



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA

Criminal Appeal 60 & 62 of 2008

KENNEDY WAFULA SIUNDU ::::: 1ST APPELLANT

COSMAS WATITWA ::::: 2ND APPELLANT

VERSUS

REPUBLIC :::::::::::::::::::: RESPONDENT

J U D G M E N T

The Appellants were jointly convicted by Bungoma Resident Magistrate of failing to prevent a felony contrary to section 392 of the Penal Code and sentenced to serve four (4) years imprisonment. This appeal is against both conviction and sentence.

Mr Makali for the appellants argued the grounds of appeal. It was the contention of the counsel that the ingredients of the offence were not proved and that the sentence was harsh and excessive. The state counsel Mrs Leting opposed the appeal on grounds that the prosecution witnesses especially PW1 and PW2 who were victims of the attack adduced very cogent evidence against the appellants.

The facts of the case are that the appellants together with another before the court were working as watchmen at Nzoia Primary School. On 30/09/06 around 2.00am a robbery took place in the houses of PW1 and PW2 who were senior teaching staff residing in the compound. Both witnesses were injured and robbed of their properties. At the time of the robbery, the appellants who were assigned specific areas of duty and were nowhere to be seen. It was after the attack that the security guards appeared.

PW1 the head teacher at the school testified that he was in his house within the school quarters around 2.00am on the material day when one of his teachers called him on phone informing him that the Deputy Headmaster PW2 had been attacked by thugs. PW1 dressed up to go to the house of his deputy. Before he got out the door of his house, the thugs forced the door open. He was attacked and injured. PW2 the Deputy Head

teacher was attacked and robbed in his house in the school compound during the material time. After the attack PW2 saw the gates of the school wide open. The appellants were not present at their respective areas of duty at the time of the attack. PW2 saw strangers walking out of the open gates freely after the attack.

PW3 was in her house which is next to that of PW2. She heard noise and commotion from PW2's house around 2.00am and later learnt that PW2 had been attacked. PW4 did not witness the attack. He was woken up by PW2 and one Eliud after the incident.

PW 4 saw two strangers walking out of the school. He and PW1 followed them as they shouted for help, but the two strangers exited the school through the open gate and disappeared.

PW5 was woken up after the attack. He saw two men walking out of the school gate. He also assisted to take PW1 to hospital.

PW6 and PW7 did not witness the incident. They were woken up by the victims of the robbery.

PW8 and PW9 were the investigating officers in this case.

PW 10 was the Security Officer in charge of Nzoia Sugar Company and was the overall boss of the appellants. He testified that on the material day the officer in charge of night shift one Patrick Nyongesa informed him of the robbery at the Nzoia Primary School staff quarters in the night of 30/9/06. He visited the scene and interviewed the appellants who were the guards on duty. The appellants said they had been overwhelmed by the attackers.

PW11 the clinical officer produced the P3 form of PW1. PW12 a police officer attached to Nzoia Police Post testified that the head teacher had called her over a note threatening to lodge an attack on the school four (4) days before the incident. PW12 recorded statements from a security guard namely Patrick Nyongesa and other people. In response to the impending attack, police officers were deployed for three nights from 27th to 29th September 2006 and withdrawn due to other assignments. On 30/09/06, PW12 learnt that an attack at the school had taken place. PW12 visited the scene and later handed over the information she had to another officer for further investigations.

The prosecution's evidence establishes that the appellants were on duty on the material night. The 1st appellant was assigned to guard the primary school section and 2nd appellant the boarding school section. The boarding section was about 25 metres from the teachers quarters. At the time of the attack, it was established from the evidence of PW1, PW2, PW3, PW4 and PW5 that the appellants were not at their respective areas of duty. Neither did they respond to the distress calls of the victims of the attack. It was much later after the attack that the appellants showed up.

In his defence, the first appellant said he saw a crowd of about 20 people entering the school compound. He decided to run and hide in the sugar plantation where he was for about 30 minutes. The 2nd appellant said he saw about ten (10) people and he was chased by some of them. He went to a nearby police post to report and found only one officer on duty. He had to wait for other police officers to return in order to report and get help.

The trial magistrate did not believe the defences of the appellants. In his judgment the defences were analyzed and found to be a sham in the light of the prosecution's evidence. The 2nd appellant said he had blown a whistle after he saw the thugs. I agree with the judgment that this could not be true since no one heard the whistle. Most of the witnesses were woken up by the attackers breaking into the victims houses and by telephone calls from friends within the staff quarters. If anyone blew a whistle in a big school where there are many members of staff and students who were boarders, the attacks on PW1 and PW2 would have been prevented. The appellants did not explain in their defence why they left the gates wide open at night with padlocks latched on them. That may have been meant to make it easy for the attackers to gain entry and exit. PW4 testified that the gates were always securely locked at night and had to be opened for anyone to get into the school compound. PW10 said he saw an opening on the fence where some wire had been cut. There was a possibility that the attackers used both the gate and the fence opening to access the school or to exit thereof. Two of them were seen leaving through the gate by some witnesses. A guard on duty is supposed to do patrols of his duty area from time to time. It appears none of the appellants patrolled areas of duty that night. The appellants' allegation that the thugs were armed with guns was not supported by PW1 and PW2 who were attacked. I find that the trial court correctly found that the appellants failed to prevent a felony which was possible had due diligence been used. The conviction was safe and I uphold it accordingly.

The maximum sentence for the offence which is a misdemeanor is three years imprisonment. The sentence of four (4) years imprisonment was against the law. I reduce the sentence to two (2) years imprisonment in respect of both appellants. The appellants have been on bond pending appeal which terminates automatically. The appeal succeeds only to that extent.

**F.N. MUCHEMI
JUDGE**

Judgment dated and delivered on the 21st day of October, 2010 in the presence of the appellants and the State Counsel Mrs Leting.

**F.N. MUCHEMI
JUDGE**