



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CRIMINAL APPEAL NO.12 & 13 OF 2017**

**BETWEEN**

**WASHINGTON ODHIAMBO OLENDO alias**

**MARCEL ODHIAMBO OWINO.....1<sup>ST</sup> APPELLANT**

**FELIX OTIENO WODE.....2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from Homa Bay CM's Criminal Case No.127 of 2013 – P. Gichohi, CM)*

**JUDGMENT**

1. **WASHINGTON OLENDO** alias **MARCEL** (1<sup>st</sup> appellant) and **FELIX OTIENO WODE** (2<sup>nd</sup> appellant) were convicted on two counts of attempted murder contrary to **Section 220** of the **Penal Code** and sentenced to serve 20 years imprisonment.

The prosecution case was that on the 19<sup>th</sup> day of October 2013 at **ARUJO** village, they jointly (with others who have since been acquitted) attempted unlawfully to cause the death of **JACKTON OWUOR OLIELO** and **PAMELA OWUOR OLIELO** by severely cutting them with a panga – they denied the charges.

2. The evidence presented at the trial was that **JACKSON AWUOR OTIENO** (PW1) who was the Chief of **ARUJO** sub-location in Homa Bay County was inside his house within **RUGA** village on 19/10/2013 at about 8.00 p.m. when his wife **PAMELA OWUOR** informed him that there were some people outside the house who wanted to see him.

Two people entered the house, and introduced themselves as coming from Rachuonyo.

3. One sat directly opposite PW1 while the other stood at the door – Pamela sat on PW1's right hand side.

They informed PW1 that they were tracking a suspect who had killed their mother at **RACHUONYO** and was living in **RUGA** village. They said they had reported the matter to Homa Bay police station.

4. PW1 felt uneasy and invited the man standing at the door (identified as 1<sup>st</sup> appellant) to enter into the house and sit down. The man answered rudely that he was not going to sit, and suddenly the man at the door pulled open the Zip of the jacket he was wearing and retrieved a panga.

5. As PW1 and his wife **PAMELA** (PW2) began screaming for help, the 1<sup>st</sup> appellant went directly to him and cut him on the head.

PW1 got hold of the panga and the 1<sup>st</sup> appellant cut him on the tip of the right hand fingers. As he continued struggling with the 1<sup>st</sup> appellant in a bid to wrestle the panga from him, PW1 kicked the panga using his left leg and consequently suffered cuts on that leg.

6. Meanwhile the man who had sat opposite him (identified as the one at large) also unzipped his jacket and retrieved a panga and chopped off PW1's left hand from the wrist – leaving a stump.

This man at large (**REUBEN RIAT**) then confronted PW2 who was walking away and cut her on the right hand, also breaking it. A third person entered the house armed with a panga and a blue knife. He went directly to PW1 and cut him on the chest, using that knife. PW1 lost consciousness briefly and when he regained his senses, he realized he had been cut on the face and knees. At that point, the lantern lamp they were using in the house went off, and the attackers fled off. PW1 did not identify this other man.

7. As PW1 got out of the house, he met his son who was heading towards his (PW1) house - eventually a report was made to police and arrests effected. PW1 identified the 1<sup>st</sup> appellant at an identification parade and said:-

**“I was able to identify the .... accused persons because the lantern lamp was on ... The light covered the whole room which was about 6 x 7m.”**

8. As a result of the attack PW1 had a plate fixed in the upper left forearm and stitches on the chest fingers and toes. He lost his left hand from the wrist.

What could have been the motive for the attack? PW1 stated that between August and September 2013, he was accompanied by elders and police to arrest a woman within the village who was in possession of changaa and she was eventually charged in court. A week later a young man named **OGUTU BWANA** went to PW1's office in a drunken state claiming he was the woman's husband had declared his intention to harm PW1. However PW1 did not take him seriously as he was drunk.

9. On cross examination PW1 stated he did not know the attackers before the night of the attack.

This evidence was reiterated by PW2 who had gone out of the main house to lock the kitchen at 8.00 p.m. when she heard their dogs barking and saw three people approaching. They requested her to restrain the dogs saying they wanted to see the chief (i.e. PW1). After informing PW1 and getting a go-ahead, she told the three men to get into the house, but only one followed her into the house and sat down next to her husband while the other stood at the door. They claimed they were looking for a suspect who had killed their mother.

10. She described the attack in the self – same manner as PW1 and identified the two people who entered their house and attacked them one of them being the 1<sup>st</sup> appellant.

