REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 46 OF 2008

FRED MUKHONO MWASHI .....APPELLANT

VERSUS

REPUBLIC ….....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 47 OF 2013

PETER AMARE ….....APPELLANT

VERSUS

REPUBLIC ….....RESPONDENT

COMPILED AS CRIMINAL APPEAL NO. 48 OF 2008

PETER AMARE ….....1ST APPELLANT

FRED MUKHONO MWASHI ….....2ND APPELLANT

VERSUS

REPUBLIC ….....RESPONDENT

(Being an appeal from the original conviction and sentence contained in the Judgment of Hon. I. Maisiba (Resident Magistrate) in Eldoret Chief Magistrate's Criminal Case No. 262 of 2007 delivered on 10th July, 2008)

JUDGMENT

Fred Mukono Mwashi and Peter Amare, the Appellants herein were charged in the Magistrate's court in Eldoret with four criminal counts.

For purposes of this Judgment, Fred Mukono Mwashi shall be referred to as the 1st Appellant and Peter Amare as the 2nd Appellant.

Count I: The two were jointly charged with assault causing actual bodily harm contrary to Section 251 of the Penal Code. Particulars of the offence were that on the 10th day of January, 2007 at Sheywe Farm within Uasin Gishu District of the Rift Valley Province jointly with others not before court unlawfully assaulted Alexius Khalumba thereby occasioning them actual bodily harm.

Count II: The 1st Appellant, Fred Mukono Mwashi was charged with assault causing actual bodily harm contrary to Section 251 of the Penal Code in that on the 10th January, 2007 he unlawfully assaulted Moses Ingasia occasioning him actual bodily harm.

Count III: Both Appellants were charged with stealing from the person contrary to Section 279 (a) of the Penal Code.

Particulars were that on the 10th day of January, 2007, at Sheywe Farm within Uasin Gishu District of the Rift Valley Province, jointly with others not before court stole one mobile phone make Nokia 2600 valued at Ksh. 12,500/= together with cash Ksh. 15,000/= the property of Alexius Khalumba from the person of the said Alexius Khalumba.

Count IV: Both Appellants were jointly charged with stealing from person contrary to Section 279 (a) of the Penal Code, in that on the 10th January, 2007 they stole cash Ksh. 6,000/= the property of Moses Ingasia from the person of the said Moses Ingasia.

The Appellants were convicted in respect of all the four counts. Each was sentenced to serve 18 months imprisonment on each count. The sentences were to run consecutively.

Initially, both Appellants were represented by learned counsel J. A. Wanjala who filed the following grounds of appeal in respect of both Appellants;

1. That the learned Magistrate erred in law and fact when he convicted the Appellants without sufficient evidence being adduced to warrant a conviction.

2. That the learned Magistrate erred in law and fact in failing to adequately consider the charges and all circumstances of the case.

3. That the learned Magistrate erred in law and fact in sentencing the Appellants to serve six (6) years (18 months x 4 counts) imprisonment without even an option of fine which is excessive in the circumstances.

4. That the learned Magistrate erred in law and fact in failing to consider the contradictions in the evidence of prosecution witnesses.

5. That the learned Magistrate erred in law and fact when he failed to consider and establish that the complainants were roughed up due to a conflict over land issues by mob justice.

6. That the learned Magistrate erred in law and fact in failing to consider the defence testimony and mitigation of the Appellants hence arriving at a sentence which is excessive in the

circumstances.

In the instance, the appeal is against both the conviction and sentence.

The appeal was canvassed on 24th March, 2014. The Appellants were in person while the Respondent was represented by learned stated counsel, Mr. Mulati. The Appellants relied on their written submissions while Mr. Mulati made oral submissions in response.

The 1st Appellant's submissions are written in the Kiswahili language. He submitted that the charge sheet was defective (charge sheet iko na makosa). He further argued that the complainant could not competently identify him without an error as he was unconscious. He also argued that the case was not competently investigated and it lacked an investigating officer. Finally, he submitted that the trial court reached findings on conviction without credible evidence on record.

The 2nd Appellant, Peter Amare made submissions based on the grounds of appeal. In respect of ground 1, he submitted that there was no sufficient ground of appeal to warrant a conviction. He cited Sections 165, 164, 111, 163 (c), 47 and 170 of the Evidence Act and Sections 170, 194 and 275 of the Criminal Procedure Code.

