REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEALS NUMBER 55, 56 and 58 of 2013 .

WAWERU ELIJAH MATHARE.....1ST APPELLANT.

PATRICK CHERUIYOT SANG.....2ND APPELLANT.

JERONO KANDIE.....3RD APPELLANT.

VERSUS

REPUBLIC.....RESPONDENT.

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera in Cr. Case 4456 of 2010 delivered by Hon. Mwangi, RM on 28th March 2013).

JUDGMENT.

Background.

Waweru Elijah Mathare, Patrick Cheruyot Sang and Jerono Kandie, herein the Appellants, were charged jointly with another with the offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code. The particulars of the offence were that on 3rd September, 2010 at Southland slums in Langata within Nairobi County, jointly unlawfully assaulted Dennis Mutungi Wambugu thereby occasioning him actual bodily harm.

In Count II, the 1st Appellant was singly charged with giving false information to a person employed in public service contrary to **Section 129(a) of the Penal Code.** The particulars of that offence were that on 3rd September, 2010 at Langata Police Station within Nairobi county, the 1st Appellant, gave false information to No. 77181 PC Michael Enyaman, a person employed in the public service, that one Dennis Mutungi Wambugu attempted to steal his motor vehicle registration number KAT 393 C, a Toyota Pick Up, information he knew to be false intending to cause the said officer to arrest the said Dennis Mutungi Wambugu.

The three Appellants were found guilty in count I. They were convicted and each sentenced to serve nine months imprisonment. Being dissatisfied with the conviction and the sentence, they lodged the present appeal. Each Appellant filed their respective appeal but all were consolidated by an order of this court dated 26th April, 2016.

The 1st and 2nd Appellants filed similar petitions of appeal. Their grounds of appeal condensed together

were that the evidence of the prosecution was unreliable and uncorroborated, that the prosecution evidence was not independent, that the trial court erred in relying on the evidence of the complainant as he reported the incident when he was intoxicated, that the medical report adduced was insufficient, that the trial court failed to balance the case in disregarding the fact that the complainant had tried to solicit money from the Appellants to settle the case, that there was utter malpractice in the way the investigations were carried out, that crucial witnesses did not testify and on the whole, the case was not proved beyond a reasonable doubt.

The 3rd Appellant's grounds of appeal were that the trial court erred in finding that she was a principal offender when in fact she did not participate in the crime, that the evidence was riddled with inconsistencies and contradictions, that the trial court failed to take into account that she was arrested before a complainant against her was made, that the evidence of the complainant was unreliable as he reported the incident when he was intoxicated, that crucial witnesses were not called, that the investigating officer succumbed to external influence and direction in charging her and her co-accused and that her mitigation was not considering while sentencing.

Submissions.

The appeal was canvased by way of written submissions. The 1st Appellant was represented by Learned Counsel Mr. Nyarimbo. He filed submissions on 14th September, 2016. In summary, counsel took issue with the fact that the evidence of the prosecution was not corroborated and was riddled with contradictions. In this respect, he submitted that the case for the prosecution was aimed at punishing the Appellants as opposed to getting into the root cause and genesis of the incident. He added that investigations were shoddy. This led to the arrest of the 1st Appellant before the complaint on the charge was filed. It was then clear that the police deliberately turned a blind eye on the complaint made by the 1st Appellant against the complainant and with a view to silencing him. Furthermore, the investigating officer admitted to having succumbed to pressure to charge the Appellants. Counsel further submitted that bearing in mind that there was no concrete evidence against the Appellants the trial court in convicting them shifted the burden of proof on the defence. Finally, it was the counsel's view that the elements of the offence of assault causing actual bodily harm were not proved beyond a reasonable doubt. Amongst the cases cited in support of the submission were; **Republic vs Turnbull & Others [1976] ALL ER 549, Republic vs Derrick Waswa Kuloba [2005] eKLR, Michael Mburu Njonjo vs R [2003] eKLR and Attorney General vs Attorney General for and on behalf of Inspector General of Police and 3 others ex-parte Thomas Nganga Munene [2014] eKLR.**

The 2nd and 3rd Appellants were represented by Learned Counsel Mr. Kangáhi who filed their submissions on 6th October, 2016. In the brief submissions, counsel noted that the investigations against the Appellants were based on no evidence and at best amounted to subversion of justice. According to the counsel, this was demonstrated by the fact that the 2nd and 3rd Appellants in the company of a watchman raised alarm that the complainant was attempting to steal the 1st Appellant's motor vehicle as a result of which he (complainant) was beaten up by members of public and arrested. The Appellants thereafter reported the matter to the police and instead of the complainant being charged, the Appellants were turned assailants and charged accordingly. He submitted that if the police wanted to do thorough investigations, they should have called the watchman who also reported the incident to the 1st Appellant as their witness. The watchman was deliberately omitted as a cover-up for the complainant who was attempting to steal the 1st Appellant's motor vehicle. As a result, the trial court arrived at a wrong decision thereby convicting the Appellants. He submitted that all the Appellants were innocent and ought to be set free.

