IN THE HIGH COURT OF KENYA
AT MACHAKOS
Criminal Appeal 159 of 2003

JOHN KIMWELI UTUTU & OTHERS .....APPELLANTS

VERSUS

REPUBLIC .....RESPONDENT

J U D G M E N T

The three appellants, John Kimweli Ututu, Julius Kathanzu Musee and Alex Kitheka Muthuvi filed Criminal Appeals 159 'A' 159'C' 159 'B' respectively against conviction and sentence in Criminal Case 821/99 of Mwingi SRM's court.

In that case before the lower court, they were 8 accused persons but only the three have appealed against the decision of that court. In the lower court John Kimweli was accused 1, Julius Kathanzu was accused 2 whereas Alex Kitheka was accused 8. They were charged with the following offences:

1. Wrongful confinement Contrary to Section 263 of the Penal Code. The allegation against them was that on the night of 22nd and 23rd July 1999 at Kakululo village Nguutani location of Mwingi district, they jointly, wrongfully confined Bernard Ndalu Ngumbi.

2. Assault causing actual bodily harm contrary to Section 251 of the Penal Code. The allegation against the accused was that on 23/7/99 at Kakululo village they unlawfully assaulted Bernard Ndalu Ngumbi and occasioned him actual bodily harm.

3. Wrongful confinement Contrary to section 263 of the Penal code. They were alleged to have confined one, Winfred Kakesa Kamanthe on the same date. After the hearing of the case, all the accused were convicted on counts 1 and 3 and accused 2 was also convicted on count two. Each was sentenced to one year imprisonment on each count and the sentences were to run concurrently. Accused 2 was sentenced to one year imprisonment.

Counsel for the appellants applied for bail pending appeal and on 25/6/03 the magistrate granted the prayer by releasing them on bond of 20,000/= pending appeal and a stay of the sentence. Though that application was made in respect of all the accused, only the appellants were present. They are the only ones who have appealed. It is not clear where the other appellants/accused are or whether they went ahead to serve sentence. I do note from the lower court file that the three appellants are actually out on cash bail of Kshs.20,000/=.

At the hearing of the appeals on 28/9/05, upon application, the court allowed a consolidation of the three appeals to be heard as one Criminal Appeal No. 159'A' because the grounds of appeal were basically similar save for ground number 14. For purposes of this appeal, John Kimweli will be referred to as 1st

appellant (accused 1), Julius Kathanzu as 2nd appellant (accused 2) and Alex Kitheka as 3rd appellant (accused 8).

The grounds of appeal set out in the three petitions of appeal are as follows:

1) That the trial magistrate erred in law and fact by failing to appreciate or take into consideration the appellants' defences and also failed to consider the testimony of the appellants' witnesses.

2) That the sentences meted out on the appellants were harsh and excessive.

3) That the magistrate erred by failing to consider the 'mens rea' and motive of the alleged offence.

4) That there was no mens rea.

5) That the magistrate failed to consider that there were material contradictions in the prosecution case.

6) That the magistrate failed to give reasons for his decision in convicting the appellants.

7) That the magistrate failed to comply with Section 169 (2) of the Criminal Procedure Code.

8) That the magistrate failed to make a finding on whether or not the offences charged were proved to the required standards.

9) The magistrate failed to analyse the evidence tendered by all the witnesses.

10) The magistrate failed to consider that PW2 did not identify the 3rd appellant as being among the persons who confined her.

Grounds 3 to 5 were done away with by an amendment. The appellants therefore seek the following prayers:

(a) That the Judgment of the lower court be quashed and set aside or altered.

(b) That the appellants be set at liberty.

(c) In the alternative the sentence imposed on the appellants be altered.

Mr Musyoka, appearing for the appellants opened his arguments by taking up the 1st ground that the trial magistrate erred by not taking into account the appellants' defence witnesses. He submitted that failure to consider the defence case is a breach of the rules of natural justice. He relied on the case of **JOSEPH NJARAMBA KARURA** versus **REPUBLIC (1982 – 88) KAR 1165** where the Court of Appeal held that failure by the trial judge to consider the case for the defence constituted a breach of the rules of natural justice and therefore sufficient to unsettle the judgement. He also relied on the case of **OKETHI OKALE 7 OTHERS** versus **REPUBLIC 1965 DA 555** in which the judges had relied on in the case of **NJARAMBA** and in which it was held that both the prosecution and defence evidence have to be weighed in their totality but that each has to be weighed separately. His submission is that failure to consider the defence evidence is fatal to the prosecution case. Mr O'Mirera, for the state argued that the magistrate had tried to refer to the defence and that he gave points of determination and that if there be a minor omission in the judgment they can be cured by Section 382 of the Criminal Procedure Code. The court has had a chance to look at the proceedings and judgment of the court. It is true that all the appellants gave sworn evidence in their defence. They called witnesses PW9 up to 13. In his judgment, the magistrate summarized the prosecution evidence at length and that of the defence witness in two paragraphs. He never summarized the evidence of PW9 to 13 nor did he make any reference to that evidence. I do concur with the appellants' submission that the defence evidence was not considered along with the prosecution evidence as should be the case. The magistrate omitted to consider the evidence of