On ground 2, he submitted that the prosecution's evidence was doubtful and that the court ought not to have relied on it. He relied on Sections 164, 165, 163 (c) and 166 of the Evidence Act.

On ground 3, he submitted that the trial court convicted him on all the four counts yet he was not charged in Count II, III and IV. He relied on Sections 47 and 111 of the Evidence Act. He also faulted the trial court for failing to consider other forms of sentencing that are non-custodial.

In respect of ground 4 he submitted that the prosecution's evidence lacked corroboration.

On ground 5 he submitted that the charges were castigated by a land dispute and that the trial court ought to have summoned all necessary witnesses who would have shed light on what was happening. He relied on Sections 7, 8, 9, 47 and 164 of the Evidence Act and 275 and 276 of the Criminal Procedure Act.

Finally, on ground 6 he submitted that the trial court did not consider his mitigation in passing the sentence.

Learned state counsel Mr. Mulati on the other hand submitted that the prosecution had proved its case beyond all doubts. He stated that there existed a land dispute between the Appellants and PW1. On the material date, PW1 was escorting court orders for service upon the Appellants when the Appellants and five others attacked him (PW1) and PW2. The attackers were armed with pangas and sticks. They beat and injured them and also stole a mobile phone and cash Ksh. 15,000/= from PW1 and Ksh. 6,000/= from PW2.

Mr. Mulati submitted that evidence of injuries sustained by PW1 and 2 was adduced by PW3, the Clinical Officer who examined them.

In view of the various submissions, I conclude that the issues for determination are as follows:-

1. Whether the evidence on record was sufficient and credible enough to warrant a conviction.

2. Whether both Appellants were liable for conviction and sentence in respect of all the counts.

3. Whether the proper sentence was passed.

To arrive at a concise determination, it is important that I briefly summarize the prosecution's case. PW1 and 2 were the respective complainants. **PW1** stated that on the material date he was escorting a process server, one Vincent to serve the Appellants with court orders. The Appellants accepted the service of the orders. While PW1 and Vincent were returning home, the Appellants in company of about 5 others while armed with pangas and sticks attacked them. PW1 got injured. He became unconscious. And as he lay on the ground, the attackers stole his mobile phone Nokia make 2600 and cash Ksh. 15,000/=. When PW1 came to, he found himself at Soy Police Station. He was referred for treatment in hospital. He was also issued with a P3 form which was filled at the Uasin Gishu District Hospital. Only the two Appellants were arrested as the rest of the attackers went underground.

PW2, Moses Ingasia testified that he was summoned to the police station and asked to direct a process server to serve court order on people who were on the farm. He was accompanied by PW1. On their way they were attacked by persons known to him among them Peter Amare, the 2nd Appellant herein and Evans Aghalumba, Jonah Lumadede and Beatrice Census. He said he was assaulted by Evans Aghalumba who stole Ksh. 6,000/= from him when he fell down. He thereafter reported the matter to the police station. He was referred for treatment. He was thereafter issued with a P3 form. He also stated that both Appellants assaulted PW1.

PW3, Joseph Chesanai, a Senior Medical Officer at the Uasin Gishu District Hospital examined both PW2 and fitted their medical examination reports. In respect PW1, he stated that he had injuries to the head, neck, chest, waist, abdomen and left forearm. He also had a swelling on the occipital region with mere bruises on the right forehead, a swollen right arm, orbital region with a cut wound, swollen tender check, swollen and tender lips, cut wound on the right limb, swollen posterior neck, tender palm and a cut wound on the left thigh. He produced his P3 form as P. Exhibit A.

As for PW2, he examined him on 11th January, 2007. He had injuries on the head, chest, both fore arms and legs. He had a cut wound on posterior region, multiple whip marks on posterior trunk, bruises on upper abdomen, swollen tender biceps on both limbs which had whip marks, whip marks on thighs and swollen left wrist.

PW4, Police Constable Nasiswa from Soy Police Station and the investigating officer testified that he received the complaints on 10th January, 2007. He registered the complaints and referred the complainants for treatment. Thereafter he arrested the suspects and charged them in court.

Both Appellants were put on their defences but they opted to remain silent.

Before I address the issues for determination, it is important that I factor in the issue raised by the 1st Appellant that the charge sheet was defective. This is what he said in submissions.

