



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII.

CRIMINAL APPEAL NOS. 129, 128 AND 127 OF 2008 (CONSOLIDATED)

BETWEEN

LEWIS SENDI WAMBO1ST APPELLANT

**CHARLES OKINYI OKELLO2ND
APPELLANT**

**DAVID OUMA AWINO3RD
APPELLANT**

AND

**REPUBLIC.....RESPONDEN
T**

**(Being an appeal from the original conviction and sentence in Migori PM’s Court
criminal Case number 1011 of 2007 dated 11th July 2008)**

JUDGMENT

1.The three appellants herein, **Lewis Sendi Wambo, Charles Okinyi Okello** and **David Ouma Awino** were jointly charged with manslaughter contrary to **section 202** as read with **section 205** of the **Penal Code**. The particulars of the offence were that on the 8th December 2006 at Raga sub location, in Migori District within the Nyanza Province, jointly with others not before court, unlawfully killed **Frederick Okoth Otieno**. They all pleaded not guilty to the charge and were subsequently tried, found guilty and convicted. They were each sentenced to serve 5 years in prison.

2. Each of the appellants felt aggrieved by the conviction and **HCCRA NOS. 129, 128 AND 127 OF 2008 (CONSOLIDATED)** sentence and filed their separate appeals which were consolidated by an order of this court dated 9th March, 2011. The common grounds of appeal were the following:-

1. That the learned trial magistrate erred in law and in fact in failing to find that the deceased met his death at the hands of a fellow villager who is still at large.

2. That the learned trial magistrate erred in law and fact in failing to appreciate that none of the prosecution witnesses identified any of the appellants as the deceased's assailants.

3. That the learned trial court erred in both law and fact in failing to consider all the surrounding circumstances of the case before it.

3. When the appeal came up for hearing, the Senior State Counsel Mr. Mutai conceded the appeal on the following grounds:-

a) The trial court relied on the evidence of PW5 who at the beginning of his testimony was declared hostile by the court upon application by the prosecution.

b) When PW5 was cross examined, he denied any knowledge of the incident during which the deceased died.

c) Once a witness has retracted a statement, such statement cannot be relied upon as a basis for a conviction as happened in this case.

d) The evidence of PW2 was not good evidence because PW2 was not an eye witness.

e) The Post mortem report was produced by a police officer without laying a basis for doing so.

4. Each of the appellants made brief submissions, reiterating that none of the prosecution witnesses identified any of them with the *HCCRA NOS. 129, 128 AND 127 OF 2008 (CONSOLIDATED)* incident during which the deceased **Frederick Okoth Otieno** died. The 2nd appellant also stated that he was convicted only on the basis of statements taken at the police station as witnesses refused to talk in court.

5. Even though the Respondent has conceded the appeal, it is still the duty of this court to reconsider and evaluate the evidence afresh with a view to reaching its own conclusions in the matter. The court has to reconsider the facts and the evidence and subject all that to a fresh scrutiny before reaching its own conclusions. See Okeno –vs- Republic [1972] E.A. 32 and Patrick & another –vs- Republic [2005] 2 KLR 162 among other cases.

6. The facts of this case are brief. On the 8th December 2006 at about 8.00 p.m., the deceased left his home at Karungu in the company of one **Geoffrey Okoth Kasuku (PW5)** for a party at the home of **Samuel Owuor Olal (PW3)**, a teacher at Orore Primary School. The two went to attend a disco which was part of the festivities organized by the youth of the area. The deceased was not to be seen alive again. On the morning of the 9th December 2006, the *HCCRA NOS. 129, 128 AND 127 OF 2008 (CONSOLIDATED)* deceased's mother, **Jane Anyango Otieno (PW1)** was informed that the deceased, who was then aged 21 years, had been beaten by "Mzee" on his way home. The deceased was brought home that same day in an unconscious state. He succumbed to the injuries on 16th December 2006. The matter was reported to the Macalder Police. The report was received by **No. 52629 PC Mutiso (PW6)** on the 21st March, 2007.

7. Subsequently, the three appellants were arrested and initially charged with murder. The murder charge was later reduced to manslaughter. A post mortem was done on the body of the deceased on the 28th December 2006 at 10.00 a.m. **Number 33097 Sgt. Baraza (PW4)** attended the post mortem examination at Eldoret. The post mortem report was produced as **P. Exhibit 1** by PW4.

8. The case for the prosecution was supported by 6 witnesses. PW1 was Jane Anyango Otieno, the mother of the deceased. She only said the deceased left home on 8th December 2006 at about 8.00 p.m. in the company of Geoffrey Okoth Kasuku (PW5). She did not **HCCRA NOS. 129, 128 AND 127 OF 2008 (CONSOLIDATED)** witness the incident nor did the deceased who was brought home in an unconscious state ever open his mouth to tell her what had happened to him or who had hit or beaten him.

