



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
CRIMINAL APPEAL 122 OF 2011
ALOICE OKELO OKELOAPPELLANT
VERSUS
REPUBLICRESPONDENT

[APPEAL FROM ORIGINAL CONVICTION AND SENTENCE FROM BONDO SRM'S COURT: P.W. MUTUA – SRM

IN
CRIMINAL CASE NO.30 OF 2008.]

J U D G E M E N T

This appeal arises from the judgment of SRM Bondo in Criminal Case No.30 of 2008 where **ALOICE OKELO OKELLO** the appellant herein was initially charged with the Offence of Causing Grievous Bodily Harm that was later substituted to that of Attempted Murder Contrary to Section 220(a) of the Penal Code. The particulars of the case were that on the 21st of December, 2007 at Nyamboyi Village in Rarieda District within Nyanza Province jointly with others not before court. The appellant attempted unlawfully to cause the death of **DANIEL ADAWA ACHOLA** by seriously injuring him. The appellant denied the charge and the matter proceeded to full hearing where the appellant was convicted and sentenced to five years imprisonment.

Being aggrieved by the judgment the appeal was filed based on the following grounds:

- “ **1. THAT the trial magistrate erred in both law and facts by convicting him on the evidence by the complainant without corroboration evidence to support the conviction.**
- 2. THAT the learned trial magistrate erred in both law and facts by convicting on the evidence of the complainant without other evidences from independent witnesses;**
- 3. THAT the learned trial magistrate erred in both law and facts by convicting me on the basis of evidence of the complainant and failing to consider that a grudge existed between me and him;**
- 4. THAT the learned trial magistrate totally failed to consider the circumstances under which I was arrested are not sound to support my conviction;**

5. THAT the trial magistrate erred in both law and facts when he gravely failed to consider that first report is dubious to support my conviction;

6. THAT the learned trial magistrate erred in both law and facts by convicting me and failed to comply with section 50(2)(i) of the constitution.”

At the hearing of the appeal the appellant relied on written submissions to the effect that the complainant was not able to identify him as he was asleep during the time of attack, the complainant gave conflicting evidence, initially he had said that he had a grudge with the appellant which testimony was later changed, the complainant, and his wife appeared not certain of who the attacker was and his other ground for appeal was that the investigating officer did not testify.

The prosecution objected to the appeal and supported both the conviction and the sentence and was submitted that the complainant was able to recognize the complainant by the assistance of a torch. That the appellant was previously known to the complainant. Further that there was no infringement of the appellant's right as he alluded .

The prosecution case can be briefly stated as follows; that on the 21st of December 2007 at about 1 a.m. as the complainant was asleep the appellant and one other person hit his door, entered and using an axe and panga assaulted the complainant who was in the house with his wife asleep. The complainant and the wife were able to identify the appellant using a torch. The appellant's wife also recognized the appellant's voice. The complainant was cut on the shoulder and on his arm.

This being the first appellate court it has to reconsider the evidence on record, examine and analyse the same in order to come to an independent opinion. The evidence on record is as follows:

PW1 DANIEL ADAWA OCHOLA – the complainant on 21/12/09 at 1 a.m. while asleep in his house in the company of his wife he heard his main door and his bedroom door hit open. Two people entered and cut him with a panga. He was able to see one of them. He recognized the attacker when his wife lit a torch.

PW2 WILKISTER ANYANGO ADAWA – wife of PW1. On the 21st December, 2007 at about 1 a.m. as they were asleep they were attacked by someone who hit open their door. Her husband was cut. She identified the voice of one of the men. She identified the appellant by use of a torch although she did not clearly see the weapon. In cross-examination she however indicated that the appellant hid behind a curtain and she was able not see him, that the attackers were several, some were in the sitting room.

PW3 ADONIJA OGUTU OCHOLLA – brother to PW1. He heard screamed on 21/12/07 at about 1 a.m. rushed to his brother's house where the noise was coming from. On the way he met a tall man dressed in black clothes. He shone his torch on him, he also saw several others running. He took his brother to hospital and thereafter reported the matter. In cross-examination he stated that there was no moonlight on the said day. Further that as he got to his brother's he met very many villagers coming out. He could not recall if names of attackers were mentioned.

PW4 DR. PETER OYIRO of Bondo District Hospital. He produced a P3 form on behalf of the hospital he gave details as cut on the shoulder and arm from an assault. The patient also complained of chest and abdominal pain. Had been put a plaster of pains. There was a fracture of left humerus and deep cut on the left shoulder. The injuries were assessed as grievous harm. Objects used were sharp and blunt.