On cross examination by 1<sup>st</sup> appellant confirmed:-

**“I was able to see you well on the material night as there was light from the lamp.”**

11. She was categorical that the 1<sup>st</sup> appellant was the one who cut her husband on the head but also stated:-

**“I do not know the 4<sup>th</sup> and 5<sup>th</sup> accused person.”**

12. **ROBERT KENNETH LANGO** (PW3) confirmed visiting the scene of the attack at about 10.30 p.m.

finding items strewn all over the place and PW1's hand was on the floor of the sitting room. While at the scene he received a call from the Assistant Chief of **KANYABALA** sub location that a suspect at **HONGO** village was threatening people with a knife. PW3 proceeded to **HONGO** accompanied by police and found that the suspect was the 1<sup>st</sup> appellant who had been beaten by a mob and escorted to the nearby **KABUNDE AP** Camp.

13. Later on PW3 got information from **OTINDI ODONGO** that someone with injuries on the leg alleged to have been robbed of his motorcycle and beaten up, was requesting to be taken to **URIRI** hospital yet he had not reported the matter to police. **OTINDI** was suspicious and eventually PW3 was able to arrange with the police for the arrest of the person, who turned out to be the 1<sup>st</sup> accused **RIAT ODONGO** (who is at large). **RIAT** claimed that the 2<sup>nd</sup> appellant who was popularly known as **NDUGU** had hired him and others including **WASHINGTON ODHIAMBO OLONDE** (the 1<sup>st</sup> appellant) to attack PW1 because he had been arrested for being in possession of changaa and fined Kshs.105,000/= and he was very bitter about it.

14. Later on the 2<sup>nd</sup> appellant called PW3 to report that boda boda riders were threatening to burn his house, and he was advised to report the matter to police.

15. **EVANS OGUTU ODERO** (PW5) of **KALANYA** village told the trial court that in September 2013 at about 4.00 p.m. as he was passing near the 2<sup>nd</sup> appellant's home, he heard the 2<sup>nd</sup> appellant telling people who were drinking in his homestead that **"he must attack JACKIE because the latter had caused the arrest of his wife who was fined for being in possession of changaa."** PW5 knew **JACKIE** as the Assistant Chief of **ARUJO**.

16. PW5 explained that he knew the 2<sup>nd</sup> appellant's voice and recognized it because 2<sup>nd</sup> appellant was a changaa dealer and PW5 had been his customer for about one year. PW5 was standing along a path from behind the 2<sup>nd</sup> appellant's house. He then reported the matter to PW1's office.

17. **MICHEAL OCHOLA** (PW7) a Clinical Officer confirmed the injuries suffered by PW1 and PW2.

18. **IP THOMAS ODENYO** (PW9) confirmed re-arresting the 1<sup>st</sup> appellant from Kabunde police post, where he had been taken by members of the public. He interrogated the 1<sup>st</sup> accused who is at large and who informed him they had met the 2<sup>nd</sup> appellant alongside others including the 1<sup>st</sup> appellant and the 2<sup>nd</sup> appellant led them to PW1's house with instructions that they should discipline PW1. That is why 2<sup>nd</sup> appellant was eventually arrested.

On cross examination he stated:-

**"Riat told us that you are the one who led them to the assistant chief's house. Your name is Felix .... Riat told us you were on a revenge mission against the Assistant Chief .... Because the assistant chief had assisted to arrest your wife before."**

19. The 2<sup>nd</sup> appellant presented himself to police as he ran away from the wrath of the members of the public ....

20. Chief Inspector **JOSEPH MULATYA** (PW10) who recorded a charge and cautionary statement from **REUBEN RIAT ODONGO** (the missing 1<sup>st</sup> accused) who confirmed that they executed the attack alongside the 1<sup>st</sup> and 2<sup>nd</sup> appellant; and this was on instructions from the 2<sup>nd</sup> appellant who said the chief was disturbing them with frequent raids for changaa in the area where the 2<sup>nd</sup> appellant was a changaa brewer and dealer, so he had to be disciplined.

21. The 1<sup>st</sup> appellant in his sworn defence stated that on 19/10/2013 he went to meet his brother-in-law at 4.30 p.m. in a bar in **KABUNDE** within Homa Bay County. They left the bar at 8.00 p.m. and went to

**WIGA.** On the way they met a group of people who demanded to know where they were going and beat them up then took them to **KABUNDE AP** Camp on suspicion that they were thieves.

22. The 1<sup>st</sup> appellant maintained that he had nothing to do with the incident and suspects that the 1<sup>st</sup> accused was coerced to confess and implicate him.

He also complained that no identification parade was conducted and in any event there was no evidence that the identifying witnesses had given police a detailed description of the attacker.

