



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA**

Criminal Appeal 133,134,135 &136 of 2009

REPUBLIC.....APPELLANT

VERSUS

AMOS W. WEPUKHULU & 3 OTHERS.....RESPONDENTS

JUDGMENT

The state filed separate appeals against the Respondents Amos W. Wepukhulu, Moses M. Wepukhulu, David W. Wepukhulu and Albert N. Wepukhulu filed separate appeals nos.133, 134, 135 and 136 all of 2009 which were consolidated. The four Respondents were jointly charged before Bungoma Resident Magistrate with two offences which are grievous harm contrary to section 234 of the Penal Code and assault contrary to section 251 of the same Act. The court found them not guilty and acquitted them. Being aggrieved by the judgment the State lodged the appeals.

The petitions of appeal contains similar grounds:

- a) *That the trial magistrate erred in law and fact in finding that the prosecution did not prove their case beyond reasonable doubt;*
- b) *That the court failed to notice that the defences were a sham and overlaid on that evidence;*
- c) *That the court failed to appreciate the ingredients of the offences charged.*

The State Counsel Mrs. Leting took the court through the grounds and pointed out the errors in the judgment which the state felt was not based on the entire evidence on record but rather on the defences of the Appellants. She submitted that the offences were committed at daytime and that the complainants knew their assailants. As such there was no possibility of mistake. The evidence of the eight (8) prosecution witnesses proved all the ingredients of the offence.

The Respondents were represented by Mr. Kraido. He submitted that the prosecution's evidence left gaps which could not be filled. The evidence was not sufficient to sustain a conviction. The court concentrated on the defences because they were comprehensive and credible as opposed to the complainants' testimonies. The Respondents called witnesses to corroborate their defences. The court could not have reached a more correct finding that it did according to the Respondents.

The complainant in count 1 Mark Wekesa Wafula (PW1) was with his brother Allan Simiyu Kijambe (PW2) working on their father's land on the material day around 8.00 a.m. At the same time there was a tractor they had hired to till the land. The complainants saw the four (4) Respondents whom they knew before the incidents enter the land and chase away the tractor driver from the land. The two complainants were also attacked by the four Respondents and a fifth person who was not arrested. The Respondents were armed with pangas and rungas as they descended on the complainants beating them continuously. The complainants sustained injuries as a result of the assault. PW1 was injured on the right eye and right hand while PW2 was injured on the head and hands.

PW3 was attracted to go to the scene by screams from the land of Mr. Wafula. He went there just to find that the children of Wafula (the complainants) were being beaten by the Respondents who were armed with rungas and jembes. The complainants had already been injured. The Respondents ran away on seeing PW3. It is PW3 and others who escorted the complainants to Bungoma Police Station.

PW4 was working on the same parcel of land. She said that she was the first to see the Respondents emerge from a sugar cane plantation. She was chased away and stood at the border. She testified that she saw the four Respondents assault the tractor driver and chase him away before they descended on the complainants and jointly assaulted them. The Respondents were armed with rungas, pangas and jembes. PW4 was one of those people who escorted the complainants to Bungoma Police Station.

PW5 the Clinical Officer, produced the P.3 forms of the complainants in evidence. PW1's ruptured right eye was operated on in the theatre. It was classified as maim.

PW6 the mother of the complainants was taking tea to them in the shamba. She saw the Respondents whom she knew before the incident emerge from a sugar cane plantation, attack the tractor's driver. The complainants went to find out what was happening to the tractor driver. They were also beaten up by the Respondents. PW6 called for help and one Josephine and Wilberforce (PW3) came to the scene. The witnesses obtained transport and took the complainants to the police station. PW6 said, that her family had a land dispute with the parents of the Respondents.

PW7, Dr. Mulianga produced the P.3 filled by his former colleague Dr. Ngugi in respect of PW2. The patient had a cut wound on the head which was stitched. The injuries were assessed as harm. PW8 was the officer who received the report at Bungoma police station and investigated the matter. He referred the complainants to hospital for treatment. In the course of his investigations, PW8 found that there was a land dispute between the father of the complainant and the family of the Respondents.

The 1st and 3rd Respondents in their sworn defences said that on 27/11/2007 around 7.00 a.m they were at Bungoma Police Station having been summoned by CID. The two Respondents said that later in the morning they were called to the office of the OCS where they saw the two complainants with injuries. The Respondents denied having assaulted the complainants as alleged. The two Respondents were released to go home. It was only the 2nd Respondent who was locked in. On the 30/11/2007, the two Respondents (1st & 3rd) went to report at the station as earlier instructed. Police then locked them in and were later charged with the offence. Both denied having been at the scene at the material time or having committed the offence. The existing land dispute between the families of the Respondents and that of the complainants was admitted in defence.

The 2nd Respondent testified that on the material day, he went to the house of one Francis Maeto a neighbour to help him repair his

house at 8.00 a.m. He finished the work at 2.00 p.m after which he ate lunch. The 2nd Respondent further said that he was summoned at Bungoma Police Station on 28/11/2007 and locked in on allegation that he had assaulted the complainant.

