



REPUBLIC OF KENYA

High Court at Kakamega

Criminal Appeal 76 of 2010

1. PETER MUYEKHO

2. LEONARD MUYEKO

3. PAUL NDETA----- APPELLANTS

V E R S U S

REPUBLIC ----- RESPONDENT

(Appeal against both conviction and sentence of the Senior Resident Magistrate's

Court at Butali in Criminal Case No. 123 of 2008 [S. N. ABUYA, SRM])

J U D G M E N T

The Appellants, **PETER MUYEKO, LEONARD MUYEKO** and **PAUL NDETA** (1st, 2nd and 3rd appellants respectively) were recharged as follows:-

Count I: Robbery with violence contrary to Section 296 (2) of the Penal Code.

The particulars of the offence are that on the 11th day of March 2008 at Mukavakava village, Musingu Sub-location, Central Kabras Location in Kakamega North District within the Western Province, jointly with others not before court, while armed with dangerous weapons namely, pangas and rungas robbed SAMWEL MUYEKO LUMBASI cash Kshs.470,000/= and at or immediately before or immediately after the time of such robbery used actual violence to SAMWEL MUYEKO LUMBASI.

Count II: Assault causing actual bodily harm contrary to section 251 of the Penal Code:

The particulars of the offence are that on the 11th day of March 2008 at Mukavakava village, Musingu Sub-location, Central Kabras Location in Kakamega North District within the Western Province, jointly with others not before court, unlawfully assaulted DORIS MUYEKHO thereby occasioning her actual bodily harm.

Count III: Assault causing actual bodily harm contrary to section 251 of the Penal Code.

The particulars of the offence are that on the 11th day of March 2008 at Mukavakava village, Musingu Sub-location, Central Kabras Location in Kakamega North District within the Western Province, jointly with others not before court, unlawfully assaulted SIPHROSE MUYEKO thereby occasioning her actual bodily harm.

The first appellant **PETER MUYEKO** faced a third count of creating a disturbance in a manner likely to cause a breach of the peace contrary to section 95 (1) (b) of the Penal code.

The particulars of the offence are that on the 30th January 2008 at Mukava village, Musingu Sub-location, Central Kabras Location in Kakamega North District within the Western Province, jointly created a disturbance in a manner likely to cause a breach of the peace by chasing MUYEKO LUMBASI while armed with pangas and rungas.

After a full trial, all the appellants were convicted and sentenced to death in Count I (robbery with violence). The 2nd appellant (LEONARD) was convicted in Count II & III (assault causing actual bodily harm).

The first appellant (PETER) was convicted in Count IV (creating a disturbance). Due to the death sentence imposed in Count I, the sentences in count II, III & IV were however held in abeyance.

The appellants were aggrieved by the conviction and sentence in all the counts and appealed to this court.

In their Petitions of Appeal, the appellants raised more or less similar grounds. The grounds of appeal can be summarized as follows;

- The charge sheet was defective.
- The particulars of the offences were not proved.
- The Prosecution case was full of contradictions and lacked corroboration.
- The Investigating Officer was not called to testify.
- The Proceedings and judgment failed to comply with the law.
- The trial magistrate shifted the burden of proof to the appellants.
- The sentence imposed was harsh.
- The conviction was based on the evidence of identification and/or recognition when circumstances were unfavourable for any positive identification and/or recognition.
- The defence cases were not considered.
- The defence was not given time to defend and call witnesses.
- The defence was denied the right to representation.

At the hearing of the appeal, the three appeals (No. 76 of 2010, 78 of 2010 and 79 of 2010) were consolidated and heard together as one. This Judgment is therefore in respect of the three appeals.

The first appellant (PETER) relied on written submissions. The written submissions basically expound on the grounds of appeal. He further pointed out that he was framed up because of a land dispute between the family members in his father's polygamous household.

Mr. Nandwa advocate appeared for the 2nd appellant (LEONARD). In his submissions he reiterated the grounds of appeal and pointed out that there was a misjoinder of counts as count I, II & III refer to the events of 11.3.2008 while count IV referred to the events of 30.1.2008. He further stated that the 2nd appellant had already been convicted of the offence of creating a disturbance. The land dispute between the members of the complainant's polygamous family was highlighted. He raised his doubts whether

people who live in the same compound can attack their father without putting on any disguise. He also wondered whether a farmer in the village can have Kshs.470,000/= in the house.