23. Although the 1<sup>st</sup> appellant had referred to 19/10/2013 as the date he was at Kabunde, on cross examination he insisted that on that date he was in Nairobi and then travelled to Migori on the same date, and he was arrested on 19/11/2013. He also was adamant that he did not know **Reuben Riat** nor the 2<sup>nd</sup> appellant.

24. The 2<sup>nd</sup> appellant in his sworn testimony only made references to the date of his arrest on 20/10/13 saying PW1 said he never saw him during the attack and they had never differed.

He however confirmed that:-

**“Yes, I had an issue of alcohol. I was arrested by OCS and OC Crime with 43 litres of changaa. The case is not finalized .... I do not know these accused persons....”**

On cross examination he said he never left his house on the alleged date and was with his wife the entire night.

25. The 2<sup>nd</sup> appellant's wife **ANYANGO OTIENO** (DW4) testified again only making reference to events touching on the date of his arrest. She did not know why he'd been arrested.

26. In her judgment the trial magistrate noted that there was enough light to enable PW1 and PW2 see and identify their attackers that night, even though they were strangers. She also noted that they had ample opportunity to see them as they had substantial consultation where the 1<sup>st</sup> appellant stood at the door and even spoke to PW1. They could see his face.

27. Further, that PW1 identified the 1<sup>st</sup> appellant at an identification parade and the trial magistrate was satisfied the circumstances were conducive for proper identification – which parade evidence the 1<sup>st</sup> appellant had not objected to and indeed the parade form indicated he was satisfied with the manner in which the parade was conducted.

28. The trial magistrate also noted that police relied in the evidence of their co-accused who was an accomplice but noted that the statement was too detailed and systematic to be rejected as a fabrication and there was no evidence to prove that the maker was coerced into making it.

29. The trial magistrate also paid due regard to the voice identification evidence by PW5 and observed that PW5 was just behind the 2<sup>nd</sup> appellant's home three weeks prior to the attack and he overheard the 2<sup>nd</sup> appellant vowing to attack PW1. She noted the circumstances and period in which PW5 had interacted with the 2<sup>nd</sup> appellant which persuaded her that there was no possibility of error in the voice identification.

30. As regards the offence of attempted murder, the trial magistrate considered the provisions of **Section 220 Penal Code** pointing out that deliberate intent to commit the offence had been demonstrated by the nature of the injuries inflicted which were so severe and the weapons used showed that the attackers definitely intended to sniff the life out of the victims

She stated:-

**“The confession by 1<sup>st</sup> accused is corroborated by Ogutu’s evidence and shows that the intention of the attackers was solely to attack and discipline” the chief. Nothing was stolen from the complainants. The manner in which these injuries were inflicted was brutal. The use of sharp objects ... Pangas and a knife shows that the discipline was intended to cause serious injuries. The attacker planned and executed it. They took deliberate and direct steps towards killing the complainants.”**

31. The trial magistrate was satisfied that the 2<sup>nd</sup> appellant had the attackers and although not identified at the scene, he actually led them to PW1’s house and his alibi defence was rejected as an afterthought.

32. The 1<sup>st</sup> appellant’s alibi defence was also rejected as being made up and that the mere fact that the 1<sup>st</sup> accused was not called to confirm his confessions which implicated him, did not weaken the prosecution case.

These findings were challenged on grounds that:-

- a) The trial magistrate relied heavily on the purported confession by an accomplice who had not even been subjected to cross examination.
- b) That the identification parade was conducted three months after the incident and the trial magistrate would not have relied on it as in any case the parade officer did not testify.
- c) There was contradicting evidence regarding the injuries sustained by the victims.
- d) There was no evidence linking him to the offence.
- e) The knife produced in court was not dusted.
- f) The evidence was not corroborated and witnesses were grossly contradictory.

33. At the hearing of the appeal, the 1<sup>st</sup> appellant submitted in writing that the attack took place in the dark and opportunity for identification was not satisfactory nor did the parade officer testify.

34. **MR. ONGOSO** who appeared for the 2<sup>nd</sup> appellant submitted that PW1 exonerated the 2<sup>nd</sup> appellant clearly saying he never saw him on that night and the same was repeated by PW2.

He urged court to disregard the evidence of PW5 regarding the conversation overheard by him saying since he often imbibed totos of alcohol, he was probably not in a clear frame of mind to discern whether the purported conversation was real or he may have been hearing voices in his head.

