



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 41 OF 2014

1. PASTE ABOLO ANTONY.....1ST APPELLANT
 2. STEPHEN ANGURA ODEKE.....2ND APPELLANT
 3. FESTAS MIODI OPUKO.....3RD APPELLANT

VERSUS

REPUBLIC OF KENYA.....RESPONDENT

Consolidated with

CRIMINAL APPEAL NO. 42 OF 2014

STEPHEN ANGURA ODEKE.....APPELLANT

VERSUS

REPUBLIC OF KENYA.....RESPONDENT

AND

CRIMINAL APPEAL NO. 43 OF 2014

FESTAS MIODI OPUKO.....APPELLANT

VERSUS

REPUBLIC OF KENYA.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 1946 of 2013 in the Chief Magistrate’s Court at Busia – Ogola D. O. (CM) on 26th November, 2014)

JUDGEMENT

1. On 26th September, 2016 this appeal (Busia High Court Criminal Appeal No. 41 of 2014 Paste Abolo Anthony v Republic) was by consent of the parties consolidated with Busia High Court Criminal Appeal No. 42 of 2014, Stephen Angura Okeke v Republic and Busia High Court Criminal Appeal No. 43 of 2014 Festus Miodi Opuka v Republic. With that consolidation, the lead file became Busia High Court Criminal Appeal No. 41 of 2014. Paste Abolo Anthony, Stephen Angura Okeke and Festus Miodi Opuka

are now the 1st Appellant, 2nd Appellant and 3rd Appellant respectively.

2. The appellants appeal against the conviction and sentence in Busia Chief Magistrate's Court Criminal Case No. 1946 of 2013.

3. The 1st, 2nd and 3rd appellants were the 1st, 3rd, and 2nd accused persons respectively in the trial before the lower Court. After the appeals were consolidated, each Appellant filed amended grounds of appeal on 6th February, 2017.

4. Upon perusal of the amended grounds of appeal filed by each Appellant, I find them to be similar. Those grounds of appeal can be condensed as follows: -

(a) That the appellants were charged and convicted on a defective charge;

(b) That the trial Magistrate failed to evaluate the evidence and misapprehended the same thereby arriving at the wrong decision;

(c) That the trial Magistrate erred in fact and in law by not observing the contradictions in the evidence and thereby arrived at the wrong decision; and

(d) That the trial Court failed to consider the defences put forward by the appellants.

5. A ground of appeal unique to the 3rd Appellant is alleged breach of Article 49(1)(a)(i) of the Constitution. He asserts that he was not promptly informed of the reason for his arrest.

6. The prosecution's case as presented to the trial Court was that on 15th November, 2013 at around 10.00pm PW2 Rosemary Awiyo the wife of the complainant (PW1 Clement Okaka) was in her house with her two children. She went to close a window and that is when she was shown a knife by some people and told that she would be killed if she did not open the door.

7. PW2 opened the door for the people who upon entering the house demanded that she gives them Kshs.100,000/= being proceeds from the sale of land which her husband had given her. She told them that she had no money. They ransacked the house and retrieved Kshs.20,000/= from the shirt of her husband. As they were exiting, they met PW1 approaching his house and cut him causing him grievous harm.

8. It was the prosecution's case that two of the three people were identified as step-brothers of the complainant. The third person was said to be a neighbour of the complainant. The following day they were arrested and after investigations they were charged with robbery with violence contrary to Section 296(2) of the Penal Code.

9. The complainant told the Court that on 15th November, 2013 in the evening he was at the home of his brother PW3 Rodorico Oketch. At about 10.00pm he left for his house. A few steps from his house he saw Paste Abolo, Angura Amukanga and Boniface Ekedenyala walking out of his house. He went and stopped outside his door and it was then that Paste Abolo cut him on the head with a panga. He used his left hand to shield his head and two fingers were chopped off. He screamed but nobody went to his rescue. His son went and called PW3. The next day he was taken to Alupe Hospital where he was admitted for treatment. His wife informed him that she had been robbed of Kshs.20,000/=.