The 4th Respondent said he works as a welder at Webuye and was at his place of work on the material day. He was informed that his brother the 3rd Respondent had been arrested for assaulting the complainants. It was not until 18/12/2008 that 4th Respondent came home and found that his brother had been released. The 4th Respondent was arrested on 28/01/2008 from his house at Mabanga. He was joined together with the other Respondents and charged with assault. He denied the offence and adds that he was not involved in the land dispute between his father and the father of the complainant.

The 1st and 3rd Respondents called DW5 C.P.L Mathew Koech as their defence witness. He testified that on 26/11/2007 he visited the disputed land acting on a report by the 1st and 3rd Respondents that the complainants had invaded their land and were planting vegetables while the Respondents wanted to plant sugar cane. At the scene the parties had a bitter exchange of words which almost led to a fight. DW5 directed the parties to report at CID office, Bungoma the following day. The 1st & 3rd Respondents and the father of complainants reported to the station on 27/11/2007 at around 7.30 a.m and waited till 10.00 a.m when they saw the O.C.S. DW5 learnt later in the day that that it was alleged that the 1st and 3rd Respondents had assaulted another person in connection with the same land dispute.

DW6 was called as a witness by the 2nd Respondent. He testified that he went to the house of 2nd Respondent on 27/11/2007 at 6.00 a.m. He called him to assist him in repairing his house. The 2nd Respondent later came and joined DW6. the two together with others worked until 2.00 p.m when they finished the repairs. The 1st and 3rd Respondents left home for Bungoma Police Station at around 8.00 a.m after DW6 gave them transport. It is within the knowledge of DW6 that there was a land dispute between the complainant's father and the Respondents.

The trial court in its judgment gave a lot of emphasis on the time the offence was allegedly committed. It appears the magistrate believed the defence as opposed to the complainants without giving reasons. She said:

“I have considered the evidence adduced by the prosecution and the defence..... DW5 confirmed that the 1st and 3rd accused were at Bungoma Police Station when the offence was committed. I therefore don't understand when they may have assaulted the complainants. DW5 further said that the 1st and 3rd accused finished their business at the station at 10.00 a.m. Later on at 12.00 noon the Investigating Officer told DW5 that the accused persons had committed an assault the same day. It is however evidence of the prosecution witnesses that the assault took place at 8.00 a.m.”

The time given by PW8 the Investigating Officer corroborates the time given by the complainants, that is, when the offence was allegedly committed and when the parties arrived at the police station, both the complainants and the accused persons. According to PW8 it was 8.00 .am and 10.00 a.m. The trial court disbelieved PW8 who received the report at the station and investigated the case and chose to believe DW5 who was just a police officer called as a defence witness. It is a legal requirement that reasons be given in a judgment to explain why the court found one witness credible as against another.

The court proceeded to give more weight to the defence as opposed to the prosecution's evidence:

“It was the evidence of the Investigating Officer that the accused persons went to the station while he interviewed the complainants. From the evidence presented by the defence, that was not the case as the 2nd and 4th accused persons were not at the station (emphasis mine) when the report was first made on 27/11/2007.”

This statement was an indication that the court had already believed the defence of 2nd and 4th Respondents and their testimony as their gospel truth. The trial court did not adequately evaluate the evidence of the prosecution witnesses. The prosecution's evidence comes first in sequence and it should be adequately evaluated before the court deals with that of the defence. The court in the same breath asked a curious hypothetical question:

“If indeed the 1st accused had been involved in the assault why was he not identified by PW2 and locked in the cells together with the 2nd accused?”

This question could only be answered by the investigating officer as to why he arrested one person on the material day and others later. The probable thing is that PW8 had just began his investigations when he arrested the 2nd Respondent. Others were to follow guided by the evidence at hand as the investigations progressed. The court reached a finding that although the complainants were assaulted, the prosecution failed to prove who had done it.

It is the duty of the first appellate court to evaluate the evidence and reach its own finding which I hereby set off to do.

PW1 and PW2 said they were assaulted by the four Appellants while working on their father's land around 8.00 a.m. The incident took place at day time and the complainants knew the four accused persons who were their relatives. There was a land dispute between the families of the complainants and that he went to the house of 2nd Respondent on 27/11/2007 at 6.00 a.m. He called him to assist him in repairing his house. The 2nd Respondent later came and joined DW6. The two together with others worked until 2.00 p.m when they finished the repairs. The 1st and 3rd Respondents left home for Bungoma Police Station at around 8.00 a.m after DW6 gave them transport. It is within the knowledge of DW6 that there was a land dispute between the complainant's father and the Respondents. The dispute was still fresh at the time of the incident. DW5 said he had visited the scene just a day before the incident when tempers flared between the two sides leading to adjournment of the meeting. He directed the parties to report at the police station the following day over the same issue. PW1 and PW2 said they were attacked by the four Respondents and another person who was still at large at the time of the trial. The four Respondents came armed with pangas and rungas which they used to assault the two young men. They later snatched the jembes of the complainant from them. The assault only ended when the Respondents saw PW3 approaching the scene. PW3 who was attracted by screams to the scene said he found the four Respondents beating the complainants. They were armed with rungas and jembes. The jembes as it came out from PW4's evidence are the ones the complainants were using in the shamba. PW4 also witnessed the incident she was chased out of the land by the Respondents before they lodged their attack on the complainants. She stood at a distance and watched what happened. It is her screams which brought PW3 to the scene. PW6 witnessed the Respondents emerge from a nearby sugar plantation, chase away the tractor driver and attack the complainants. This witness also screamed for help. There were three eye witnesses to the incident whose evidence was not considered by the court. The Respondents argued that some of the witnesses were relatives and were not independent witnesses. The fact that they were relatives does not make them biased or incredible unless there is evidence to the contrary to support such an argument. There was no such evidence. It is also noted that DW6 who was called as a witness by 2nd and 4th Respondents were related to them. That fact did

not affect the credibility of the witness.