35. He further submitted that even if the court was to invoke circumstantial evidence, then the chain must be watertight and place the accused at the scene. He referred to the case of **WAMUNGA –VS- R. 1989 eKLR page 424** where the Court of Appeal stated that:-

**“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”**

36. Counsel also submitted that when the 1<sup>st</sup> accused (who is at large) made the charge and cautionary statement, it was in Kiswahili yet what was presented at the trial was the English version and that despite the 2<sup>nd</sup> appellant objecting to it the trial magistrate did not order for a trial within a trial to determine the admissibility. He further faulted the manner in which the confession was recorded saying it was flawed and rendered it invalid.

It was also argued that most of the evidence was contradictory in nature.

37. In opposing the appeal MR.OLUOCH on behalf of the State submitted that the identification was proper because when the attackers went to the house there was light from a lantern and a television set which made opportunity for identification favourable and free from any error. He argued that even if the court were to find that the charge and cautionary statement was not properly admitted, there was still evidence of positive identification. In regard to the identification parade he said it was in accordance with Judges Rules.

38. As regards the charge and cautionary statement MR. OLUOCH submitted that a trial within a trial would only have been useful if the maker was present – in this instance he had jumped bail and the court was duly guided by **Section 32** of the **Evidence Act**.

39. Counsel also urged this court not to disregard the evidence of PW5 saying his evidence was limited to the motive for the attack.

### **Identification**

40. PW1 and PW2 were able to positively identify their attackers with the aid of light from a lantern which was burning in the house. The attack was not sudden; the intruders got into the house and had a conversation with PW1 in the presence of PW2. The 1<sup>st</sup> appellant was standing at the door listening to the conversation and was even invited to get in and sit down but he became rude. It was not a momentary glance – the trial magistrate duly considered the prevailing circumstances and was satisfied that the 1<sup>st</sup> appellant was properly identified. That identification was not solely dependent on the recovered weapons or clothes. The trial magistrate also considered the issue regarding voice identification and duly analyzed it.

41. I am satisfied that the trial magistrate carefully examined the evidence and correctly concluded that the circumstances were favourable.

42. As pointed out by **MR. OLUOCH**, PW5's evidence was not pegged to the presence of the 2<sup>nd</sup> appellant at the scene – it actually simply provided the motive for the attack.

43. As regards the confessions – as the appellants had correctly pointed out, they were not present when the confession was recorded, so what purpose would a trial within a trial have served yet they were not the author of the confession? **Section 32** of the **Evidence Act** provides:-

**32(1) When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the court may take the confession into consideration as against such other person as well as against the person who made the confession.**

**(2) In this section “confession” means any words or conduct, or combination of words and conduct which has the effect of admitting in terms either an offence or substantially all the facts which constitute an offence:**

**“offence” includes the abetment of, or an attempt to commit, the offence.”**

44. It must be clarified that this was not a statement under inquiry – it was a confession and it has not been demonstrated what prejudice the appellants suffered by having the English version presented in court instead of the Kiswahili one. In my view the trial court did not rely solely on this evidence in arriving at its decision – the scenario here is distinguishable from that which arose in **MUSILI TULO – VS- R [2014] eKLR** where the makers of the statement were present in court – here the maker absconded – indeed the trial magistrate was cautious to weigh that statement in the light of the maker being an accomplice.

45. This then leads to the question of circumstantial evidence – I do not think it is a coincidence that:-

- a) That the 2<sup>nd</sup> appellant has not denied his home was a changaa den.
- b) The chief (PW1) had led police and village elders in arresting the 2<sup>nd</sup> appellant's wife for being in possession of changaa.
- c) The 2<sup>nd</sup> appellant's wife was arrested and charged in court and fined.
- d) The 2<sup>nd</sup> appellant was bitter about the incident and –
  - i) PW5 went to warn the chief that he would harm him after hearing 2<sup>nd</sup> appellant make a similar vow;
  - ii) One of the persons arrested confirmed to being hired with the others to execute the revenge mission.

The narrative was consistent all along and these circumstances form a chain so strong that the strands indeed pointed inculpably to the guilt of 2<sup>nd</sup> appellant and to the exclusion of anyone else.

46. For **MR. ONGOSO** to suggest that at the time PW5 overheard the 2<sup>nd</sup> appellant vowing to attack PW1 he was intoxicated is speculative as there was no evidence presented to suggest that.

47. Consequently my finding is that the conviction was safe and I uphold it.

Indeed the injuries inflicted leave no doubt that those attackers intended to send their victims to the next world.

48. The sentence meted was well deserved and I confirm the same.

49. Consequently, the appeal is dismissed.

**Delivered and dated this 22<sup>nd</sup> day of January, 2018 at Homa Bay.**

**H.A. OMONDI**

**JUDGE**