10. The evidence of PW2 was to the effect that on the material night she was in her house with her two children when she went to close the window. It was then that she was shown a knife by some people who threatened to kill her if she did not open the door. She opened the door for them. Upon entering the house they demanded for money. After she told them she had no money they ransacked the house and took away Kshs.20,000/= from the shirt of her husband which was hung on a string. Her son later named the appellants as the people who robbed her.

11. PW3 told the Court that when he arrived at the home of the complainant he found that he had been injured. The complainant named Paste Ekidenyete and Angura as his attackers.

12. PW4 Benson Emokoba a clinical officer at Alupe Sub-County Hospital produced a P3 form showing that the complainant lost the left thumb and first finger. He concluded that he had suffered grievous harm.

13. PW5 police constable Elvis Kamangol of Mukolisi Police Post testified that on 16th November, 2013 the complainant went and reported to him that he had been assaulted the previous night by three people known to him. He named his assailants as Paste, Festus and Stephen. Stephen was later escorted to the post by members of the public. He rearrested him. He also arrested Boniface. He took the two to Adongosi Police Station. He identified the 2nd Appellant at the trial as Stephen. He also identified the 3rd Appellant as Boniface.

14. PW6 Henry Ajulu Omutoka told the Court that on 16th November, 2013 at about 9.00 am he heard his brother Selerio Okwani talking to somebody. He went to check and found a stranger who told them that he comes from Ongulu. The stranger told them that he had been chased by villagers from Okwata as his brother had been cut with pangas at night. The stranger had blood on his forehead and right hand. They alerted the Assistant Chief who later called them and told them to detain the man as he was suspected of cutting his brother. They later took him to Machakosi Administration Police Camp. He pointed to the 1st Appellant as the stranger they had arrested.

15. PW7 police constable Fred Luchau was the investigating officer. I shall come back to his evidence in due course.

16. The 1st Appellant testified in his defence as DW1 and called his wife DW2 Eunice Akisa as his witness. He told the Court that on the material day he went home at 5.00pm and did not leave up to the next day. The following day he proceeded to the farm and while there he saw a big crowd going to where he was. They attacked him claiming that he was a thief. His wife supported his testimony.

17. The 3rd Appellant who testified as DW3 told the Court that on 16th November, 2013 he was at his home when police officers went and searched his house before being escorted to Adungosi Police Station where he was locked up and later charged.

18. The 2nd Appellant testified as DW4 and told the Court that on 16th November, 2013 while going home from work, he met members of the public who demanded that they proceed to the police station. He complied and at the police station he was told that Clement Okaka had been attacked and robbed and it had been alleged that he was among the robbers. He was later charged.

19. The duty of a first appellate court is to re-evaluate the evidence tendered in the trial afresh in order to arrive at its own independent decision. In doing so, the court must remember that, unlike the trial court, it did not have the benefit of seeing and hearing the witnesses testify-see **Okeno v Republic [1972] E.A. 32** and **Ogeto v Republic [2004] KLR 14**.

20. The grounds of appeal in this matter are intertwined and I will straight away proceed to state my view on the appeal.

21. The complainant testified that he identified the three robbers as the appellants as there was bright moonlight. His evidence as to the source of light that assisted him to identify the robbers was contradicted by his brother PW3 who told the Court that it had rained on the material night and it was very dark.

22. The evidence of the wife of the complainant is intriguing. She told the Court that she had lived with the complainant for four years and the 1st and 3rd appellants were her brothers-in-law. She knew them very well before the material night. It was her evidence that she did not identify any of the robbers

although they talked to her and were in her house for over 30 minutes. Her evidence can either mean that the robbers were strangers or it was so dark that she could not see anybody.

23. When cross-examined by the 1st Appellant, PW7 told the Court that the robbers were three despite the fact that he had recorded in his statement that they were four. There is also the mystery of one Boniface Ekadenyala. Nobody seems to know this person who was said to have been one of the robbers.

24. The evidence on the identity of the robbers is shaky. Indeed PW2 told the Court that it was her son who gave her the names of the robbers. There is no explanation how her son managed to identify the robbers yet she had failed to do so. Her son was not called as a witness.