the defence witnesses totally. The state counsel as good, also conceded by saying that the magistrate only 'tried' to consider the evidence of the defence. Failure to consider the defence does amount to a breach of rules of natural justice because the defence has not been given a fair hearing.

The appellants also submitted in respect of grounds 9, 10, 13 that no reasons were given for the conviction nor was there an analysis of the evidence tendered and hence offended Section 169 (1) of the Criminal Procedure code. Counsel argued that though the court had pointed out what the points for determination were at the beginning of his judgment, the magistrate never made findings on whether there was confinement of the complainants or not. In opposing that argument the state counsel argued that this being a 1st appellate court, it can on its own motion consider the evidence and come up with its own conclusion if indeed there was no analysis of evidence and that the court can come up with its own verdict. Again looking at the judgment of the court, I do uphold the appellants' submission that there was no analysis of the evidence. The trial magistrate concentrated on summarizing the evidence of the prosecution witnesses which covered 5 pages and in 2 short paragraphs he reached his decision and convicted the accused persons. Section 169 (1) of the Criminal Procedure Code provides that a judgment shall contain points of determination, the decision and reasons for the decision. No reasons were given nor were there any findings made by the magistrate. The conviction was therefore made in error.

Further to the above it is the appellants' case that the magistrate did not comply with Section 169 (2) of the Criminal Procedure Code in that he did not specify the Section of the Penal Code or other law which the accused person was convicted. This is a mandatory provision but I do note that at the beginning of the judgment, the magistrate had stated the offences with which the appellants were charged and the Sections. The appellants had been represented. There is no indication that they did not understand what the magistrate meant by convicting them of count 1, 2 and 3 as charged. In my view, this omission cannot deal a fatal blow to the prosecution case. After all that provision comes at the end when reasons for the conviction are given.

As earlier observed by the learned state counsel, this court being the 1st appellate court has jurisdiction to look at the evidence again and come up with its own conclusion which the court will do as the other grounds raised by appellants are considered. Briefly, the evidence of the key prosecution witnesses PW1 and PW2 was as follows:

PW1 recalled that on 22/7/99 at about 11.00 a.m he alighted from a matatu at Mbuluni market and was walking to the school where he teaches when he met accused 3, 4, 5, 6 ,7 and 8 who stopped him and accused 3 showed him a letter signed by the chairman of Atangwa clan, 1st appellant (accused 1). The contents were that PW1 and two others were required by the clan for a meeting. His requests that he first reports at his school fell on deaf ears. He was held from both sides. They boarded a vehicle to Nguutani trading centre. On the way they met PW1 Winfred Kakeso, whom they informed was also required by the clan chairman. At the home of accused 1, PW1 was interrogated as to where his friends were hiding, accused 1 ordered him to be taken to the cowshed where he was stripped naked save for the innerwear and was tortured by putting a solution of water, pepper and sisal in all openings on his body. PW2 was left seated under a tree and only heard PW1 complain loudly. From there, they were taken to Kavese's home where the clan meeting was to be held the next day and were guarded by youth wingers the whole night. They sat at a fire outside the house. PW1 said that at the meeting he was accused of not attending clan meetings, advising Kamene Kiiya on a land case with his uncle and escorting Kakesu (PW2) to the District Commissioner's office over a land case with her grandmother. After his case was heard and determined and he had been warned, he thought he could leave the meeting but as he started to leave and was a few metres away he was ordered back and youths were sent to bring him back. Accused 2 joined the youth who beat him up with sisal leaves. He was only able to recognize accused 2 who followed him up to the centre of the circle where people sat and where there was light. Accused 2 also snatched the seat that had been given to him. He was injured on the right ankle and right shoulder blade where accused 2 hit him with a stick.

