



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

(CORAM: A.K. NDUNG'U J.)

CRIMINAL APPEAL NO. 63 OF 2018

DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT

VERSUS

SARAH KWAMBOKA OBONGO.....1ST RESPONDENT

OBED GUTO ONDUSO.....2ND RESPONDENT

AGNES NYAMWANGE ONDARI.....3RD RESPONDENT

ROSALIA KASHIMIR OKARI.....4TH RESPONDENT

JULIUS MOINDI ONGERI.....5TH RESPONDENT

ANDREW MORANGA NYAMAO.....6TH RESPONDENT

(Appeal from the acquittal of the Respondents by Hon. R.T. Ateya (R.M) delivered on 25th January 2018 in Ogembo Criminal Case No. 1152 of 2013)

JUDGEMENT

1. This is an appeal by the State against the acquittal of the respondents on grounds that;

a. The learned trial magistrate failed to take into account the evidence produced as a whole but wholly concentrated on the defense evidence totally disregarding that of the prosecution;

b. The trial magistrate erred in classifying the evidence adduced by the prosecution as circumstantial evidence as adduced; and

c. The trial magistrate wrongly evaluated the evidence which resulted in wrongful acquittal of the respondents.

2. It is important to note at the outset that the appellant failed to serve the 2nd and 5th respondent with the appeal and opted to withdraw the appeals against them. There was an assertion by learned counsel for the respondents that the 3rd respondent had been sick and was not able to follow the proceedings but no proof of the said illness was availed in court despite being given an opportunity to do so.

3. Before I delve into the determination of this appeal I must remind myself of the duty of a first appellate court which is to re-evaluate the evidence tendered afresh bearing in mind that it did not see or hear the witnesses.

4. The respondents herein namely **SARAH KWAMBOKA OBONGO, OBED GUTO ONDUSO, AGNES NYAMWANGE ONDARI, ROSALIA KASHIMIR OKARI, JULIUS MOINDI ONGERI** and **ANDREW MORANGA NYAMAO** had all been charged for the offence of committing grievous harm contrary to **Section 234** of the **Penal Code**. It was alleged that on the 2nd day of June 2012, at Kiongongi Sub Location in Sameta District within Kisii County, the respondents jointly with others not before court, did grievous harm to Jane Bochere Ombati.

5. JBO (PW1) recalled that on 2nd June 2012, she was sleeping in her house when she heard a commotion outside at about 6:00 a.m. Shortly afterwards, her door was hit and she was taken outside her house by a group of people. She testified that the moon was out and she named the people she saw as Yusania Moige, Obed Onduso, Agnes Jane, Moaranga Nyamau, Julius Moinge, Sarah Kwamboka Obonyo, Asuga Mbego

and Bongera Andrew. She identified Yusania Moige as the wife to her husband's brother and the rest as people from around.

6. PW1 recounted how she was beaten up by the accused persons who were armed with *pangas*, *rungus* and a cow whip. She testified that on the way to the buying center in Itumbe, she fell down and the accused ran away. She was taken to Kisii Level 5 by other people and the matter reported at Ogembo police station.

7. NOO (PW2) testified that he was at home with his mother PW1 and his siblings on that day when at about 6:00 a.m., their neighbours Suga, Sarah, Obed Guto, Julius and Yusania Moige and other people who were not before court came to their home and went to the main house where PW1 was sleeping. He testified that the respondents told him that PW1 had taken the sub chief's land. They brought her out and began beating up her up with *rungus* and *pangas* as they headed towards the road but ran away when the police arrived.

8. After *voire dire* examination, MNO (PW3) testified that she had also heard the knocking outside. Soon thereafter, the respondents knocked the door open and started beating up PW1 while pulling her outside where they continued beating her. PW3 testified that the respondents were her neighbours. They were armed with *pangas*, *rungus* and cow whips. She recalled that they had also taken iron sheets and Kshs. 5,000/= from the house. They left PW1 outside and their neighbours took her to hospital.

