REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT KISUMU

(Coram: Hancox, J A Chesoni and Platt, Ag JJ A)
CRIMINAL APPEAL NO 99 OF 1983
BETWEEN

1. BENSON MOENGA NYAGWECHA)……..APPELLANT

2. MOSES OROKO)

AND

REPUBLIC…….RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisumu (schofield, J) dated 12th August, 1983
in
Criminal App No 290 & 291 of 1983)

JUDGMENT OF THE COURT

The two appellants, Benson Moenga Nyagwencha and Moses Oroko appeal from their conviction on the first count of causing grievous harm contrary to Section 294 of the Penal Code (Cap 63). On the second count they were convicted of unlawfully damaging property contrary to Section 339 (1) of the Penal Code. The appellants were sentenced to four years' imprisonment together with ten strokes of corporal punishment and to a concurrent term of two years' imprisonment on count two. But as a result of the first appeal, while the High Court confirmed the convictions and sentence imposed on the first count, it allowed the appeal of the appellant Benson against sentence on the second count reducing it to six months imprisonment together with ten strokes of corporal punishment and to a concurrent term of two years' imprisonment on count two. But as a result of the appeal, while the High Court confirmed the convictions and sentenced imposed on the first count, it allowed the appeal of the appellant Benson against sentence on the second count reducing it to six months imprisonment, while in the case of the appellant, Moses he was acquitted and sentence set aside. The present appeal largely concerns the conviction of the appellants on the first count.

Mr Obura who appeared for both appellants directed our attention to three matters:

1. whether the evidence of identification of the appellants was free from the possibility of error;

2. whether the discrepancies in the evidence of prosecution witnesses had been properly evaluated by the courts below; and

3. whether the defence of the appellants had been sufficiently taken into account.

We may say at once that the third ground was partly abandoned because the appellant, Benson was thought to have put forward a defence of alibi, while in fact he had not. Mr Obura therefore conceded that the courts below had made no error on this point. In the case of Moses Oroko, he had put forward an alibi which was properly considered by the courts below. Otherwise we shall deal with the defence in general later on.

On the first ground Mr Obura complained that the complainant and victim of the attack on the first count, one John Makori Ntabu, had not had the means of identifying the appellant, because he had been seriously injured in the eye. It was further said that the supporting witnesses - namely Matundura Nyakeiya, the mother of John Makori, and Malaki Atony Nyakeiya, were not close enough with sufficient light, to be able to see who it was that was assaulting the complainant.

The facts may be related shortly as found by the lower courts. John Makori had been walking home from Itibo market at about 8 pm on February 28, 1982. He was carrying a torch. On the way, before he reached home, he met a group of some seven people, of whom he said he recognised six persons. They included the persons whom we have mentioned at the beginning of this judgment, as well as a man called Sunda, who has not yet been brought before the court. It was Sunda who came up to the complainant and accused him of stealing his lady friend. When the complainant first saw the group of people he flashed his torch at them and greeted them. Four men in the group had torches also. The greeting was not returned. The complainant noticed Sunda carrying a walking stick, when he made the accusation against him. The appellant Benson carried a simi, Thomas Atondi carried a Somali Sword, the appellant Moses Oroko an iron-bar, and Simon Monyanche carried a club. The complainant denied Sunda's accusation and indeed knowing anything about the lady concerned. But before he could finish answering, Sunda attacked the complainant hitting him on the right jaw, and the appellant Benson slashed him with his simi over the right upper arm. Thomas Atandi stabbed the complainant with his somali sword on the right eye, and Moses Oroko got a panga from another man and slashed him over right leg and lower. Being in the vicinity of his home, his screams alerted his family. His brother Malaki informed his mother Matundura and they went towards the screams. Matundura and Malaki were able to see the appellants Benson and Moses Oroko. The appellant Benson came towards them while the appellant Benson came towards them while the appellant Moses Oroko told them to go away. The appellant aimed a blow with his panga at Matundura, which she warded off with the aid of the lantern. The result was that the lantern was broken and fell to the ground. Matundura and Malaki ran away, but after sometime recovered their courage and went back to the complainant, whom they found seriously injured. They eventually got transport and took the complainant to hospital and after some time he recovered except that he has lost the sight of his eye and full use of his right arm, and complains of other deformities apparently not noticed by the doctor. There is no doubt that this was an extremely serious attack carried out with common intent by the group. But Mr Obura is entitled to ask this court to scrutinize the evidence with great care, because the attack took place at night, and was set in motion quickly.