PW5 P.C. JAMES LEGANDU of Aram Police Station. He received the file from his colleague **DUNCAN ODHIAMBO** who has since been transferred. All investigations had been done by the previous officer. That the investigations that the complainant revealed a group of people in his compound at about 1 a.m. on 21/12/09 while asleep. Two of the people armed with pangas entered. The complainant recognized one. The two cut the complainant who raised an alarm and neighbours came to his rescue.

PW6 P.C. ROBERT NGETICH of Lwala K'Otieno Police Station previously of Aram Police

Station. He recalled that on the 12th of January, 2008 in the company of colleagues **Sgt. Odhiambo** and **Inspector Rotich** being led by the complainant they arrested the appellant.

At the close of the prosecution case the appellant was found to have a case to answer. He gave a sworn statement as follows:

DW1 ALOICE OKALO - from Uyoma. On the 12th of January, 2008 a police officer by the name of **Odhiambo** entered his house at around 7 a.m. accused him of having assaulted Adawo yet on the material day he spent at Asembo at Tuju's home while campaigning. He denied assaulting the complainant a mason who had also erected a home for him. He confirmed at cross-examination that the complainant was his relative. He also stated that he had never differed with the complainant at all.

The issue before court for its determination is whether the prosecution has placed evidence to the required standard linking the appellant to the offence facing him.

From the on set I must reiterate the cardinal principle in criminal cases; the onus of proving the guilt of the accused beyond all reasonable doubt is upon the prosecution. It is not for the accused person to fill gaps if any in the case for prosecution and that if there is any doubt in the mind of the court that doubt must go to the benefit of the accused.

The appellant was charged with the offence of attempted murder. In other words he went to the house of the appellant with the intention of unlawfully causing his death.

PW1& PW2 that is the complainant and his wife testified that upon being attacked **PW2** lit her torch that enabled them see one of the assailants. **PW2** also testified that she identified the voice of the appellant. In which case recognition was visual and by way of voice. I must as of necessity consider the circumstances prevailing at the time as against the evidence before court to see if the same were favourable to allow positive recognition of the assailant. It was dark, several people were heard in the compound, they kicked open the doors and struck at which point **PW2** flashed her torch. The attack was behind the curtain one of the assailants spoke and upon **PW2** screaming they ran away.

From the evidence on record **PW1** the complainant does not say that any of the assailants spoke. He stated that they saw one, but did not see the weapon he carried.

It is my view that in the circumstances of the case it was not likely that faced by armed assailants that one would flash a torch and positively identify/recognise a person. It is not mentioned either whether the incident took time to allow the victims make proper observations and how an attack behind a curtain would make it possible for the attackers to be seen.

PW2 said she recognized the appellant's voice. It has been held before that recognition is more reliable than identification however it is not free of error either. See the case of **Republic vrs Ndalamua & 2 others (2003) KLR 638** also referred to by the trial court. Now **PW1** who had had a previous engagement with the appellant did not allude to any voice coming from the appellant. Secondly I am doubtful that the few words if any spoken in the circumstances of the case would allow positive recognition free of any error.

PW3 the complainant's brother said he met a tall man. He did not state whether he recognized him or not. He could recall, either names of assailants being mentioned immediately after the accident.

In the case relied upon by the trial court **REPUBLIC VRS NDALAMINE** the Court of Appeal stated:

“ normally evidence of voice identification is reasonable and admissible in evidence and it can depending on the circumstances, carry as much weight as visual identification. In receiving such evidence care would be necessary to ensure that it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it.”

From the above authority two things emerge; were the alleged words uttered and were they uttered by the appellant?

The evidence of **PW2** was not corroborated by the complainant. **PW1** does not allude to the words nor the person who uttered the same which leaves the evidence of PW2 pointing to the voice recognition uncorroborated.

For the above reasons I am not convinced beyond all reasonable doubt that the prosecution evidence point to the appellant as the culprit was beyond the required standard. There is no doubt that **PW1** and **PW2** were attacked on the material night and **PW1** received injuries however I do not find it safe to enter a conviction based on the evidence given linking the crime to the appellant.

In this regard therefore I fault the conviction and sentence by the trial court, I set aside both and acquit the appellant.

He is set free unless otherwise lawfully held.

DATED AND DELIVERED THIS 29TH DAY OF JUNE 2012

ALI-ARONI

J U D G E

IN THE PRESENCE OF:

.....**State Counsel**

.....**Appellant**