9. Daniel Nyamino (PW4) a clinical officer based at KTRH produced a P3 form filed in respect of PW1 whom he had examined on 26th June 2013. He testified that he observed that PW1's lower limb had a plaster cast with a window on the left leg. The discharge summary of 7th March 2013 revealed that PW1 had suffered a fracture of the left tibia and fibula. By the time he examined her, the injury had lasted approximately 1 year. He told the court that PW1 was admitted at KTRH Ward 2 where she stayed until 7th March 2013. On her last visit in June 2013, it was discovered that her bones had never united and PW1 needed a bone graft and internal fixation. He classified the injury as maim.

10. Maurice Nyongesa (PW5) of Ogembo police station testified on behalf of the investigating officer CPL Alex Ngewa who had retired from the force. He recounted the events of the day and stated that PW1 had been rescued by officers from Itumbe police station. The officers took PW1 to Kisii Level 5 where she was admitted until 7th March 2013 when she was discharged.

11. Sarah Kwamboka (DW1) stated that she did not know why she was in court. She testified that the complainant was her neighbour and she had no dispute with her.

12. Obed Onguto Onduso (DW2) similarly stated that he did not know why he was in court. He testified that on the material day, he noticed that grass had been removed from his brother's roof and he informed DW6 who was a clan elder about it. They followed the trail of grass and found that it was outside the complainant's home. They reported the matter to the chief who also found his stolen onions at the complainant's home. DW2 testified that they had gone back home and did not hurt the complainant.

13. Andrew Moranga Nyamagwa (DW6) confirmed that DW2 had reported the theft of the thatch to him on 2nd June 2012 and that when they followed the trail of the grass, they found it at the complainant's home. He reiterated that they reported the matter to the chief who also found his stolen bananas and onions at PW1's home. He however denied knowing who had assaulted the complainant.

14. Agnes Nyamwange (DW3) testified that she was related to her co-accused but denied knowledge of the attack on the complainant.

15. Eusania Onduso (DW4) stated that the complainant was her brother's wife. She testified that she did not know whether the complainant had been assaulted or why she had been arrested.

16. Julius Ongeri (DW5) testified that he was at home on the material day and did not know what had transpired.

17. Peter Nyanganacha Ondieki (DW7) testified that DW5 lived with him and the accused were his neighbours. He testified that he did not see DW5 assaulting PW1 who was his in law.

18. John Mochama Machogo (DW8) testified that he saw the complainant on the day she had been assaulted but he did not know who assaulted her.

19. Felix Ongwesa Mochama (DW 9) testified that the accused persons were his neighbours and the complainant was his wife. He told the court that on the day in question, he left home for church at 6:00 a.m. and on his way back, he found PW1 on the roadside having been assaulted. He testified that as he left in the morning, he did not hear any commotion and did not find anyone at the scene.

20. On analyzing the evidence placed before it, the trial court held that while it was clear that the complainant was assaulted and sustained serious injuries, there was no evidence tying the accused persons to the offence. It held that although the law allows conviction on circumstantial evidence, the evidence before the court did not meet the threshold for conviction. According to the trial court, the complainant and her witnesses testified that the accused were in a group of people who attacked the complainant but they did not positively identify any of the accused persons as using a particular weapon to assault her and thus acquitted the accused.

21. Directions were taken to dispose of the appeal by way of written submissions. Both parties filed their respective submissions which I have duly considered. I have also had regard to the material placed before this court including the proceedings before the trial court, the impugned decision and the memorandum of appeal.

ANALYSIS AND DETERMINATION

22. The finding by the trial court that the complainant was assaulted and sustained grave injuries on the material day is not challenged. Medical proof of her injuries was tendered by PW4 who testified that PW1 sustained a fracture of the left tibia and fibula and was admitted in hospital from 2nd June 2012 to 7th March 2013. The main issue for determination in this appeal relates to the identification of the respondents as the complainant's assailants.