The witness Malaki had heard the complainant crying that "Nyagwencha's people are beating me." The appellant Benson carries that name, it is the name of a person who lives in the complainant's village. The complainant and his family knew this appellant and Moses Oroko and so strictly speaking this was a case of recognition and not identification. Mr Obura accepted. There is no doubt, as the courts below both held, that the complainant had had time to recognise his assailants before the attack on him commenced. He had used his own torch, and had exchanged a short conversation with them. He was likely to be well aware of what was happening because of Sunda's accusation against him. As the story runs, he has not tried to explain the actions of all the members of the gang, but of only those who commenced the attack upon him. Later on, he explained that he recognised Sunda and other people after he gained consciousness at the hospital. There is therefore, evidence which the lower courts could accept.

But in reviewing the evidence by the trial court, the learned Judge on first appeal decided to give Thomas the benefit of the doubt. He made clear that he did not impugn the evidence of the complainant, but held that as there was no corroboration, it would be safer to base a conviction on the first count, on the evidence of the complainant as corroborated by the evidence of Matundura and Malika.

Mr Obura attacked this decision for two reasons. He said that doubt must be cast upon the evidence

accepted, by the acquittal of Thomas Atandi, and secondly he asserted that the evidence of Matundura and Malaki was unreliable. We cannot accept either argument. The trial court had accepted the evidence of the complainant, his mother and his brother, and despite the discrepancies as to time and place, there was evidence to support that decision. On first appeal, the learned judge did not find that the evidence of recognition had been wrongly received, or that there has been any misdirection or non-direction with regard to their evidence. He was careful to point out that he was treating the recognition of the appellant Benson and Moses Oroko from a legal point of view, namely, that while the evidence of recognition might be right, it would only be safe to convict those assailants, who had also been seen by Matundura and Malaki. This is now a second appeal on matters of law. There was no fault in the way in which the evidence was received and evaluated, and we can only say that the learned judge had appreciated Mr Obura"s general argument, and had only convicted those persons against whom there was supporting evidence, apart from that of the complainant.

With regard to the second argument, we have considered whether there were any legal grounds why the evidence of Matundura and Malaki should not have been accepted as confirming the testimony of the complainant. We are satisfied that the lower courts were entitled to accept their evidence. Looking at all the surrounding circumstances, as Mr Obura submitted was the proper approach, we cannot see that the evidence of Matundura and Malaki was affected for instance by anything said by the hostile witness or by the Baraza which the appellant Benson had caused to be heard.

This leads us to the last question argued by Mr Obura. It appears that the appellant Benson had complained to the assistant chief that he and others were being blamed for the attach on the complainant. A baraza was held by the chief in which the father of the complainant appeared, but did not actually name the appellant. It is clear that neither Matundura nor Malaki complained either. It is said that by forcing an open baraza to be held, the appellant Benson had demonstrated his innocence, and the trial court had not taken this into account. It was the substance of the defence which was hardly referred to by the trial court. It was conceded that the learned Judge dealt with this matter on first appeal; but it was Mr Obura's contention that that was not sufficient.

There is no doubt that the trial court recognised that the appellant Benson had given evidence on oath and had called two witnesses in defence the purport of all of which, was simply that this appellant had denied committing the offence. It is of interest to note that the appellant's advocate Mr Ondaba in summing up the case, did not mention the baraza aspect of the defence. He did not refer to the baraza at all or to the evidence of the defence witnesses, such as the assistant chief, who confirmed that the baraza had been held. Neither did the prosecutor. The impression might be left that this evidence was more prejudicial than probative, and that therefore it was best left aside. However that may be, the learned Judge explained that the trial court was not told when the baraza had taken place. It could well be that Matundura could not attend, because she was still at the hospital with her grievously injured son. If that is so, that would explain why the father, who was a man largely confined to his home, had been unable to make a clear accusation, until the complainant was well enough to confirm who had attacked him. It is clear that the complainant was convinced of his recognition, and that it was he who later recognised the appellant in a public gathering, and took the police to arrest him.

Having considered all the evidence, we agree with the learned Judge that had this issue been pressed at the trial, it would not have affected the learned magistrate's assessment of the rest of the evidence.

In conclusion therefore, we confirm the convictions of the appellant on the first and second counts and as the sentences imposed thereon were lawful, we dismiss this appeal. In the case of the appellant Moses we confirm his conviction in count one and the sentence imposed thereon which was lawful. Therefore the appeal is dismissed in its entirety.

Dated at Kisumu this 9th day of December, 1983.

A R W HANCOX

JUDGE OF APPEAL

Z R CHESONI

AG JUDGE OF APPEAL

H G PLATT

AG JUDGE OF APPEAL