Learned State Counsel Ms. Atina opposed the appeal. In her written submission filed on 24th October, 2016, she emphasized that the case was proved beyond a reasonable doubt. She asserted that the prosecution had called eye witnesses who saw the Appellants assaulting PW1, the complainant. Medical evidence was in addition called which corroborated the eye witnesses' testimonies. She submitted that the Appellants were identified by way of recognition and therefore an identification parade was not

necessary. In addition, counsel submitted that it was not necessary to call the watchman as a prosecution witness because under Section 143 of the evidence Act, the prosecution was at liberty to call any number of witnesses which they thought were sufficient to prove their case. In this regard, she was of the view that the prosecution witnesses who testified had established a case beyond a reasonable doubt. On sentence, counsel submitted that the nine months imprisonment was lenient as the law provided a maximum of three years imprisonment. The case of Francis **Musyoka Nzau vs Republic [2013] eKLR** was cited in support of the submission.

Evidence.

The case for the prosecution was that on the 3rd September, 2010 at around 2300Hrs, PW1 Denis Mutungi Wambugu was going home in Langáta. He stopped at a local bar in Southlands to relief himself. He clung on to a pick up vehicle which was parked along the road. At that point the watchman guarding the bar saw him and though that he was trying to break into the motor vehicle. He raised an alarm and informed its owner and other people. The vehicle was owned by the 1st Appellant and the 2nd and 3rd who were his friendsPW1 near the vehicle assaulted him. The 3rd Appellant kept shouting that he was a thief urging the 2nd and 3rd Appellants to continue beating him. He was rescued by police officers who were on patrol. The police urged the Appellants to report the matter to the police. The 1st Appellant while accompanied by the 2nd Appellant reported the matter at Langa'ta Police Station. While making their report, PW1 also came to the police station. The Appellants identified him as the suspect and he was locked up in custody. On the following day, he was released on a free police bond to attend to medical treatment at KNH where a P3 form was also issued.

PW2 and 3 Zacharia Motaro and Phillip Sakwa Muchuke respectively were both eye witnesses. According to PW1, on the fateful night, while eating at a nearby butchery, he saw three people who were beating PW1. The 1st and 2nd Appellants were banging PW1's head on the pick- up vehicle while the 3rd Appellant was shouting that PW1 was a thief. He testified that PW1 was rescued by his friend one Felix. His further testimony was that he physically knew the Appellants who were also in the company of a watchman. PW3 while corroborating the evidence of PW2 testified that he noticed a commotion outside his estate gate as he went home. He then noticed PW1 whom he knew being banged on a pick-up vehicle. He rescued PW1 and raised his brother to come to the scene. A police patrol car then passed by and the police officers in it urged the Appellants to report the matter to the police. He also accompanied PW1 to the Police Station where they found the Appellants had already reported the incident. In cross-examination, PW3 stated that by the time he arrived at the scene, PW1 had already been assaulted and did not know who had assaulted him.

PW4, PC Michael Enyeman of Lang'ata Police Station booked the report of attempted theft of motor vehicle from the Appellants on the night of 3rd September, 2010. The report was that PW1 was trying to break into a motor vehicle. When an alarm was raised he tried to flee. He was chased by members of public who arrested and beat him up.

PW3, PC Douglas Nzala testified as the investigating Officer. His testimony was that he took over the investigations from PC Boen on orders of the OCS on ground that the matter was not being properly investigated as the latter came from the same community as the Appellants. He testified that he was ordered by the OCS to charge the Appellants. He conceded that the Appellants had made a report of attempted theft of a motor vehicle by PW1 on 3rd September, 2010. Further that on 6th September, 2010, PW1 made a complaint of assault against the Appellants. He further conceded that no investigation on the report made by the Appellant was done but was quick to add that the complaint was wrongful because there was no corroboration of the complaint.

PW6, Dr. Kamau of Police Surgery examined PW1 on 10th September, 2010 on allegations that he had been assaulted. He had lost his upper left incisor tooth and his upper right and lower canines were chipped. The injuries had been inflicted by a brunt object. He adduced the P3 form that he filled as an exhibit.

After the case of prosecution case, the three Appellants who were the 1st, 2nd and 4th accused persons respectively were put on their defence. The 3rd accused was acquitted under Section 210 of Criminal Procedure Code for want of sufficient evidence. The 1st and 2nd Appellants gave their defence as DW1, and DW2 respectively. Each of their defence was corroborative of the other. The 3rd Appellant opted to offer no defence. The **1st Appellant** who gave a sworn defence stated that he parked his vehicle outside Mwendathu Bar and went into the bar to meet his friends. He was immediately approached by the 2nd Appellant and the bar watchman and informed that somebody was trying to break into his vehicle. He went outside the bar and confirmed the information. When he, 2nd Appellant and watchman confronted the assailant, he started running away. The 3rd Appellant who was in their company joined them in raising an alarm. The assailant who happened to be PW1 was caught up by the members of public who beat him up before police who were on patrol intervened. He was accompanied by the other Appellants to Lang'ata Police Station where they reported the attempted theft of the motor vehicle. As they reported, PW1 arrived at the Police Station and was locked up. He was however released on the following day without an explanation. On the following day, 4th September, 2010, he recorded a statement on the complaint he made to the police. Two weeks later, he was summoned to the police station by a Corporal Baraza who told him to go to the police station together with the other two Appellants. On arrival, he was informed that they would be charged with the offence of assault against PW1. They were not given an opportunity to record statements of the assault case. He showed the court a complaint letter dated 12th October, 2010 by which his advocate wrote to the OCS complaining about the way the matter was being investigated. On 4th February, 2011, the office of DPP ordered that a fresh investigation be conducted but this was never done. He stated that the charges against him and his co-accused were malicious and intended to cover the real culprit, PW1, who had attempted to steal his motor vehicle. The **2nd Appellant** entirely corroborated the evidence of the 1st Appellant.