23. Counsel for the State strenuously challenged the trial court's finding that the prosecution's case was based on circumstantial evidence. He argued that the complainant and her children gave direct evidence and positively identified the respondents as being part of the larger group that had assaulted the complainant.

24. For his part, Learned Counsel for the respondents appears to vacillate in his submissions, on one hand, describing the evidence adduced as circumstantial evidence and delving into an elaboration of the threshold required for such evidence to secure a conviction and, on the other hand, attacking the lack of direct evidence upon which the respondents could have been convicted.

25. Circumstantial evidence is defined in the **Black's Law Dictionary 9th Edition at page 636**as:

"1. Evidence based on inference and not personal knowledge or observation.

...

2. All evidence that is not given by eyewitness testimony."

26. On the same page, the Black's Law dictionary defines direct evidence as:

"1. Evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption."

27. The definition of circumstantial evidence above eliminates eye witness accounts as constituting circumstantial evidence. The prosecution's case as given by PW1, PW2 and PW3 was that they saw the respondents storm into PW1's house at about 6:00 a.m. on the morning of 2nd June 2012 and frog marched her from her house while beating her up with various weapons and left her injured on the road. Their evidence was based on experience and observation and could not be classified as circumstantial evidence as erroneously done by the trial court.

28. Since the prosecution relied on visual identification to implicate the accused persons of the offence, it was necessary to evaluate the evidence carefully to safeguard against a case of mistaken identity. In the oft cited case of **Kiarie v Republic Criminal Appeal 93 of 1983 [1984] eKLR**, the Court of Appeal emphasized that where the evidence relied on to implicate an accused person is entirely of identification that evidence should be watertight to justify a conviction.

29. Similarly, the Court of Appeal in **Wamunga Vs Republic Criminal Appeal No 20 of 1989[1989]eKLR** held;

"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."

30. The identification of the accused persons in this case was by recognition of persons known to the prosecution witnesses. PW1 recalled seeing Asuga Mbego, Mbogero Andrew and the 4th, 2nd, 3rd, 6th, 5th and 1st respondents as part of the group that assaulted her that morning. She testified that 4th respondent was the wife of her husband's brother and the rest of the respondents were her neighbours. PW2 also named all the respondents and one Suga, as PW1's assailants. PW3 testified that she saw all respondents on that fateful morning. She specifically named the 6th, 2nd and 4th respondents as PW1's assailants and testified that the accused were their neighbours. Other than the 3rd and 5th respondents, all the respondents admitted that they knew the complainant. The 4th respondent, also admitted that the complainant was her brother's wife.

31. As held in the case of **Reuben Taabu Anjononi & 2 Others v Republic Criminal Appeals No.s 480, 208 And 209 Of 1978 [1980] eKLR**, the recognition of an assailant is more reliable as compared to the identification of strangers as it depends on the personal knowledge of the assailant. That said, the court is required to take into account that mistakes in recognition of close relatives and friends can be made. A careful analysis of the conditions prevailing at the time is necessary to ensure that the accused were positively identified. Where the conditions make it difficult for identification, a trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused, the time taken by the witness to observe the accused so as to be able to identify him among other factors. (See **R v Turnbull [1976] 3 All E.R. 549**)

32. The attack in this case occurred in the morning at about 6:00 a.m. According to PW1, the moon was out and one could see well. PW2 also testified that there was light outside and one could see.

33. According to PW1, her house was a long distance from the buying centre near Itumbe where the respondents took her. PW2 testified that he was in a house about 2 meters away from the main house where PW1 and his siblings were sleeping when the accused came. He told the court that the respondents kicked him and went to the main house where they kicked the door open. He recalled asking them why they were attacking his mother and he was told that she had taken the sub chief's land. He followed the group a long distance down the road and saw the respondents run away when the police came. PW3 who was in the house with PW1 recalled that she was able to see the respondents and saw that they were armed with *pangas*, *rungus* and cow whips.