25. Was the complainant actually robbed? The complainant testified that his wife told him that the robbers had taken Kshs.20,000/= which he had given her after selling land. In her evidence-in-chief the complainant told the Court that Kshs.20,000/= had indeed been removed from the shirt of her husband. Upon cross-examination she changed her evidence and stated that Kshs.30,000/= had been taken from her.

26. One may excuse the contradiction as to the amount stolen. However there are other signs that seem to point to the fact that nothing was stolen from the complainant on the material night. PW5 who was the first police officer to come into contact with the complainant told the Court that the complainant reported to him that he had been assaulted the previous night by three people known to him. In his evidence-in-chief and during cross-examination, PW5 never mentioned that the complainant reported to him that money had been stolen.

27. The evidence on record does not support theft of money from the wife of the complainant. In my view, the offence that was committed on the material night was grievous harm. There is however irreconcilable evidence on record as to the identification of the people who committed the offence and it would be very difficult to conclude that the appellants are the persons who injured the complainant on the material night.

28. There was evidence adduced in Court showing that the 1st Appellant had blood at the time of his arrest. This can be explained by his testimony to the effect that he had been assaulted before he went to seek refuge at the home of the brother of PW6.

29. Before, I conclude I need to mention one issue that was not raised by any of the parties. When the matter came up for further hearing before the trial Court on 8th April, 2014, the 3rd Appellant did not attend Court as it was alleged that he had been arrested in Uganda. At that time T. Wanjiru Cherere, CM (as she then was) was the trial magistrate. On 22nd April, 2014 Ogola D. O, CM (as he then was) took over the matter. The 3rd Appellant had not yet turned up in Court. On 17th June, 2014 he complied with Section 200 of the Criminal Procedure Code (Cap. 75) in respect of the 1st and 2nd appellants. He then proceeded to record the evidence of PW6 and PW7 where upon the prosecution closed its case. The trial Court ruled that the appellants had a case to answer and placed them on their defence. The defence hearing was fixed for another date.

30. On 13th April, 2014, the surety of the 3rd Appellant produced him in Court and applied to be discharged. The surety was discharged and the defence hearing fixed for 10th November, 2014 when Section 211 of the Criminal Procedure Code (Cap. 75) was complied with and the matter proceeded to defence hearing.

31. There are two errors in how the matter proceeded in respect to the 3rd Appellant. Firstly, he did not have the opportunity of cross-examining PW6 and PW7. Upon his arrest PW6 and PW7 ought to have been recalled so that they could testify afresh and give him an opportunity to cross-examine them. Secondly, Section 200 of the Criminal Procedure Code (Cap. 75) was not complied with in respect to this particular Appellant. The right availed to an accused person by Section 200 is sacrosanct. The provision must be complied with so that the accused can make a choice as to whether to have the matter start

denovo or ask for recall of the witnesses either to testify afresh or for cross-examination only. Of course whether the Court will accept the decision of an accused person to recall witnesses is a matter to be determined by the Court depending on the circumstances of the particular case.

32. The trial and conviction of the 3rd Appellant was attended by fundamental defects and were this Court to uphold the convictions of the appellants, the best order in respect to the 3rd Appellant is to order a retrial.

33. I have pointed to contradictions in the evidence of the prosecution witnesses that go to the root of the prosecution case. Our law, save in exceptional situations, places the burden of proving a criminal case on the prosecution. The prosecution must establish the guilt of an accused person beyond reasonable doubt.

34. In this case the evidence on identification was so contradictory that to arrive at a conviction in reliance on the same would result in injustice. There is also doubt as to whether the offence charged was indeed committed as the element of theft was not satisfactorily proved.

35. As was stated in **Woolmington v DPP [1935] AC 462**, “[i]f, at the end of the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner ... the prosecution has not made out the case and the prisoner is entitled to an acquittal.”

36. In the case at hand, I find sufficient doubt to warrant a reversal of the conviction of the appellants. The appeal by each appellant succeeds. The conviction of each appellant is quashed and the sentence imposed on each one of them is set aside. Each appellant is set at liberty unless otherwise lawfully held.

Dated, signed and delivered at Busia this 30th day of March, 2017

W. KORIR,

JUDGE OF THE HIGH COURT