I have accordingly considered the evidence and the respective rival submissions. I have deduced this case to be one that was characterized by utter subversion of justice. From the outset, it was clear that the police conducted shoddy investigations, turned tables upside down and converted the complainant into an offender. No doubt the 1st Appellant in the company of the 2nd and 3rd Appellants went to Langata Police Station on 3rd September, 2010 to report about the incident of attempted theft from the motor vehicle. This was immediately after the incident outside the bar. Shortly afterwards, PW1 went to the Police Station accompanied by other persons. That is when the Appellants identified him to the police as the culprit. He was accordingly locked up as a suspect. Without good reason, he was released on the following day and was never to be called back to the police Station.

It is apparent that on the night of 3rd September, 2010, when PW1 went to the Police Station, he did not make a complaint against the Appellants. He made his complaint much later on 6th September, 2010. The 1st Appellant kept pestering on the position of his case. No answers were forthcoming from the police. It was only two weeks later that he was informed that he and the friends who went to report the attempted theft case would be charged with assaulting PW1. Of course he complained again that he police were not investigating his complaint. He was told to settle the case of assault outside court. When he declined insisting on his innocence, he and the 2nd and 3rd Appellants were charged.

Of course PW2 did testify that he witnessed the assault. PW3 initially testified that he too witnessed the assault but in cross-examination, he reneged on this testimony and stated that he arrived at the scene when the assault had already taken place and never saw who perpetrated it. The learned trial magistrate ought to have cast doubt on the credibility of the witness after the conflicting testimony. The net effect was that the case was tainted with contradicting evidence which ought to have been resolved in favour of the Appellants. The 1st and 2nd Appellants on the other hand stated that PW1 was assaulted by members of the public who caught up with him as he tried to flee the scene of crime.

Amidst the conflicting testimonies, the only person who would have given an independent account of what actually transpired at the scene was the watchman who alongside the 2nd Appellant first saw PW1 attempting to break into the vehicle of the 1st Appellant. Unfortunately, the police deliberately omitted his

evidence even though PW2 testified that the watchman accompanied the Appellants at the scene. I use the word deliberate because no answers were given as to why the case of theft of motor vehicle was not investigated. It is also in the oral evidence of PW5, PC Douglas Nzala that he was commanded by the OCS to charge the Appellants. He further testified that the case was taken away from a PC Boen away because he came from the same community with two of the Appellants. Clear the OCS was determined to exonerate the real culprit, PW1. As such, the institution of the charges was based on no investigations but aimed at coercing the Appellants to withdraw their complaint.

As it is now settled law, the failure to call crucial evidence may lead the court to conclude that had the evidence been called, the same would have been adverse to the prosecution case. See **Bukenya & Others vs Republic 1972 EA 548** in which it was held that;

> ***(a) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.***
>
> ***(b) The court has the right and duty to call the witnesses whose evidence appears essential to just decision of the case.***
>
> ***(c) When the evidence called is barely adequate, the court may infer that the evidence of uncalled witness would have tendered to be adverse to the prosecution.***

Accordingly, the case became characterized with subversion and obstruction of the course of justice which is obstruction and interference with administration of justice. The net result was defeating the ends of justice as the actual culprit was not charged. This pushed the Appellants to face the law in an unlawful manner. This was a total breach of the rule of law. It impeached on the process of proper investigations with the police turning tables and falsely having the Appellants prosecuted for an offence that was aimed at covering the actual perpetrator. The police demonstrated gross impropriety in the manner that they conducted the case with their own admission that the investigating officer was coerced to charge the Appellants. The unfortunate tendency should he discouraged. It is for this reason that the appeal must succeed.

On the whole not withstanding that medical evidence showed that PW1 was assaulted, there was no evidence that the assault was perpetrated by the Appellants. In the result, I find that the case was not proved beyond a reasonable doubt in respect of all the Appellants. I quash the conviction, set aside the sentences and order that the Appellants be forthwith set free unless otherwise lawfully held.

Dated and Delivered at Nairobi this 31st May, 2017.

G.W. NGENYE-MACHARIA

JUDGE

<u>In the presence of;</u>

Mr. Nyarimbo for the 1st Appellant.

Mr. Nyarimbo h/b for Mr. Kangáhi for the 2nd and 3rd Appellants.

M/s Nyauncho h/b for M/s Aluda for the Respondent.