34. Judging by the interaction PW1, PW2 and PW3 had with the respondents, it is safe to say that the conditions were conducive for a positive identification. The evidence which I have set out above indicates that the prosecution witnesses interacted with the respondents at close proximity for an extended period of time as they dragged the complainant from her home and clobbered her along the way. They also gave evidence on the intensity of the light which was sufficient to identify the respondents as the complainant's assailants. The trial court did not analyze the manner in which the respondents were indentified. If it had done so, it might have reached the conclusion, as I have, that they were properly identified as the persons who attacked and inflicted PW1 with her injuries.

35. Next, I turn to the trial court's finding that the respondents were not culpable of the crime for the reason that the particular weapon each used to assault the complainant was not specified. Counsel for the State referred this court to **Section 21** of the **Penal Code** on this issue. It provides;

21. When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

36. There was no evidence of a premeditated plan to attack the complainant in the present case. However, a common intention can arise in the course of committing an unlawful act as held by the Court of Appeal in the case of **Dickson Mwangi Munene & another v Republic Criminal Appeal No. 314 of 2011[2014] eKLR**;

"The law is well settled on the definition and in what circumstances common intention can be inferred if it is not express or obvious. Common intention is deduced where there are two or more parties that intend to pursue or to further an unlawful object or a lawful object by unlawful means and so act or express themselves as to reveal such intention. It implies a pre-arranged plan. Although common intention can develop in the course of the commission of an offence, it is normally anterior in point of time to the commission of the crime showing a pre-meditated plan to act in concert. It comes into being, in point of time, prior to the commission of the act."

37. I also find useful guidance in the case of **Dracaku s/o Afia Vs R [1963] E.A.363** where the Court held that *"there was no evidence of any agreement formed by the appellants prior to the attack made by each ... that is not necessary if an intention to act in concert can be inferred from their actions"* like *"where a number of persons took part in beating a thief."*

38. From the facts presented by the prosecution, it is clear that a common intention was formed among the respondents to assault the complainant and cause her grievous harm. The respondents did not dissociate themselves from the unlawful act. PW1 and PW3 testified that the respondents were armed with *pangas*, *rungus* and a cow whip. PW2 stated that each of the accused persons was carrying a *rungu* and the men were carrying *pangas* also.

39. It might not be clear who among them had a *panga*, *rungu* or a *cow whip*. But having been positively identified as among the people who went to the complainant's house purposely to beat her up and did in fact flush her from her house and brutally assault her for an extended period of time; the only logical conclusion to be drawn is that the respondents they were joint offenders in perpetration of the offence for which they were charged.

40. I have evaluated the defences proffered by the 1st, 3rd, 4th and 6th respondents and find that they were no match for the evidence tendered by the prosecution's case. The defences by DW1, DW3, DW4 and their witnesses DW7 and DW8 were mere denials. The defence by DW6 that they found the complainant with stolen grass and farm produce on the day she was attacked did little to exonerate him from the crime. His defence not only put him at the *locus in quo* but also gave him a motive to attack the complainant.

41. In the end, I find this appeal to be merited. I hereby quash the acquittal of **SARAH KWAMBOKA OBONGO, AGNES NYAMWANGE ONDARI, ROSALIA KASHIMIR OKARI** and **ANDREW MORANGA NYAMAO** and substitute thereof with a finding that **SARAH KWAMBOKA OBONGO, AGNES NYAMWANGE ONDARI, ROSALIA KASHIMIR OKARI and ANDREW MORANGA NYAMAO** are guilty of grievously harming Jane Bochere Ombati contrary to section 234 of the Penal Code. I hereby convict them accordingly.

Dated, Signed and delivered at Kisii this 3rd day of February, 2021.

A.K NDUNG'U

JUDGE