"Kama charge sheet iko na makosa aneeza kuirekebisha kabla kesi kuanza."

that is to say;

"If the charge sheet has a defect, it should be amended before the case begins."

Let me first point out that this is not an issue that was raised in the grounds of appeal. The 1st Appellant did not also point out to the court what error or defect was constituted in the charge sheet to necessitate an amendment. But as was pointed out by my sister, Hon. Justice L. A. Achode in **NAIROBI CRIMINAL APPEAL NO. 443 OF 2010 JKK-VS- REPUBLIC** cited as **JKK -VS- REPUBLIC (2014) e KLR**; "***A properly framed charged contains three basic parts: the commencement, the statement of the offence and the particulars of the offence. The particulars must be clear enough to enable the accused person to know the offence he is charged with. It is fundamental that the charge should allege all the essential constituents of an offence.***"

In the instant case, all the three basic parts of a charge were spelt out. All the ingredients of a charge were also clearly stated. I find no fault in the draftsmanship of the charge sheet.

PW1 and 2 were the only eye witnesses in their case. Both gave candid and consistent evidence of how the Appellants, while accompanied by others waylaid them and for no apparent reason, set on them with pangas and sticks, assaulted and injured them.

PW2, on cross-examination did say that none of the Appellants assaulted him. But this notwithstanding, the two Appellants were in the company of the other assailants. The mere fact that they did not strike him (PW2) did not absolve them from blame. They ochestrated (abetted) the assault due to the land dispute that existed between them and PW1. They were therefore principal offenders as defined by Section 20 (1) of the Penal Code which reads as follows:-

*"**20. (1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say-***

(a) every person who actually does the act or makes the omission which constitutes the offence;

(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) every person who aids or abets another person in committing the offence;

(d) any person who counsels or procures any other person to commit the offence; and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.

The evidence of PW3 proved that indeed PW1 and 2 sustained actual bodily harm. Their medical examination reports (P3 forms) showed that the injuries they sustained were consistent with the weapons they were assaulted with, namely pangas and sticks. There was no evidence of a frame up case of assault. Besides, both opted not to challenge the prosecution's case by not tendering any defence. I have no doubts in my mind that it is the Appellants who inflicted those injuries on the complainants.

On the charges of theft, it is clear that the alleged stolen property was neither recovered from the Appellants nor did the complainants produce any documents to prove their ownership. This fact ought to have created doubts in the mind of the trial court and given the Appellants the benefit of doubt and accordingly acquitted them in respect of counts III and IV.

On sentence, this privilege is in the discretion of the trial court. An appellate court will only interfere with the sentence if the same was arrived at based on the wrong principles or the trial court overlooked some material factors. An appellate court may also interfere with the sentence if it is manifestly excessive.A sentence must also be commensurate to the moral blameworthiness of the offender – See **AMBANI -V- R. 1990 KLR, 161**.

In the instance case, under Section 251 of the Penal Code, "***any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years***".

The Appellants attacked the complainants because of a land dispute.The latter dispute was already being addressed by a separate court. They ought to have awaited the court's verdict other than take the law into their hands.Besides, the force with which they attacked the complainants was unwarranted. It left PW1 unconscious. The use of pangas was indicative that more harm would

have been meted against the complainants, thanks none died.

The Appellants only escaped with an 18 months jail term which I think was lenient in the circumstances. I will not enhance it though, in the hope that both will learn a lesson for the period they shall serve the sentences.

The trial court did order that the sentences run consecutively. This would translate into an approximately six (6) years jail term, which was punitive. And all the sentences having been equal, the most appropriate thing to do was to order that the sentences run concurrently.

In the end, I find that the prosecution only proved its case to the required standards in counts I and II but did not do so in counts III and IV. I accordingly uphold the sentences imposed against both Appellants in respect of counts I and II. For the 1st Appellant, Fred Mukhono Mwashi the same shall run concurrently. I do however quash the conviction and set aside the sentences against both Appellants in respect of counts III and IV. The sentences shall be tabulated from the date of sentencing but shall exclude the period both Appellants were on bond.

It is so ordered.

DATED and DELIVERED at ELDORET this 25th day of September, 2014.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

1st Appellant present in person

2nd Appellant present in person

Mr. Mulati for the Respondent