assault causing actual bodily harm contrary to **section 251 of the Penal Code**. The particulars were that on the 23<sup>rd</sup> September, 2018, at Tendere location in in Gucha sub-county within Kisii County, unlawfully assaulted Peter Mosoti thereby occasioning him actual bodily harm.
3. The second count was malicious damage to property contrary to **section 339(1) of the Penal Code**. The allegations were that the Applicant willfully and unlawfully damaged mobile phone make(HUAWEI Y336) touch screen valued at Kshs 6,500 the property of Peter Mosoti.
4. The Appellant pleaded not guilty before the lower court. After a full trial, the appellant was found guilty and convicted of the aforesaid offences and sentenced to serve 5 years imprisonment.
5. The Appellant felt aggrieved on his conviction and sentence and preferred this appeal raising the following grounds namely:-
  1. *The learned trial magistrate erred in both in law and fact when she found that the appellant was guilty in both counts of the charge while the evidence was insufficient to warrant conviction.*
  2. *The learned trial magistrate erred both in law and in fact in failing to analyze the evidence on record properly thus arriving at a wrong decision.*
  3. *The learned trial magistrate erred in law and fact by failing to find that the evidence on record does not corroborate.*
  4. *The learned trial magistrate erred in law and in fact by failing to take into cognition that the complainant hereon and his witnesses didn't know the accused; thus the appellant was not properly identified by the complainant.*
  5. *The learned trial magistrate erred in law and fact by failing to recognize that the value and ownership of the damaged property in count II was not proved.*
  6. *The learned trial magistrate erred in law and in fact by failing to recognize that the incident took place at night thus the identification was not proper.*
  7. *That the learned trial magistrate erred in law and in fact by failing to analyze the evidence tendered in count II was insufficient to*

*prove malicious damage of the said phone.*

8. *That the learned trial magistrate erred in law and in fact when she jointly sentenced the appellant to 5 years in prison on both counts without separating the sentence in each count.*

9. *That the sentence of 5 years in jail with no option of fine is severe considering the foregoing circumstances.*

10. *The learned trial magistrate failed to recognize that the medical evidence did not corroborate with the testimony of the complainant*

6. At the hearing of the appeal, Mr. Gichana counsel for the appellant relied on his written submissions while Mr. Otieno, state counsel made oral submissions.

7. The appellant in their submissions advanced that both Pw1 and Pw2 testified that it was dark and thus questioned the trial court's finding that there was some light. Pw1 testified that Pw2 called the appellant by name while Pw2 only knew the appellant physically leading to the conclusion that they both did not know the assailant. They cited the case of **Toroke v Republic [1987] KLR204** where the court of Appeal held as follows;

*“It is possible for a witness to believe quite genuinely that he had been attacked by someone he knows, yet be mistaken. So the error or mistake is still there whether it be a case of recognition or identification.”*

8. With regards to the second count, it was submitted that the trial magistrate failed to give any legal reasoning for finding the appellant guilty. The elements of the offence under **section 339(1) of the Penal Code** were not proved.

9. Mr. Otieno conceded the appeal based on the evidence tendered before the lower court. He argued that Pw1 stated that he did not know the person who attacked him. Pw testified that Pw2 knew the appellant by name yet Pw2 testified that he did not know Pw2 by name. He also referred the court to the trial court's holding that the appellant did not bring an alibi to boost his defence and faulted the trial court for shifting the burden of proof to the accused. He submitted that there was reasonable doubt which ought to have been resolved in favour of the appellant.

10. Being a first appeal, I am alive to the role of the first appellate court as spelt out in **Okeno –vs- Republic [1972] E.A 32** where at page 36 the court stated;

*“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya –vs- R [1975] E.A 336). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts finding and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters –vs- Sunday Post (1958) E.A 424.”*

11. I am also aware that this court is not obligated to allow an appeal simply because the state is not opposed to the appeal. In **Odhiambo vs. Republic (2008) KLR 565** the Court held that:-

*“the court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on evidence.”*

12. The evidence on record is that Pw1 (*the complainant*) recalled that on the material day at around 6:00 p.m. someone slapped him, held him by the hand and that he fell down as he was beaten. He was in the company of Justine Nyabuto (Pw2) who ran to ask for help. Pw1 testified that the assailant also threatened to kill him. Pw2 testified that after the appellant attacked Pw1 he went to seek for help. He told court that when they got back to the scene they shone light from the motorcycle's headlights to see the attacker. The person who had accompanied him referred to the appellant as *Bonchoka*. When they turned the headlights on, the appellant immediately ran away.