The Respondents faulted PW1 and PW6 for not knowing the name of the tractor driver who was ploughing the land for them and who was chased away by the Respondents before they attacked the complainants. It was explained by PW1 that he had just met the driver on the road and hired him that morning. It is highly probable that in business, one would hire a stranger to work for him or render services without bothering to register the person's name in his mind. There is also a possibility of forgetting the name of a person after hearing it the first time.

The defence of the 1st and 3rd Respondent that they went to the police station on the material morning as instructed by DW5 is credible and consistent with the calendar of events surrounding the land dispute. The only bone of contention is the time they left home or reached at Bungoma Police Station. The two Respondent say it was 7.30 a.m while the complainants say they were assaulted at around 8.00 a.m on the disputed premises at Mabanga. This court takes judicial notice that the distance between Mabanga and Bungoma is fairly close which may not take more than fifteen minutes by road using a vehicle or a motorbike. DW6 testified that he is the one who gave the 1st and 3rd Respondents bus fare to go to the police station around 8.00 a.m. This means that the Respondent's traveled by road to Bungoma. According to DW6, the two Respondents were still at home around 8.00 a.m when the incident allegedly occurred. DW5 said he saw the two Appellants at the station around 7.30 a.m. The difference between the time given by different witnesses is not more than 30 minutes. Given the short distance between Mabanga and Bungoma and the time one is likely to spend traveling Bungoma, the difference in time is negligible. It is also important to note that all the witnesses who gave the evidence on time were giving approximate time since none of them said they had looked at their watches or at other time gadgets to confirm the exact time.

The 2nd Respondent went to help DW6 to repair his house – at around 8.00 a.m. The defence was that DW2 spent the day with DW6 and did not leave that home till 2.00 p.m when the work was finished. In cross-examination DW6 said that the 2nd Respondent lives only 300 metres from DW6's place. The scene which is the disputed land was within the same vicinity. It is highly probable that DW2 had committed the offence before he joined DW6 at his home at around 8.00 a.m or thereabout. Again, the short distances involved work in favour of the prosecution.

It was therefore a misdirection for the trial court to put too much weight on the time difference and ignore the rest of the evidence on record. Indeed the evidence of PW6 makes it highly probable that both the complainants and the four Respondents went to the police station after this incident had taken place leading to the charges. The witness said that when he was interviewing the complainants, the Respondents also went there and alleged they had been assaulted. PW8 saw visible injuries on the complainants but none on the Respondents. He therefore advised all the parties to go and seek treatment. The complainants had gone to the station specifically to report the assault. The 1st and 3rd Respondents had gone there to see the DCIO on the land dispute as directed by DW5. It is only when the Respondents saw the complainants reporting the matter that they alleged that they had also been assaulted.

As for the 4th Respondent, he claims to have been at Webuye at the material time. The prosecution witnesses know him and said that they saw him at the scene. His defence was outwitted by the prosecution's evidence. It was not at all suggested that any of the witnesses had any reason to frame the case against him.

There is no doubt that the complainants were assaulted in the material morning of 27/11/2007. The medical evidence by PW5 confirms the injuries of PW1 which were classified as maim. PW7 confirms the injuries sustained by PW2 and assesses the degree as harm. The evidence of the eyewitnesses PW3, PW4 and PW6 corroborated that of the complainants. Visibility was clear at day time and the witnesses knew the Respondents. There was no possibility of any mistake of identity or error.

The defence argued that none of two complainants could tell which of the four (4) Respondents hit them, at what part of the body and with what weapon. The failure to clearly make distinction on these aspects is explained by the way the attack was carried out. The attack was carried out by five people who were armed against two who were not armed. The four Respondents all descended on the complainants and beat them up. The said omission or confusion does not in anyway weaken the case of the prosecution in view of the rest of the evidence.

I find that the prosecution proved the offences against the Respondents beyond any reasonable doubt. The magistrate erred both in law and fact to find the evidence was not sufficient to convict the Respondents. The appeal is therefore successful. The orders of acquittal by the trial court are therefore set aside and substituted with a conviction in respect of both count I and II . The matter is hereby referred to the trial court to impose sentence.

F. N. MUCHEMI
JUDGE

Judgment dated and delivered on the 20th day of July 2010 in the presence of the four (4) Respondents, their counsel Mr. Ikapel for Kraido and the State Counsel.

F. N. MUCHEMI
JUDGE