



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 7 OF 2015**

**BENARD SANYA OKELLO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From the original conviction and sentence in Criminal, case No. 1568 of 2014 of the Chief Magistrate's Court at Busia by Hon. D.O Ogola- Chief Magistrate)*

**JUDGMENT**

1. The appellant, **BENARD SANYA OKELLO**, was convicted for the offence of being an accessory after the fact to murder contrary to section 222 of the Penal Code.
2. The particulars of the offence were that on 19<sup>th</sup> June 2014 at **MARACHI EAST** Location, **BUTULA** District of **BUSIA** County, assisted **CLIFTON OTIENO MAKOKHA** to sneak away in order to enable him escape punishment while knowing that the said **CLIFTON OTIENO MAKOKHA** was guilty of the offence of murder.
3. The appellant was sentenced to serve four years imprisonment.
4. The appellant was in person. He raised eight grounds of appeal that I have summarized as follows:
  - a) That the learned trial magistrate erred in law and in fact by convicting him without sufficient evidence.
  - b) That the learned trial magistrate erred in law and in fact by failing to appreciate that he was a first offender.
  - c) That the learned trial magistrate erred in law and in fact by ignoring his mitigation.
5. The state opposed the appeal through Mr. Omayo, the learned counsel, who erroneously contended that the appellant was convicted on own plea of guilty.
6. The facts of the prosecution case were briefly as follows:

The appellant was arrested in company of a murder suspect whom it was alleged he was harboring.
7. In his defence, the appellant contended that he was arrested on his way to the shop.
8. This is a first appellate court. As expected, I have analysed 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 therefore be guided by the celebrated case of **OKENO vs. REPUBLIC [1972] EA 32**.
9. Section 222 of the Penal Code provides as follows:

***Any person who becomes an accessory after the fact to murder is guilty of a felony and is liable to imprisonment for life.***

Section 396 (1) of the Penal Code defines accessories after the fact as follows:

***A person who receives or assists another who is, to his knowledge, guilty of an offence, in order to enable him to escape***

*punishment, is said to become an accessory after the fact to the offence.*

The ingredients of this offence, which the prosecution is required to prove beyond reasonable doubts, are as follows:

- a) That the accused received or assisted another person;
- b) With knowledge that, that person was guilty of murder; and
- c) With the aim of enabling him to escape punishment.

10. The prosecution called three police officers who gave evidence about the information they had against the appellant. None of their informants testified. Their evidence was therefore inadmissible hearsay.

11. The prosecution did not prove any of the three ingredients of the offence. The conviction was unsafe. I accordingly quash the same and set aside the sentence. The appellant is set at liberty unless if otherwise lawfully held.

**DELIVERED and SIGNED at BUSIA this 15<sup>th</sup> day of March, 2018**

**KIARIE WAWERU KIARIE**

**JUDGE**