13. After the incident, Pw1 was treated at Bomachoge Chache sub-county Hospital and the P3 form was produced by Francis Omenyi (Pw3). Pw3 confirmed that Pw1 was treated at the institution on 23<sup>rd</sup> September 2018. He had a history of being attacked by a person known to him on the chest, neck and forehead. He experienced pain on his neck and his head and chest were tender. The degree of injury was assessed as harm. The investigating officer, PC Phalestine Cheruto (Pw4) testified that the complainant reported the incident and the appellant was first arrested on 19<sup>th</sup> January 2019 but the complaint was withdrawn. He testified that it was the complainant who identified the accused.

14. Positive identification of the appellant is a crucial element of any offence. The appellant contends that the incident took place at night and he was not positively identified as the assailant.

15. Pw1 was attacked by a person unknown to him and he testified that Pw2 recognized the appellant as he was a person known to him. He told court that Pw2 referred to the appellant by his name. Pw2 testified that he did not know the appellant by name but only knew him physically. The incident took place at 6:20 p.m. and both Pw1 and Pw2 testified that it was a little dark and explained that they shone the motorcycle's headlights to see the assailant. The court of appeal in **Shadrack Shuatani Omwaka v Republic [2020] eKLR** while discussing identification of an assailant at night cited with approval the decision of the Supreme Court of Uganda in **Abdulla Nabulere and another – v - Uganda Cr. Appeal No. 9 of 1978 (un reported)** where the court held as follows:

"...Apart from light during the incident, and familiarity of the assailant to the victim, other factors, such as distance between them, the length of time the victim had to observe and even the opportunity to hear the assailant are factors to look out for."...

"All these factors go to the quality of the identification evidence. If the quality is good the danger of mistaken identity is reduced but the poorer the quality the greater the danger. When the quality is good as for example, when the identification is made after a long period of observation, or in satisfactory conditions by a person who knew the accused before, a Court can safely convict even though there is no other evidence to support the identification evidence, provided the Court adequately warns itself of the special need for caution."

In the case of **Cleophas Otieno Wamunga vs. Republic [1989] KLR 424**, as follows:

*"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Widgery, C. J. in the well-known case of Republic vs. Turnbull [1976] 3 ALL ER 549 at page 552 where he said:*

*"Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."* [Emphasis mine]

16. The investigating officer, Pw4, testified that it was Pw1 who identified the appellant yet Pw1 did not know his attacker prior to the incident. Pw1 testified that it was Pw2 who knew his attacker. The prosecution evidence also reveals that at the time Pw1 was attacked it was dark and Pw1 was not able to see his attacker as he ran away when the motorcycle headlights were shone. Therefore, the identification evidence by itself could not sustain a conviction against the appellant. The law is settled, that in general, identification of a suspect who was a stranger at the time the offence was committed, which was not followed by the witness describing the suspect to the police who would organize a properly conducted identification parade at which the witness is afforded an opportunity to affirm his identification by pointing out the suspect, is a dock identification which in some cases is regarded as worthless (see **James Tinega Omwenga v Republic [2014] eKLR**).

17. There was no other evidence mounted by the prosecution that connected the appellant to the offence. It was not clear how the phone which was stolen was recovered.

18. In the end I find that the conviction of the appellant was unsafe and should not be allowed to stand. I hereby allow the appeal, quash the conviction of the appellant and set aside the sentence imposed. The appellant shall be set free forthwith unless otherwise lawfully held.

**DATED AND DELIVERED AT KISII THIS 30TH DAY OF JULY 2020.**

**A.K NDUNG'U**

**JUDGE**