



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL NO. 8A OF 2017

BETWEEN

COLLINS OCHIENG AURA1ST APPELLANT
NELSON OSALE ANDIKA2ND APPELLANT
EMMANUEL OKOTH NDONGA3RD APPELLANT
JAMES OUMA ODUOL4TH APPELLANT
SOLOMON OTIENO OTIENDE5TH APPELLANT
JOSHUA WEKESA BARASA6TH APPELLANT
TITO LUFUMBO AMOI7TH APPELLANT
NELSON BANDI LWENY8TH APPELLANT
VINCENT KWENDO BASASI9TH APPELLANT
ABEN MURANI WAFULA10TH APPELLANT
WILLIAM OTENO ODIPO11TH APPELLANT
JOHN OCHIENG WAO12TH APPELLANT
EDWIN OKOTH OWINO13TH APPELLANT
DOUGLAS TANDA MAMBIRI14TH APPELLANT
ERICK MAKHATIA MNIAZI15TH APPELLANT
JOSEPH JUMA OKELLO16TH APPELLANT
PAUL MULOSIA BULINGA17TH APPELLANT
WYCLIFF KIMAMBO AJINGI18TH APPELLANT

MICHAEL OWUOR OTOKO19TH APPELLANT

MICHAEL OTIENO ONGUSO20TH APPELLANT

AND

REPUBLICRESPONDENT

JUDGMENT

1. The appellants were charged and convicted of the offence of causing malicious damage to property contrary to **section 339(1)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. It was alleged that on 13th May 2014 at Abyssinia Iron and Steel Company Limited (“the Company”) premises in Kisumu East District within Kisumu County, they jointly and willfully and unlawfully damaged 22 tongs valued at Kshs. 231,000/= the property of the Company. The appellants were also charged with creating disturbance in a manner likely to cause breach of the peace contrary to **section 95(1)(b)** of the *Penal Code*. They were all acquitted on this charge.

2. The appellants were given a one year suspended sentence. They now appeal against the conviction only. The thrust of their appeal is that the trial magistrate did not consider the entire evidence and thus came to the working conclusion that the offence was proved. The respondent supported the conviction and submitted that the prosecution proved its case.

3. As this is a first appeal, the duty of this court is to consider all the evidence independently and come to its own conclusion bearing in mind that it neither saw nor heard the witnesses. I now turn to outline the evidence emerging at the trial.

4. Onesmus Mulwa Mwinzi (PW1), the Human Resource Manager, recalled that on 13th May 2014, he went to work at 8.00 am to redeploy workers. Some of the workers walked away from the premises and others went to the cooling belt where they assaulted the workers, forcefully took their tools and threatened to beat them. He recalled that there were some hot pieces of metal on the cooling belt. As the situation became violent, he ran away. He produced a payroll which showed the appellants were employees. He stated that he could recognize the employees though he only knew a few of them by name.

5. A general supervisor at the Company, George Omondi Obok (PW 2), was at work at 9.00am on the material day. He told the Court that some workers stopped work, some went outside and others continued to work. He testified that some of the workers went back to the factory, disarmed those on duty, took iron tongs, which were still in the process of manufacture, and broke them. In cross-examination he stated that he saw 20 people at the scene.

6. Eunice Nduta Muthua (PW 3), also a Human Resource assistant, was at work on the material day. She stated that at about 9.00am, the employees who had not been paid went to the factory cooling belt and snatched the tongs from those on duty thereby damaging them. She recalled that the workers threw some tongs under the cooling belt, where they could not be recovered, and others over the fence. She was able to identify only four of the appellants.

7. A1, A4 and A8 who testified on oath denied committing the offence. They told the court that when they came to work, they were barred from entering the company and although there was commotion, they did not participate in any fracas and were only arrested later. Tobias Onyango (DW 1), who used to work as a supervisor at the Company, testified that when he arrived, at work at 7.00am on the material day, he found some workers waiting outside. When he went inside, he found a supervisor at the cooling bed section where he was informed that new workers were being trained. He recalled that the workers ultimately came in and that but did not go to the cooling bed as they were told to go and discuss an issue with the HR officer. He testified that he was at the cooling belt and did not see the appellants there.

8. The issue as I see in this appeal is whether the appellants were involved in damaging the tongs alleged to have been damaged. There is no doubt that the appellants were employees of the Company and this fact was evidenced by the payroll produced in evidence but what is in issue is whether each of them participated or damaged the tongs. PW 1 told the court that he could identify each of them but not by name, but in his evidence, he stated, *“I was almost there when the incidence occurred but I ran away since they were violent.”* How could he have seen the appellants and identify each of them as participants when he took off? Likewise, PW 2 stated that there were 20 people. He did not name whom he saw while PW 3 only identified A1, A4, A8 and A20 whom she stated threw the tongs over the fence.

9. The trial magistrate did not deal with the issue of identity of the perpetrators but confined his findings to the fact that PW 1, PW 2 and PW 3 corroborated each other’s evidence on the fact that the incident took place. Further, in considering this issue, the trial magistrate did not take into account the fact that there was a trade dispute and that it so happened that the 20 people charged are the same person who were claiming that they had been underpaid. I have also looked at the judgment and it is clear that the trial magistrate did not deal with or consider the appellants’ defence alongside the prosecution case in his findings.

10. The duty of the prosecution is to prove that each of the appellant participated in causing malicious damage. For the reasons I have set out, the conviction is unsafe. The appeal is allowed and the conviction and sentence are quashed and the appellants are hereby discharged.

DATED and DELIVERED at KISUMU this 16th day of January 2018.

D.S. MAJANJA

JUDGE

Mr Yogo, Advocate for the appellant.

Mr Muia, Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.