



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CRIMINAL APPEAL NO. 60 OF 2014.

MBOKE MUTINDA KABURU ::::::::::::::: APPELLANT.

VERSUS

REPUBLIC ::::::::::::::: RESPONDENT.

(Being an appeal from the original conviction and sentence of J.M. Nang'ea – SPM in Criminal Case No. 2455 of 2011 delivered on 3rd June, 2014 at Kitale.)

J U D G M E N T.

The appellant, **Mboke Kaburu Mutinda**, appeared with two others before the Senior Principal Magistrate at Kitale charged with six counts as follows:-

- I. Kidnapping with intent to confine, contrary to section 259 of the penal code, in that between the 19th and 20th September, 2011 at [particulars withheld] Trans Nzoia County with intent to cause J M G, to be secretly and wrongfully confined, kidnapped the said person.*
- ii. Grievous harm, contrary to section 234 of the penal code, in that on the 19th September, 2011 at [particulars withheld] Trans Nzoia County, jointly with others unlawfully did grievous harm to JMG.*
- iii. Intimidation contrary to section 238 (1) of the penal code, in that on the 19th September, 2011 at [particulars withheld] Trans Nzoia county, with intent to cause alarm to JMG, threatened to cause unlawful injury to him by pointing a loaded pistol to and forcing him to confess to an offence of stealing.*
- iv. Possession of a firearm, contrary to section 89 (1) of the penal code, in that on 15th October, 2011, at [particulars withheld] Trans Nzoia county, without reasonable excuse had in his possession a Makarot pistol body marked Number 23 with no serial number in circumstances which raised reasonable presumption that the firearm was indeed for usage in a manner prejudicial to public order.*
- v. Possession of ammunition, contrary to section 89 (1) of the penal code, in that on 15th October, 2011 at [particulars withheld] Trans Nzoia county, without reasonable cause had in his possession four (4) rounds of 38 mm ammunition in circumstances which raised reasonable presumption that the ammunitions were intended for usage in a manner likely to be prejudicial to public order.*
- vi. Possession of public stores, contrary to section 184 (3) read with section 36 of the penal code, in that on the 15th October, 2011, at [particulars withheld] Trans Nzoia County, had in his*

possession public stores namely a rifle holster, a jungle shirt, a jungle trouser, a smoke jacket, a green staple belt, a lanyard and whistle and a jungle hat, property of a disciplined force namely Kenya Police Service, such property being reasonably suspected of having been stolen or unlawfully obtained.

Other than counts I and II, the appellant was separately and individually charged with the rest of the counts.

After a full trial, the appellant was convicted on counts I, II and III and sentenced to four (4) years imprisonment on counts I and II each and two (2) years imprisonment on count three. The sentences were ordered to run concurrently.

Being dissatisfied with the conviction and sentence, the appellant preferred this appeal on the basis of the grounds contained in his petition of appeal filed herein on 10th June, 2014, by the firm of **Samba & Co. Advocates.**

At the hearing of the appeal, the appellant was represented by Learned Counsel, **Mr. Samba**, who opted to argue the six (6) grounds of appeal together and submitted that the conviction on count one was in error as it was clear from the evidence that the complainant was ordered to jump into the back of the pickup vehicle from the appellant's business premises. No force was used on the complainant to board the vehicle and the time was 8.30 a.m. That, the complainant was in the vehicle with the appellant's co-accused and an employee called M. The vehicle was driven to the appellant's home which was known by the complainant as he had previously been there to fetch water for usage in the appellant's hotel.

Learned Counsel, submitted that the wordings of section 259 of the penal code refer to secrecy and there was no secrecy of any kind herein since the complainant travelled to the appellant's home which he already knew. That, the vehicle was never driven by the appellant as alleged by the complainant. That, the defence by the appellant indicated that he did not see the complainant on the material date.

That, the prosecution was expected but did not call the employee called M and therefore, there was no confirmation as to who drove the vehicle from the appellant's business-premises. That, there was no explanation from the prosecution as to why M was left out as a witness.

Learned counsel, submitted further that the prosecution failed to prove its case when they failed to call M as a witness. That, the entire prosecution evidence showed that the complainant was allegedly assaulted by six (6) people as indicated by PW2. That, the complainant referred to five people and stated that he was beaten and confined in the home of the appellant whereas he spent the night in a store. That, it was impossible for the appellant to close his business, go to his home and spend the whole day assaulting the complainant.

Learned counsel, went on to submit that the complainant alleged that his anus was pricked with a hot nail but he did not indicate that the nail was held by the appellant. He (complainant) could therefore have suffered injury as alleged.

That, the clinical officer (PW5) contradicted what was in the P3 form as he talked of injuries in the complainant's genital. He (PW5) when cross-examined said that he did not establish grievous harm. That, there was no evidence of treatment of the complainant at Kitale District Hospital since there were no medical treatment notes. That, the clinical officer alleged that the complainant was treated at the said hospital yet the medical notes from which the P3 form could have been extracted were not produced.

Learned Counsel, submitted that the judgment of the trial magistrate agreed that the evidence by the clinical officer did not tally with that of the complainant but nonetheless, the trial court held that the report of the clinical officer corroborated the complainant's evidence.

That, the conclusion reached by the trial court was erroneous and ought not have led to a conviction.

That, the trial court cited section 21 of the penal code and held that there was a common intention between the appellant and his co-accused yet there was no evidence of common intention. That, PW2 and PW3 contradicted themselves with the regard to the person who actually drove the vehicle to the home of the complainant. That, the motive of reporting the matter to the police was shown by PW3, when she stated that they went to the police after failing to raise the balance of the money required from the complainant. That, the complainant proceeded to hospital three days after being released.

