



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO.28 OF 2013

ANDREW OTIENO BUYUAPPELLANT

VERSUS

REPUBLICRESPONDENT

**[Being an appeal from original conviction and sentence from Bondo Principal Magistrate's Court
by D. WANGECI R.M.]**

in Criminal Case No.629 of 2012

J U D G M E N T

The appellant was convicted of stealing c/s 275 of the Penal Code, malicious damage to property c/s 339(1) of the Penal Code and grievous harm c/s 234 of the Penal Code in Counts 1, 2 and 3, respectively. He was sentenced to one year in jail on each of counts 1 and 2 and to life imprisonment in count 3. He was aggrieved by the conviction and sentence and preferred this appeal.

The prosecution case was briefly that Joyce Anyango Ongilo (PW2) sells omena and paper bags. On 23/8/12 she went for a crusade leaving her niece Olivent Achieng (PW3) aged 10 and the children at home. In the night PW3 and the children were asleep when the door was broken open by the appellant who entered and lit the lamp. He had a panga and threatened to cut those in the house. He took PW2's wallet, photo album, identity card and cash Kshs.1700/=. There was a bucket in which were Omena. He removed paraffin from his pocket and poured it into the bucket thereby damaging the omena. He cut the polythene bags and left. PW2 returned at 11.30 p.m. to find what had happened. On 26/8/12 at 11 a.m. she sent her brother-in-law Morris Ogolla Ombogo (PW1) to the appellant to ask back the photo album and identity card. PW1 went to the appellant's house and found him. When he asked for the items, the appellant said he was going to cut him. He (the appellant) asked his wife to bring a panga. PW1 came out of the house and up to the gate. The appellant begun to chase him with the panga up to a place where he fell. The appellant attacked him with the panga and cut him severally saying that he would kill him. People came to his rescue and incident was reported to Akala Police station. When PW1 was brought to the station injured, the appellant also came holding a bloodied panga and a stick. He was arrested. PW1 was taken to Akala health centre and then referred to New Nyanza Provincial Hospital where he was admitted until 4/3/12.

The medical evidence produced by Dr. Ochola Okal Ephraim (PW4) of New Nyanza Provincial Hospital showed that PW1 suffered a deep cut on the lower back, deep cut on the left upper limb with a fracture of the humerus, deep cut on the right leg with a fracture of the tibia fibula bone. He sustained grievous harm.

The appellant made a sworn defence and did not call witnesses. He stated that while at his house

on 26/8/12 at about 10.30 a.m. three people, including PW1, came. PW1 had a sword. The other two were one carrying paraffin and the other a panga. PW1 asked him to come out saying his time was up as his life was in their hands. He locked himself in the house but they broke in. He screamed and that was why they ran away. He went to Akala Police Station and reported. He reported to PW8 (P.C. John Turunya). This is the same officer who testified that after PW2 came to report the incident the appellant came with a blood stained panga. Immediately PW1 was brought with several deep cuts on his body.

This is the evidence that the trial court considered and concluded that the guilt of the appellant had been proved beyond doubt on each of the three charges. The appellant complained on appeal that the case had been poorly investigated; the trial court had over-relied on the evidence of PW1 and P2; the prosecution had failed to call material witnesses; the case had not been proved as required; and the court had not complied with the provisions of sections 324 and 329 of the Criminal Procedure Code. Mr. Mongare of the DPP opposed the appeal.

I have had a fresh look and consideration of all the evidence on which the appellant was convicted, while bearing in mind that I did not see or hear the witnesses (**OKENO .V. REPUBLIC [1972] EA 32**).

On count 3, PW1's evidence that he was cut and injured by panga was materially supported by the medical evidence contained in P3 produced by PW4. He (PW1) testified that he was chased and cut by the appellant. The appellant denied this and said that PW1 was among three men who on this day went to his house threatening to kill him; that when he made noise they ran away and that was when he went to report to the police station. According to PW8 the appellant went to the police station with a blood-stained panga and a stick at the time when PW1 was brought here badly cut. PW5 Rosyline Aluoch Juma is a tenant neighbour of the appellant at Akala market and saw PW1 come to the appellant's house to ask for identity card. She heard the appellant ask for a panga from his wife. The appellant came out of the house and began to chase PW1 with the panga. She went to inform PW2 (PW1's sister-in-law) who went to report to the police station. She (PW5) later found PW1 lying on the ground having been cut. PW7 Aloice Onyango Wayamba testified that he found PW1 lying down, having cut wounds and was bleeding. PW1 told him that the appellant had cut him.

It is evident that despite the appellant's denial, there was overwhelming evidence from PW1, PW2, PW5, PW7 and PW8 that he had cut PW1 using the panga which was later retrieved from him. The extent of the attack was as shown in the medical report. I find that no crucial witness was omitted from the list of those called by the prosecution and that the evidence was consistent and believable.

In regard to counts 1 and 2, the only person who witnessed the theft and damage in PW2's house was PW3 who was aged 10 and in class three. The incident was at night and she said that the appellant lit a tin lamp whose light she used to recognise him. The appellant was not found with the said stolen items. PW3 was subjected to *voire dire* inquiry and found to be possessed of sufficient intelligence to justify the reception of her evidence and that she understood the importance of telling the truth (section 19(1) of the Oaths and Statutory Declarations Act (Cap 15). The court observed that although PW3 had not been sworn she had given candid and honest evidence.

However, the court did not consider that PW3's evidence was that of a single witness of recognition. It is now settled that whenever the case against an accused person depends wholly on the correctness of one identifying or recognizing witness the court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification or recognition were favourable and free from any possibility of error before it can safely make it the basis of a conviction (**WAMUNGA .V. REPUBLIC [1989] KLR 424**). Further, although recognition may be more reliable than identification of a stranger but still when a witness is purporting to recognise someone he knows, it should be borne in mind that mistakes of recognition of close relatives and friends are sometimes made (**KARANJA & ANOTHER .V. REPUBLIC [2004] 2 KLR 140**). Lastly a witness may be honest but still mistaken. The trial court was not alive to all these. It was not alive to the requirement of corroboration where a child gives unsworn evidence (**JOHNSON MUIRURI .V. REPUBLIC [1983] KLR 445**). PW3's evidence required corroboration. There was none. Considering the provisions of section 124 of the

Evidence Act (1980), I am unable to find that the conviction in counts 1 and 2 was based on safe grounds.

In conclusion, I allow the appeal on conviction on counts 1 and 2, quash the same and set aside the sentence. I confirm the conviction in count 3.

On sentence, the appellant was ordered to serve life imprisonment for count 3. This was the maximum penalty for the offence. It was evident that the appellant cut PW1 using a panga. PW1 was on the ground. He was cut severally and deeply. The appellant was saying he would kill him. The circumstances were serious, but still he was a first offender. The general rule is that a maximum sentence should not be imposed on a first offender (**JOSEPHINE ARISSOL .V. REPUBLIC [1957] EA 447**). He mitigated by saying that what he had done was not willful.

I find that the sentence was, in the circumstances, harsh and excessive. It is reduced to 10 years in jail. To that extent, therefore, the appeal against sentence is allowed.

Dated, signed and delivered this 18th March, 2014

A. O. MUCHELULE

J U D G E