PW2 basically reiterated PW1's evidence on how he met accused 3 – 8 with PW1. Was ordered to accompany them to the home of the clan chairman where she was required. She recalled PW1 being taken aside in the cow shed and later they were taken to Kavese's compound where they spent the night

outside, at a fire place while guarded by youths. They were not released till after the meeting was held on 23/7/99. They were at the meeting till midnight. She saw when PW1 tried to leave but was brought back as he was beaten. She did not however see the assailants.

PW3, Christine Kitindi, wife to PW1 said that on 22/7/99, some youth came to get her husband's sweater but she did not give it. She went to find out where he was. She found him at Kavese's house. She was not allowed to talk to her husband much for he was allegedly under arrest. She went back home and next day went to the meeting. After a while he was released and left for home but the chairman ordered that he be brought back and several youths with sticks followed him, beat and pushed him back. Accused 2 also used a stick to beat the complainant and even when given a chair accused 2 pulled it away. The other prosecution witnesses were never present at the scene.

Accused 1 in his sworn defence denied ever seeing PW1 and 2 on 22/7/99 nor did any people go to his home. He had however sent out a letter notifying people for a meeting at Kavese's house which he attended between 23 and 24th July 1999. The meeting had 236 attendants. The meeting was meant for collecting school fees for needy children and domestic problems. They discussed an issue of PW1's wife having assaulted. PW1's mother and PW1 had taken no steps and PW2's land issue. He denied knowing how PW1 and 2 got to be at the meeting. He admitted that if one disobeyed clan rules he would be expelled from the clan and if one failed to attend meetings he would be taken there by force. He denied that PW1 was beaten but that he was a paid up member.

Accused 2 denied assaulting PW1. He denied knowing anything about 22/7/99 and 23/7/99 save that there was a meeting where he arrived late. He said that he is a cousin of PW1 and they had never quarrelled before.

Accused 8 said he stayed at his home on 22/8/99 and never attended any meeting on 23/8/99 as he was left to care for the home. DW9 Patrick Kiambi the secretary to New Utangwa Clan attended the meeting and produced the minutes of the meeting. He recalled discussing the issue of PW1's mother being assaulted and Kakesu's land case being withdrawn from court amongst others. He denied that anybody was ever beaten at the meeting. DW10 Jones Nzinga attended the clan meeting on 23/7/99 which he left at midnight. He did not see anybody assaulted. DW11 Fredrick Mwandikwa talked of the meeting in 2001 at Kavese's home. He never saw anybody being assaulted.

DW12 Kathake Ututu a brother to accused 1 attended the meeting of 23/9/99. It ended at midnight. DW13 Martha Kamanda recalled that she arrived at the meeting at 1.10 p.m. She found about 15 people but never saw PW1 and PW2 there. She never witnessed any incident.

All the defences of the other accused persons who have not appealed were basically general denials that they never witnessed any assault nor did they confine PW1 and PW2 on 22/7/99.

I have carefully considered both the evidence of the prosecution and that of the defence. I find the evidence of PW1 and PW2 unshaken as to events of 22/7/99 and 23/7/99. It was the appellants' submission that there were contradictions in the evidence of PW1 and PW2 because PW2 never saw accused 2 at the time of her arrest. I find no contradiction in their evidence. PW1 was very clear in his evidence as to who first confronted him – accused 3 to 8. Accused 2 was not present. It is the same accused persons who on their way met PW1 and ordered her to accompany them. That means that accused 2 (3rd appellant) was not present on 22/7/99 and cannot have been involved with the alleged confinement and was therefore wrongly charged with count 1 and 3. The magistrate made a wrong finding that all those charged were present on 22/7/99.

PW1 and PW2 related what happened to them on 22/7/99. PW1 was not even allowed to report to his school as he was under arrest. PW2 was not allowed to take medicine home. They later slept at a tree at Kavese's home waiting for the meeting of 23/7/99. PW3 visited her husband at the home of Kavese and she was not even allowed to talk to him much because he was a prisoner. PW1 also related how he could not even move from the meeting till it was over. Accused 1 did admit signing a letter seeking that PW1 attends the meeting including 2 others. Instead of DW9 writing the letter as Secretary for some reason

accused 1 did it himself. According to PW1 he is the one who ordered PW1's torture. PW2 witnesses it and later frogmatched the two to Kavese's home. In cross-examination accused 1 did admit that PW 1 was not attending clan meetings and that if one did not he would be forced to do so. Though other accused persons seemed to deny that one would not be forced their chairman accused 1 said it all. One could be forced and I do believe that is exactly what happened to PW1. They knew he would not attend clan meeting and so arrested him a day earlier, detained him unlawfully so that he could attend by force. I do believe the testimony of PW1 and PW2. There is no way that they could have come up with such an imagined story to get so many people in trouble. Some of the accused are related to them and all are clan members. What they told the court was the truth and the fact that PW1 and PW2 were not free to go about their business, PW1 being forced to attend a meeting he does not believe in being forced to sleep under a tree away from home amounted to unlawful confinement. There was no need to prove mens rea as that flows from the accused persons' actions.