9. PW2 was **Paul Amollo Oloo**, at whose home the celebration took place. It was a memorial for his late grandfather. He said he saw the deceased at the party. He saw the deceased had fallen down but could not say who had floored the deceased. The deceased left with Kasuku (PW5). PW2 said the three appellants were also among the dancers. There were many people.

10. PW3, **Samuel Owuor Olal** said there was a disco dance at the memorial service. He went to sleep at about 11.00 p.m. and on the following day, he learnt that the deceased had been beaten by “mzee’ who was appellant’s on a revenge mission. PW3 did not say who “Mzee’ was.

11. PW4, **Sgt. Baraza (Number 33097)** attended the post mortem examination on the body of the deceased at Eldoret Moi Referral Hospital on 28th December 2006. He produced the Post Mortem Report. **HCCRA NOS. 129, 128 AND 127 OF 2008 (CONSOLIDATED)**

12. PW5 was **Geoffrey Okoth Kasuku** who turned hostile and on the application of the prosecutor, Chief Inspector Mbugua, he was cross-examined by the prosecution. The statement he made to the police was tendered in evidence. PW5 said he could not remember making the statement that was read over to him during the cross-examination but he acknowledged that the signature thereon was his.

13. PW6 was **No.52629 PC Mutiso of Macalder Police Station**. He received the report of the murder on 21st March 2007, as a result of which he arrested the three appellants.

14. At the close of the prosecution case, each of the three appellants gave unsworn evidence. The 1st appellant, Lewis Sendi Wambo stated that he was arrested on the 19th December 2006 on allegations he knew nothing about. The 2nd appellant, Charles Okinyi Okello gave a similar testimony and denied any knowledge of the allegations made against him. The 3rd appellant, David Ouma Awino stated simply:-

“I do not know about this case and I have nothing to say.”

15. In its judgment, the trial court said that it was not in doubt **HCCRA NOS. 129, 128 AND 127 OF 2008 (CONSOLIDATED)** that each of the three appellants was at the party. The trial court relied on a portion of PW5’s retracted statement which stated in part:-

“At that time a fight between my friend Fredrick Okoth and Mzee Samuel started Mzee Samuel hit Fredrick with a rungu on his head and he fell down. Sendi Wambo [1st accused] came while armed with a wood and hit Fredrick severally with the said wood.

Then Okinyi Okello [2nd accused] came with a walking stick and joined them in beating Fredrick Okoth, Nyauchi Awino (3rd accused) also came with a walking stick and joined them in beating

Fredrick Okoth. Marika Oyamo also came while armed with a walking stick and continued beating Fredrick Okoth.

Charles Opiyo came with Maasai whip and joined in beating Fredrick Okoth. All this time they were complaining that Fredrick had disturbed them for a long time. Then Fredrick was crying for them why they were killing him.”

16. It was on the basis of the above “evidence” that the trial court found each of the appellants guilty as charged and convicted each one of them to five (5) years’ imprisonment.

17. I have reconsidered that evidence and evaluated it afresh. In my humble view, the evidence on which the court relied to convict the appellants was the weakest kind of evidence. Having been retracted by PW5, it was no evidence at all. **Section 152 of the Criminal Procedure Code** provides that in cases where a witness retracts his statement, the court is under a duty to deal with him as thereunder **HCCRA NOS. 129, 128 AND 127 OF 2008 (CONSOLIDATED)** provided, including incarceration for eight days each time such witness refuses to comply. Where the witness continues with refusal, the court can mete out any other “punishment or proceeding for refusing or neglecting to do what is required of him” but this refusal by such witness shall not prevent the court in the meantime from disposing of the case ‘according to any other sufficient evidence taken before it.’”

18. A look at the evidence that was taken before the court (excluding the “evidence” by PW5) shows that the said evidence was not sufficient to sustain a conviction against any or all of the three appellants.

19. Accordingly, this court concurs with the position taken by the Senior State Counsel in conceding the appeal.

20. The appeal is therefore allowed as prayed. The conviction of the lower court is quashed and the sentence of 5 years imprisonment is accordingly set aside.

21. Unless otherwise lawfully held, each of the three appellants is **HCCRA NOS. 129, 128 AND 127 OF 2008 (CONSOLIDATED)** to be set at liberty forthwith.

22. It is so ordered.

Dated and delivered at Kisii this 07th day of April, 2011.

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Present in person - 1st Appellant

Present in person - 2nd Appellant

Present in person - 3rd Appellant

Mr. Mutai for Respondent

Mr. Bibu - Court Clerk

Mr. Kasera – interpreting

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