



IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL NO. 75 OF 2014

(FORMERLY KISII HCCR APPEAL NO. 8 OF 2014)

BETWEEN

JOHN ODERO OMENDA.....1ST APPELLANT

ENOS INGAIZA OMENDA.....2ND APPELLANT

AND

REPUBLIC..... RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 126 of 2012 at Principal Magistrate's Court at Migori, Hon. G. W. Kirugumi, RM dated 3rd July 2013)

JUDGMENT

1. In the subordinate court the appellants, **JOHN ODERO OMENDA** and **ENOS INGAIZA OMENDA**, were charged with the offence of causing grievous harm contrary to **section 234** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. The particulars of the charge were that on 24th August 2010 at Anjego Village in Migori County, jointly with others not before the court, they unlawfully did grievous harm to HUDSON LIAZURA KISARI. They were both tried, convicted and sentenced to 4 years in imprisonment.
2. The prosecution case was supported by four witnesses. PW 1, the complainant was married to PW 2 who was the step mother of the appellants. He had "inherited" her after her husband and father of the appellants passed away. He lived in PW 2's home. PW 1 knew the appellants since they went to school together. PW 1 testified that on the 24th August 2010, while in the house with PW 2, four men attacked, tied and dragged him out of the house. He was taken outside and his hands smashed on a stone. He identified the two appellants as being among the people who attacked him. At that time PW 2 was preparing supper. She testified that she saw four men, among them the two appellants, beating PW 1 and taking him out of the house. As she was running to her sister's place, she found PW 1 with an injured hand. A boda boda was called and PW 1 was taken to Pastor Machage Hospital.
3. At Pastor Machage Hospital, PW 1 was treated by PW 3. PW 3, a doctor, testified that PW 1 had crushed fractures on his 4th and 5th fingers of the right hand. The 1st, 2nd and 3rd fingers were amputated. PW 4 is the officer who testified how the matter was investigated.
4. The appellants elected to give sworn testimony when they were called upon to make their defence.

They also called witnesses. The 1st appellant testified that on the material day he was at Suna Nursing Home where he had been admitted suffering from typhoid. He stated that he was in hospital from 22nd August 2010 upto 26th August 2010. His testimony was supported by his wife, DW 3, who stated that she took him to hospital and paid all his medical bills.

5. The 2nd appellant testified that he was working in Eldoret for a sewing company from the year 2004 upto 14th February 2011 when he was dismissed from work. His wife testified on his behalf and confirmed that on the material day her husband was at work in Eldoret.
6. The appellants now appeal to this court against the conviction and sentence on the grounds set out in the Petition of Appeal filed on 4th February 2014 and which may be summarized as follows; that the trial magistrate convicted the appellants when the offence was committed in circumstances that were not favourable to positive identification, that the evidence of the complainant and his wife (PW 2) ought to have been corroborated by independent witnesses, that the complainant and his wife (PW 2), had a motive to implicate the appellants so that they could be jailed and he would inherit their land and that the learned magistrate failed to give due weight to the appellants alibi defence. They also contended that the sentence was harsh and excessive
7. Ms Owenga, learned counsel for the State, supported the conviction on the ground that the evidence was sufficient to sustain the conviction and that the facts constituting the offence were proved beyond reasonable doubt.
8. As this is the first appeal, this court is enjoined to conduct an independent review of the evidence and reach an independent conclusion bearing in mind that it neither heard nor saw the witnesses testify (see **Okeno v Republic [1972] EA 32**).
9. From the evidence outlined, it is not in doubt that the complainant was assaulted and suffered serious injuries amounting to grievous harm. The main issue in this appeal is whether the appellants were identified as the persons who assaulted the complainant at 7.00 pm on 24th August 2010. The appellants advanced the defence of alibi.
10. In dealing with the appellants' defence the learned magistrate stated that;

[A]ll along in cross-examination, the defence that was advanced was that the complainant was beaten by members of the public because he was a bad person and that he slept with his grandmother. The questions put to the prosecution witnesses were on that area of thought. The accused person later at the end of the case while tendering their evidence indicated a defence of alibi. It is trite law that such a defence for it to be admissible must be tendered at the earliest opportunity not at the close of the prosecution case. In light of the earlier defence adopted by the accused persons I find the defence of alibi as an afterthought and I therefore reject it.

11. In approaching the issue of the defence of alibi, it must always be recalled that the burden remains on the prosecution to prove the allegations made against the accused person beyond reasonable doubt. In **Kiarie v Republic [1984] KLR 739**, the Court of Appeal held that:

An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The judge had erred in accepting the trial magistrate's finding on the alibi because the finding was not supported by any reasons. It was not possible to tell whether the correct onus had been applied and if the prosecution had been required to discharge the alibi.

12. In the case of **Wangombe v Republic [1976-80] 1 KLR 1683**, the Court of Appeal addressed itself to the treatment of defence of alibi by a court trying a case and held that even where the accused

does not call witnesses, it is the duty of the court to weigh the evidence adduced in totality and make a finding on the culpability or otherwise of the accused.

13. The trial court, in taking the approach it did, failed to consider the veracity of that defence and determine, in light of the entire evidence, whether the prosecution had met its obligation to the required standard. This not a case where the appellants merely asserted an alibi they gave sworn testimony and produced evidence. The 1st appellant produced a discharge summary and a receipt for payment confirming that he had been admitted to hospital on the material day. The testimony was supported by his wife. The 2nd appellant produced documentary evidence that he was employed in Eldoret at the time the incident took place and his wife supported his defence.
14. The standard required for consideration of the defence was outlined in ***Uganda v Sebyala & Others [1969] EA 204***, where the learned Judge quoted a statement by Georges CJ., in Tanzania Criminal Appeal No. 12D 68 of 1969 who observed that:

The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts.

15. The defences raised by the appellants were plausible and although they were raised for the first time during the defence, the duty of displacing or rebutting that defence lay on the prosecution. Indeed, the law affords the prosecution such an opportunity in **section 212** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*** which provides:

If the accused person adduces evidence in his defence introducing a new matter which the prosecutor could not by the exercise of reasonable diligence have foreseen, the court may allow the prosecutor to adduce evidence in reply to rebut that matter.

16. While the evidence of identification of the appellants by PW 1 and PW 2 may have sufficed, I am cautious to find that the prosecution satisfied the standard of proof in light of the appellant's defence which the trial court, respectfully, did not exhaustively weigh against the prosecution evidence to make a finding that it was displaced by it.
17. In view of the finding I have made, it is not necessary to deal with the other grounds advanced by the appellants.
18. The appellants' conviction is unsafe and as a result the appeal is allowed. The conviction and sentence are quashed and the appellants are set free unless otherwise lawfully held.

DATED and DELIVERED at MIGORI this 21st day of November 2014

D.S. MAJANJA

JUDGE

Mr Odero instructed by Agure Odero and Company Advocates for the appellants.

Ms Owenga, Senior Prosecuting Counsel, instructed by Office of the Director of Public Prosecutions for the respondent.