REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 25 OF 2018

ALEX MANDELA KATAKA .....1ST APELLANT

ABEL LUMBASI IMBUSI .....2ND APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(An Appeal from the Judgment of the Resident Magistrate Honourable E. Kigen in Eldoret Criminal Case No. 5866 of 2015 dated 6th April, 2018)

JUDGMENT

ALEX MANDELA KATAKA and *ABEL LUMBASI IMBUSI* were jointly charged in the lower court with the offence of assault causing actual bodily harm, contrary to *Section 251* of the *Penal Code.*

The particulars of this offence are that on the 18th day of October, 2015 at Lukusi village in Lugari district within Kakamega County, the two appellants jointly, willfully and unlawfully assaulted *Robert Luvisia Malimasi* thereby occasioning him actual bodily harm.

The prosecution case is that on 1st October 2015 PW-1 and PW-2 were at a funeral. There was music. At about 2.00 a.m they heard a girl calling for help. They went to where the call had emanated from, which was at a nearby footpath. They found people who had wanted to rape the girl. The assailants escaped when PW-1 and PW-2 arrived. PW1 and PW-2 pursued them. Along the way they got one suspect. They took him back to the girl for identification and the girl exonerated him. Suddenly there was commotion. *Alex Mandela* had attacked the complainant from behind. *Abel Lumbasi Imbusi*, who is described by PW-1 as an uncle to *Alex Mandela Kataka*, joined in and they both attacked the complainant. *Abel Lumbasi Imbusi* drew a sharp object from his pocket and cut the complainant with it on the head. The complainant was rushed to Lumakanda hospital for treatment and thereafter reported the matter at Lumakanda police station.

PW-1 used moonlight to see and identify the assailants. PW-2 stated the two appellants were his neighbours.

On 14th October, 2015 the P-3 form for the complainant was filled at Lumakanda Sub County Hospital by *Eunice Chebet*. She noted that PW-1

had a deep cut wound on the head with two layers. The wound had been stitched. It could have been caused by a sharp object. She classified the degree of injury as harm. The said P-3 form was produced by PW-4 as an exhibit. On this same day, one *InduKa Ezekiel*, who is the chair community policing of Chekalini, was requested by the assistant chief to arrest the two appellants for assaulting someone. He did so and handed them at Lumakanda police station. The complainant was present and had bandages on the head.

PW-5 investigated the matter. The report had been made on 5th October, 2015. Complainant alleged he was assaulted by the appellants. His statement as well as those of other witnesses were recorded. A blood stained shirt was handed over as an exhibit. The P-3 form was filled and the suspects arrested. They were then charged.

The appellants gave each a very brief sworn evidence in their defence. The 1st accused said he reside in Musembe. He does not work. He is married with one child. The offence is not true as he has never assaulted anybody.

The second accused said he's a farmer and resides in Musembe. He is married with two children. He denied the offence saying he had not wronged anybody.

The trial court weighed the evidence and found both accused guilty of the offence. They were convicted and sentenced each to 18 months imprisonment.

Dissatisfied with the said conviction and sentence, they appealed separately. *Alex Mandela Kataka* appealed in file No. 25 of 2018 and *Abel Lumbani Imbusi* in file No. 26 of 2018. The two appeals were consolidated on 14th June, 2018 in file No. 25 of 2018.

Both appellants had raised 12 similar grounds of appeal which may be summarized into two, that the prosecution did not prove their case beyond reasonable doubt and that the sentence imposed, given the circumstances was very harsh.

The Appellants and the state prosecutor submitted orally during the hearing of the appeal.

I have re-evaluated the evidence on record, the judgment of the lower court, sentence passed and considered the raised grounds of appeal and the submissions by both parties.

The trial magistrate in her judgment had it wrong when she found that:-

> ***"The evidence of PW-1 is corroborated by the evidence of PW-2 an eye witness who was present at the scene. Both witnesses stated that the accuseds were known to them as they were neighbours. They further confirmed that they were able to identify the accused using light from the moon as well from their voices as they had insulted the complainant before attacking him".***

Looking at the evidence of these two witnesses, PW-1 said, ***"I knew the accused before that day. There was moonlight and I could identify the accused persons".*** On cross examination by PW-1 he said, ***"I am sure you are the one who assaulted me. You began by abusing me and later you assaulted me. You assaulted me and your uncle joined you and you went on to assault me. I do not know why you assaulted me".***

This witness never said anywhere that the appellants were his neighbours. He as well did not state anywhere that the 2nd appellant (accused) spoke to him. He also did not claim to had recognized or identified any by their voice.

PW-2 on his part, on the alleged issues stated in his evidence in chief;

> ***"…. I know the first accused person he is my neighbor as well as the 2nd accused. ……. suddenly there was commotion and I saw the 1st accused he was holding Robert fighting from behind the 2nd accused took a sharp object from his pocket and cut the said Robert on the head".***

On cross examination by the 2nd accused, he stated;

> ***"I pleaded with you to let go of the complainant. You had a jacket on".***

This is the witness who said the appellants were his neighbours. As he introduced himself he said he resides at Musembe. PW-1 said he lives in Lugari Chekalin. These are two different places and it was not explained how far apart they are. It can't therefore even be argued that since the appellants are neighbours to PW-2, they must as well be neighbours to PW-1. PW-2 did not disclose the source of the light that enabled him see what was happening if at all there was any light. He did not state that any of the appellants spoke to him or heard him speak. Saying that he pleaded with the 2nd accused to let go of the complainant, suggests it is PW-2 who spoke to the 2nd accused and not the vise-versa.

PW-1 did not state how he knew the accused persons and for how long. PW-2 said they were his neighbours and did not also state for how long he had known them and how close they were as neighbours.

Though he said he lives in Musembe and the appellants as well in their defence stated they live in Musembe, we do not know whether Musembe is an estate, village, sub location, location or rather how big and therefore how apart or close they could have been as neighbours. It is vivid that the evidence of these two witnesses does not corroborate each other on the vital issues as alleged by the trial magistrate in her judgment.

PW-1 alleged he was able to see using moonlight. Though he never indicated the time the incident took place, having talked of moonlight suggests it was at night. PW-2 was clear in that it was at 2.00 a.m. That is at night. There was a funeral and music according to PW-2. There was a crowd. The court was not told the size of the moon and the intensity of its light. Likewise, it was not told how long the incident took or for how long the witnesses ***"saw"*** the appellants. The law in relation to recognition or identification of suspects is as was pronounced in the case of ***Wamunga –vs- Republic, Criminal Appeal 20 of 1989 KLR [1989] 424.*** That is, when the prosecution is relying entirely on the evidence of recognition or identification, 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 a conviction. While it is appreciated that recognition may be more reliable than identification of a stranger. It is possible for mistakes in recognition of close relatives and friends, sometimes to be made.

The circumstances under which PW-1 and PW-2 claims to had recognized the appellants herein are not convincingly favourable. There is a possibility that they made mistake of them. The trial court did not evaluate the evidence properly and ended up arriving at the wrong decision that they were properly identified. I do resolve the doubt in their favour.

Its effect is that the appeal is merited. The conviction and sentences passed are quashed. The appellants are set free unless otherwise lawfully held.

S. M GITHINJI

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 1st day of November, 2018

In the presence of:-

Ms Khayo for the appellants

Ms Oduor for the state

Mr. Mwelem - Court assistant