



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

HCRA NO. 21 OF 2014

KEVIN MAKOKHA.....1ST APPELLANT

EVANS OGANDO.....2ND APPELLANT

ROBERT WASWA 3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the Judgment of C.M CR. Case No. 395 of 2014 delivered by D.O.Ogolla CM on 25th June 2014)

J U D G M E N T

1. Kevin Makokha (The 1st Appellant), Evans Ogando (The 2nd Appellant) and Robert Waswa (The 3rd Appellant) are each serving a sentence of 5 years imprisonment after having been convicted of the offence of Causing Grievous Harm contrary to section 234 of the Penal Code.
2. Although the trio had been charged alongside a 4th Accused person of attempted robbery with violence, the Trial Court did not find that the evidence established that crime. That notwithstanding, the Trial Court found that the evidence was sufficient to prove that the three Appellants had committed the lesser offence of Causing Grievous Harm contrary to section 234 of the Penal Code and proceeded to convict under the provisions of section 179 (2) of the Criminal Procedure Code. That section reads:-

2. When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.
3. At Trial, the Appellants challenged the sentence only. However, The State Counsel pointed out the conviction may have been unsafe and requested this court to re-evaluate the evidence.
4. The only direct evidence led by the Prosecution was the account of Edwin Onyango Bonya (The Complainant). He is a BodaBoda rider and all the three (3) Appellants are known to him. That on 22/2/2014, he carried the three persons as passengers for about 200 meters. That the 1st Appellant sat immediately behind him and then the 2nd Appellant and 3rd Appellant in that order.
5. After the 200 meters, the 3rd Appellant asked him for the key to the motor cycle but he did not oblige. He then described what followed:

“I then found someone standing on the way I slowed down and accused 1, 2, and 3

jumped off the motor cycle. Someone slapped me and I started to lose control. While I was struggling to escape the 4th person that I did not identify hit me on right eye with a stone. I managed to escape and go home. I reported the matter to my brother Vincent”

The further evidence is that the Complainant sustained injury on his lower jaws and left eye. He also lost some teeth.

6. The Complainant did not directly state how each of the 3 Appellants attacked him. Indeed in his evidence in chief he does not state that any of the 3 Appellants attacked him. He does not seem to have seen the person who slapped him. Although on cross examination by the 3rd Appellant, he said:-

“After we drove for a while you attacked and beat you (sic)”

the witness does not elaborate how he was attacked by the said assailant. In addition it is not suggested that the three acted in concert with the unknown 4th assailant who is said to have hit the complainant with a stone on the right eye. This Court is unable to reach the same conclusion as the Trial Court that there was prove, beyond any reasonable doubt, that the three attacked the Complainant and caused him grievous harm. The evidence is far too thin.

7. The upshot is that I do hereby quash the conviction against all the 3 Appellants and do hereby set aside the sentences imposed on them. The three shall be set free at once unless held for some other lawful reason.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 12thDAY OF MAY 2015.

F. TUIYOTT

J U D G E

IN THE PRESENCE OF:

OILE.....COURT CLERK

All Appellants present in person.....FOR THE APPELLANT

Owiti.....FOR THE RESPONDENT