The third appellant (PAUL) relied on his written submissions. The same also basically expound on the grounds of appeal.

Mr. Orinda the State Counsel opined that the evidence regarding the cane proceeds pointed to an offence of robbery but that the nature of the injuries sustained by the victims coupled with the issue of the land dispute were a pointer to the offence of attempted murder. Mr. Orinda submitted that the misjoinder of the offence did not cause any prejudice.

This being a first appeal, it is the duty of this court to re-evaluate the evidence and draw its own conclusions (see OKENO V R. [1972] EA 32).

The trial commenced before C. M. Ndegwa, SRM who heard the evidence of ten (10) witnesses when the case was thereafter taken over by S. N. Abuya, Ag. SRM. The defence opted to have the case start *de novo*.

The prosecution then called a total of eight witnesses before they closed their case.

The case for the prosecution is that on the 11.3.2008 at about 8.00 p.m., the complainant in Count I, MUYEKO LUMBASI was in his house with one of his wives, PW2, DORIS MUYEKO and two of their daughters who were students were in the sitting room reading while the parents were in the bedroom.

The door to the house was broken from outside and fell to the inside of the house. A gang of seven assailants entered the house and proceeded to the bedroom where the complainant and his wife were. The assailants who were armed with pangas and rungas demanded to be given money by the complainant in Count I. The said complainant pointed at a wooden box which was in the bedroom and contained Kshs.470,000/=. The money was taken by the assailants. The complainant in count I was attacked with pangas and knives and cut on the neck, right hand, shoulder and stomach and chest before being pulled to the door.

The complainant in Count II (PW2) who is the wife to the complainant in count I was hit on the head and cut with a panga.

Their daughter SEPHROSE (PW4) who is the complainant in Count III screamed. She was cut on the head.

Neighbours and other family members rushed to the scene. The attackers fled.

The injured were taken to hospital. The complainant in Count I was admitted in hospital for three months while the complaint in Count II was admitted for three weeks. P3 forms were filled in. The witnesses recorded statements. The victims of the attack named four sons of the complainant in court I as having been amongst the assailants. The 1st, 2nd and 3rd appellants were among the sons named by the witnesses.

After investigations the 1st, 2nd and 3rd appellants were charged with the offences herein.

The complainant in count I (PW1) had been chased with a panga on 30.1.08, and the 1st appellant (PETER) was among those who had chased him and had been charged with offence of creating a disturbance in a manner likely to cause a breach of the peace Contrary to Section 95 (1) (b) of the Penal Code in RM's court Butali Criminal Case No. 31/08. Butali RMC Cr. Case No. 31/08 was consolidated with Butali SRMCRC NO. 123/08 (the subject of this appeal) ON 7.10.08.

In his defence, the 1st appellant, **PETER MUYEKO** gave sworn evidence. He stated that on the 11.3.08 (material date) he was in his house sleeping when he heard screams coming from the direction of his

father's house (Mzee Muyekho). He rushed to the scene. He found his step brothers and neighbours there. His father and his step mother had been injured. The injured were given first aid and taken to hospital.

The following day, he (1st appellant) went to see the injured in hospital. He then came back home and continued with his farming activities. His step brother, ZACHARIA LUMBASI then went to where he was working and inquired how he could continue working while their father was in hospital. The appellant did not respond as he could see his step brother was bitter. After a short while the said step brother and other step brothers while armed proceeded to where the 1st appellant was. The 1st appellant fled and went to report the matter to the Sub-chief and at Malava Police Station. The 1st appellant was however arrested and put in the cells. After two days the 1st appellant's mother and brother went to see him but they were also arrested and put in the cells. Thereafter when his brother BERNARD LUMBASI went to see them, he was also arrested.

The appellant was subsequently charged with the offences herein. He denied the charges and stated that he could not steal from his own father who he had even been assisting with money. He blamed the acrimony in the family on his father's five wives who don't agree. He further stated that because of the family's land dispute, Doris, the step mother (PW2) had threatened to finish him. That after the arrests, their properties and houses were destroyed and their cane harvested and one cow taken to Butali market.

The 1st appellant in his defence further stated that his mother is the third wife and there are five boys in their house. That at his age he should even have a girlfriend but that is hard because his father has not allocated him his share of the family land. He stated that the land dispute is pending before the Chief and the District Commissioner.