Though accused denied that he ever sent for PW2 yet when she was taken to his home, he never ordered her release. He confined her along with PW1. He is the one who wields the power as chairman and he was part and parcel of the common intent to confine PW1 and PW2 and have them attend the meeting.

The defence seemed to be stressing the issue of PW1 having been accused of not protecting his mother when the wife assaulted her. PW1 on the other hand, claimed the main contention was his non attendance of meetings to which accused 1 conceded, and the fact that he was assisting PW2 and another in land matters. Though the clan members were aware and had been restrained from discussing land matters they actually went ahead to discuss PW2's land issue which amounted to intimidation and coercion so that she does not go to court. There was proper machinery for such land issues to be ventilated and the clan should steer clear of them and not resort to force and intimation as they seemed to be doing in this case.

As regards the charge of assault PW1 said it is accused 2 who he identified as having assaulted him because accused 2 followed him up to where there was light where he went to sit and even snatched a seat from him. PW2 did not see the assailant. This is because it was dark and that is why PW1 was not able to see the rest of the assailants. I find no contradiction in the evidence of the two. The place was crowded and it depended where each sat.

The Doctor found PW1 to have been injured on the ankle and shoulder blade which was consistent with evidence of PW1 and PW3 as to the injuries PW1 received on 23/7/99. The court finds and is convinced beyond any doubt that accused 2 was properly identified as one of the people who assaulted PW1 on 23/7/99. The assault relates to 23/7/99 but not 22/7/99 and so the injuries allegedly suffered from the torture if any are irrelevant. Accused 2 had no reason at all to assault the complainant and no reason why PW1 and PW3 would frame the accused 2 with the charge. I do uphold the lower court's finding and conviction of the 2nd accused (appellant) on the offence of assault Contrary to Section 251 of the Penal Code.

As regards the charge of unlawful confinement, I do find that accused 2 was only present at the meeting of 23/7/99 when PW1 and PW2 had been detained from about noon 22/7/99 all night and all day on 23/7/99. He only came to the scene towards the end of meeting on the night of 23/7/99. I will find that he was not party to those who confined the complainants and is therefore not guilty of counts 1 and 3 and the court hereby quashes the convictions against accused 2 on counts 1 and 3 and sets aside the sentence against accused 2 on the charges of unlawful confinement Contrary to Section 263 of the Penal Code.

Accused 1 was the mastermind of the confinement. He issued a letter that PW1 be brought in if found which accused 3 and others effected. He gave the orders and accused 8 and others picked up PW1 and PW2, took them to his home, had then guarded at Kavese's home the whole of 22/7/99 up to 23/7/99 night. I find that the lower court reached the correct finding by convicting the two accused of the offence of unlawful confinement Contrary to Section 263 of the Penal Code. I hereby confirm the conviction.

The appellants submitted that the sentences meted on them were harsh and excessive and prayed that the same be set aside, or give alternative sentences.

Section 263 of the Penal Code provides for a sentence of Kshs. 14,000/= in default one year imprisonment. It is a misdemeanor. The appellants were sentenced to one year imprisonment with no option of fine. The court took into account the circumstances of the case. Indeed the circumstances were aggravated. The clan took the law into their own hands, exposed PW1 and PW2 to suffering, shame and denied them their freedom. However being 1st offenders the court should have considered non custodial sentences and the court hereby sets aside the prison sentence of one year on each count and substitutes it with a fine of Kshs. 10,000/= on each count (count 1 and 3) in default to serve 6 months on each count.

On count 2, the charge of assault Contrary to Section 251 of the Penal Code, the maximum sentence is 5 years. Accused 2 had been sentenced to one year imprisonment which in my view is not harsh or excessive but the court should have given consideration to an option of fine since accused 3 was a first offender. This court hereby sets aside the prison sentence of one year and substitutes it with a fine of Kshs. 16,000/= in default 9 months imprisonment. Orders accordingly.

R.V. WENDOH

JUDGE

Dated at Machakos this 31st day of March 2006

Read and delivered in the presence of

R.V. WENDOH

JUDGE