Learned Counsel, contended that the complaint against the appellant was ill-motivated and that the appellant's sons were included in the complaint by the complainant as a form of revenge.

Learned Counsel urged this court to allow the appeal.

In response and in opposition to the appeal, the Learned Prosecution Counsel, **M/s. Limo**, on behalf of the state respondent submitted that the evidence by the prosecution was sufficient and clear for conviction of the appellant and his co-accused. That, the prosecution evidence was in black and white such that any contradictions noted by the defence were so minor as to prejudice the prosecution case.

Learned Prosecution Counsel, urged this court to dismiss the appeal in its entirety.

After considering the appeal on the basis of the supporting grounds and the rival submissions made by both sides, the duty of this court was to re-consider the evidence adduced at the trial court and arrive at its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

In that regard, this court has carefully considered the evidence forming the prosecution case as narrated by the complainant, **J M G (PW1)**, the complainant's father, **JGG (PW2)**, the complainant's wife, **S W K (PW3)**, a firearms examiner, **C.IP Emmanuel Lagat (PW4)**, a clinical officer, **Kirwa Labat (PW5)**, and the investigating officer, **P.C. Abdallah Mohammed (PW6)**.

The evidence by the appellant by way of his defence was also considered along with that of his co-accused, **Benson Mutambei Kaburu** and **Peter Micheni Njagi**.

With regard to the first count of kidnapping with intent to confine, section 259 of the penal code provides that someone who kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined is guilty of a felony and liable to imprisonment for seven (7) years.

This is an offence against an individual's liberty and from the evidence by the complainant (PW1) it was established that he worked for the appellant in his hotel and because some items had gone missing from the hotel, the appellant suspected his workers including the complainant with the theft of the items. Also suspected was a worker called M. Both the complainant and M were ordered by the appellant to board the appellant's pick up motor vehicle. They were then driven in the pickup by the appellant into his home at [particulars withheld]. The complainant had previously been to that home. Together with M, they were locked in a store at the homestead after which the complainant was intimidated and assaulted in the presence of the appellant. The complainant was forced to confess the alleged theft and fearing for his life he did so. He offered to take the appellant to his house in search of the stolen items but the appellant demanded that he had to spend the night at the home. He was therefore untied and locked inside a smaller store where he slept on sacks. The complainant was taken to his house on the following day but no stolen items were found therein. He was only released and set at liberty after his family paid the appellant some money as compensation for the stolen items. His family signed an agreement for further payment at a later stage and he was given a month to pay the alleged outstanding balance.

In his defence, the appellant denied having kidnapped the complainant and indicated that investigations by his sons revealed that the complainant had stolen some hotel goods. He (complainant) was taken to his home but it was discovered that the hotel goods were used elsewhere. The appellant's son then arrested the complainant and his wife and took them to the appellant's office where they pleaded with him not to take the matter to the police. They then agreed to pay compensation for the stolen goods.

The learned trial magistrate disbelieved the defence and holding that the complainant was believable in his evidence, the learned trial magistrate found that the first count had been proved against the appellant.

This court, would agree with the learned trial magistrate with regard to his (appellant's) criminal culpability in relation to the complainant (PW1). The appellant may not have strictly speaking kidnapped the complainant but he definitely abducted him when under his command and watch, the complainant was ordered into the appellant's vehicle and driven to the appellant's home where he was assaulted and unlawfully confined until the following day.

Abduction is defined under section 256 of the penal code, thus:-

“Any person who by force compels, or by any deceitful means induces, any person to go from any place is

said to abduct that person”.

This is exactly what happened to the complainant when he was forced into the appellant's vehicle and taken by the appellant and others into the appellant's one with intent to confine and did actually confine him there against his will. It transpired that the appellant was a police reservist and instead of enforcing the law in the manner prescribed he ended up breaking the law with impunity. His conviction by the learned trial magistrate on court one was sound and proper. He could not be heard to say that he was not responsible for the complainant's predicament. He was the main player and in fact controlled and commandeered the whole criminal transaction both directly and indirectly.

With regard to the second count of causing grievous harm to the complainant there was sufficient and credible evidence from the complainant to establish that he was assaulted and injured by the appellant's agents or employees by names, Shadir, Mutembei and George.

The complainant did not say with certainty that the appellant participated in the assault but he indicated that the appellant was present at the time and was in control of the unlawful action by his employees.

The appellant thus aided and abetted the unlawful action by his employees. He was thus a principal offender and fully culpable for the offence of grievous harm against the complainant.

The injuries suffered by the complainant were undisputed and in any event were confirmed by the evidence of the clinical officer (PW5) which was reasonably credible and could not be disputed for the mere reason that the medical examination report (P3 form) was not accompanied by treatment notes. It is against all the foregoing background that this court upholds the appellant's conviction on the second count by the learned trial magistrate.

The third count of intimidation was also fully established by the complainant's evidence which showed that the appellant pointed a pistol at and threatened to kill him. The threat was geared towards compelling the complainant to confess to the alleged theft of goods from the appellant's hotel. As a police reservist, the appellant was in lawful possession of a firearm but he misused it to break the law by intimidating the complainant. The act of pointing a firearm at another person is quiet threatening and may compel a person to do what he ought not do.

Herein, the complainant was forced by the appellant to confess to theft when a firearm was pointed at him. He was thoroughly intimidated by the appellant whose conviction by the learned trial magistrate in that regard was indeed proper and sound. This court upholds the conviction.

In sum, the appellant's conviction on all three counts i.e. Counts I, II and III was lawful to warrant any interference by this court.

The sentences meted out in all the said counts were lawful albeit quite lenient with regard to count two.

This appeal is thus dismissed in its entirety.

[Delivered and signed this 6th day of August, 2014].

J.R. KARANJA.

JUDGE.