The 2nd appellant, **LEONARD MUYEKO** stated in his defence that he was born out of wedlock but his father took him home and educated him up to University level. However, in 1999 when the 2nd appellant graduated his graduation gown disappeared from home before he could return it to the University. The 2nd appellant sought the assistance of the District Commissioner and the police and his father was arrested together with Doris the step mother for theft of Government Stores. The graduation gown was recovered but from then on a rift existed between him and his parents.

The 2nd appellant stated that on 11.3.2008 (material day), he was at a neighbour's house where there was a funeral for the neighbour's daughter and he stayed there the whole night with the mourners as per their customs. The following morning a passerby informed him what had happened at his father's house. Together with his brother, John Muyeko, the 2nd appellant proceeded to his father's homestead but found only his sisters at home. After the sisters explained what had happened the appellant proceeded to hospital to see the injured but found the condition of the patients was such that they could not talk. That after 2 days the step brothers destroyed the home of his co-appellants. When the 2nd appellant went to the Police Station to inquire about his family members who had been arrested, he was also arrested and ended up being arraigned in court.

The 2nd appellant further stated that his father had given him land before the material date and he was happy and had no reason to attack his father whom he respected for having educated him. He termed this case as a frame up by family members who are jealous of his high level of education.

The 3rd appellant (PAUL) in his defence stated that he was in his house at the material time when he heard screams. He went outside to where the screams were coming from. He found his brothers and sisters there and his injured father and step mother. He learnt about the attack by thugs and they organized for a motor vehicle and the injured were taken to hospital. In the morning he went to see the injured in hospital. When he returned home the step brothers attacked them with pangas and rungs. He reported the matter to the sub-chief and also went to inform his mum and brothers who were in police custody but he was also arrested. The 3rd appellant denied the charge. He further stated that his house and property to wit a mattress, maize were burnt and his bicycle disappeared. He blamed the acrimony in the family on his

father's five wives and stated that the asst. chief and D.O. visited their home and their father divided his land amongst his sons.

Having considered the submissions and re-evaluated the evidence adduced before the trial magistrate's court, it comes out clearly that the conviction of the appellants was based on the evidence of recognition.

The evidence of the complainant in count I, PW1 SAMUEL LUMBASI MUYEKO shows that his daughters (PW4 & PW5) were reading in the sitting room while he was in the bedroom with his wife. Although it was at night, it is PW1's evidence that he saw the attackers as there was a "chimney lamp". His evidence is that 1st, 2nd and 3rd appellants who were amongst the attackers are his sons. His evidence is therefore that of recognition. The evidence of PW1 is detailed and refers to the 1st and 2nd appellants as the ones who removed the money from the box. That Peter, the 1st appellant cut him on the neck and Leonard, the 2nd appellant is the one who cut him on the right hand and on the shoulder. That Leonard, the 2nd appellant is also the one who hit Doris (PW2) on the head and cut her with a panga. That Ndeta, the 3rd appellant and another son called HEZRON who is at large stepped on his stomach and chest and pulled him to the door. During cross-examination, the father (PW1) further stated that he also identified the 1st and 2nd appellant through voice recognition. According to PW1, his sons attacked him because they wanted the money and the land.

The evidence of **PW2 DORIS MUYEKHO**, PW1's wife who was with him at the material time corroborates PW1's evidence. PW2 has given a similar account of evidence. She stated that the daughters (PW4 & 5) were reading in the sitting room while she was with PW1 in the bedroom. It is PW2's evidence that the 1st, 2nd and 3rd appellant were amongst the seven people who attacked them while armed with rungas and pangas. PW2 further testified that she knew the voices of the appellants who were their sons and added that a "glass lamp" was on and the attackers had bright torches and she was able to see the attackers who included the 1st, 2nd and 3rd appellants. During cross-examination, PW2 stated that the lamp in the bedroom was on and the attackers did not interfere with it.

The evidence of PW4 and PW5, (the two daughters) corroborated that of their parents (PW1 & PW2). The evidence of PW4 and PW5 also points to the attack by seven people among them the 1st, 2nd and 3rd appellants who were their step brothers. PW4 (SIPHROSE) was cut on the head. The two sisters (PW4 & PW5) testified that they were reading using a "chimney lamp" when the attack took place. According to the two sisters (PW4 & PW5) the attackers passed through the sitting room where they were reading then proceeded to the bedroom where their parents were.

Although the four witnesses (PW1, 2, 4 & 5) have described the lamp as "chimney lamp" and "glass lamp", it comes out clearly that the two sisters were reading. The light was therefore bright enough for the two sisters to see the attackers and to recognize their own brothers.

PW4 (SIPHROSE) during cross-examination further testified that there was a lamp in the sitting room which was smashed by Leonard the 1st appellant after she started screaming after her parents were cut with the pangas and that there was a lamp in the bedroom which remained intact. The evidence of PW5 (JUDITH) was that the lamp was on until the thugs left does not come out clearly on whether there was one lamp in the house or two lamps. All the same, the two sisters (PW4 & PW5) who were in Std. 8 and Form 4 at the material time had their reading lamp on when the attackers passed through the sitting room where they were. PW5 (JUDITH) in her evidence also talked about the voice recognition. The two sisters (PW4 & PW5) also described the mode of dress by the appellants at the material time as black clothes.

PW3 **ZACHARIAH LUMBASI**, a son to the complainants in Count I & II (PW1 & PW2) rushed to the scene with his torch upon hearing screams. It is his evidence that his torch light enabled him to see the said attackers and among them he recognized his four brothers who included the 1st, 2nd and 3rd appellants at the door of his parent's house. That the attackers fled towards the forest direction after they saw his torchlight.

The evidence of PW3 and PW1 shows that they had received payments for cane delivered to West Kenya Sugar Company. It is therefore not inconceivable for PW1 to have had Kshs.470,000= in the house.

PW6, **PATRICK LUCHEVI MURUKWA**, a neighbour who rushed to the scene after hearing the screams has also testified herein. His evidence corroborates that of PW1 – PW5. The evidence of PW6 is that of an independent witness. It is the evidence of PW6 that he saw seven attackers among them the 1st, 2nd and 3rd appellants. According to PW6, there were torches and moonlight and he was able to see the assailants.

The evidence of PW1, PW2, PW3, PW4 and PW5 is that of the same family. However, we take cognizance of the fact that an attack at night will invariably find family members together. We have however considered the evidence of the said witnesses against the backdrop of the family acrimony, the polygamous background and the land dispute which every witness including the appellants has testified about. We are however satisfied that there was sufficient light that enabled the witnesses see the attackers. PW6 who is an independent witness has also identified the appellants. The appellants were positively identified by all six prosecution witnesses who were at the scene.

The complainant in count I (PW1) also testified on the incident of 30.1.08 and stated that he was chased with a panga by the 1st and 2nd appellants and one of sons called HEZRON who is still at large. The offence in count IV (Creating a disturbance) in a manner likely to cause a breach of the peace allegedly took place on 30.1.08. It is therefore not founded on the same facts nor does it form part of the series of the offences of the same or similar character as the offences in count I, II & III which took place on 11th March, 2008.

The evidence of PW1 – PW6 left no doubts in our minds that the attack took place. The evidence of PW1, PW2 and PW4 who are the complainants in count I – III respectively shows that they were injured during the attack.

The evidence of the Clinical Officer, PW8 **KIZITO SIFUNA** confirmed the said injuries. It is the evidence of the Clinical Officer that he treated PW1 and PW2 for cut wounds. The nature or the injuries described by the Clinical Officer is consistent with the injuries described by the complainants.

The gist of the defence by the 1st and 3rd appellants is that this case is a frame up due to the land dispute in their polygamous family. The 2nd appellant also talked about the same land dispute and perceived jealous over his high level of education and further stated that he was at a neighbour's home at the material time.

We have considered the defence case by each of the appellants. However, we are not convinced that this is a case of frame-up. Although a land dispute existed between the family members, the complainants would not have also occasioned grievous harm on themselves and then marshaled up a case against the appellants. We find the prosecution case was strong and the defence raised did not cast reasonable doubts on the same in count I, II and III.

We have found no diffects in the charge sheet and the offences are supported by evidence. The only exception is count IV (Creating a disturbance) which we have found to be a misjoinder of offences. There was also no sufficient evidence adduced in support of count IV (Creating a disturbance).

The attackers had a common intention. In our view, the trial magistrate ought to have convicted all the accused in Count I, II and III. However, there being no cross-appeal by the State in respect of Count II & III, we will leave the matter at that.

With the foregoing, we quash the conviction in Count IV (Creating a disturbance).

We uphold the conviction and sentence in count I, II & III.

Judgment delivered, dated and signed at Kakamega on the 24th day of October, 2012

S. J. CHITEMBWE

B. THURANIRA JADEN

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