Oque v Osii & 2 others (Criminal Appeal 55A of 2018)
[2024] KEHC 8102 (KLR) (19 March 2024) (Judgment)

Neutral citation: [2024] KEHC 8102 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL 55A OF 2018

KW KIARIE, J

MARCH 19, 2024

BETWEEN

CHRISPINE OMULO OQUE ..... APPELLANT

AND

ROCHI OSII ..... 1ST RESPONDENT

SULMAN OUMA AKELLO ..... 2ND RESPONDENT

KENNEDY ..... 3RD RESPONDENT

(From the original conviction and sentence in Criminal case NO.576 of 2016 of the Chief Magistrate's Court at Homa Bay by Hon. T. Obutu–Senior Principal Magistrate)

JUDGMENT

1. Chrispine Omulo Oque, the appellant herein, was the complainant in a case where the respondents were charged with an offence of assault causing actual bodily harm contrary to section 251 of the *Penal Code*.

2. The particulars of the offence are that on the 25th day of September 2016, at Got Kokech village, Homa Bay District, within Homa Bay County, jointly with others not before the court, wilfully and unlawfully assaulted Chrispine Omulo Okwe, occasioning him actual bodily harm.

3. The respondents were convicted, and each was sentenced to pay a fine of Kshs. 20,000.00 or, in default, to serve six months imprisonment. The appellant was aggrieved and filed this appeal against the sentence. He raised grounds of appeal as follows:

    a. That the appellant was robbed of Kenya Shillings (7) seven thousand by three people (persons) by the respondents.

    b. That the incident caused the appellant to separate from his family.

c. That matter was reduced to assault, yet it was a robbery.

d. The trial court did not consider the appellant's pain.

4. There was no indication that the first and the second respondents were served with the Notice and the appeal record. Only the third respondent attended court on the 22nd day of February 2024. Subsequently, Mr. Brian Mboya filed a notice of appointment and submission on behalf of the respondents on the 27th day of February 2024. The appeal was opposed.

5. This is a first appellate court. As expected, I have analyzed and evaluated all the evidence adduced before the lower court. I have concluded, considering I have not seen or heard any witnesses. I will be guided by the celebrated case of *Okeno v Republic* [1972] EA 32.

6. There are procedural issues that the appellant overlooked. One cardinal principle in dispensing justice is that no party should be condemned unheard. When this appeal was filed in 2018, the respondents were not served. Secondly, the ODPP was expected to file the appeal, but it would appear the appellant overlooked this fact and opted to clothe himself with the powers of the ODPP. This court is aware of the provision for private prosecution, but that differs from his chosen route. However, I will address the merits of the appeal despite the procedural breach.

7. The respondents were charged with an offence of assault causing actual bodily harm contrary to section 251 of the *Penal Code*. Though the evidence he gave in court tended to point to a robbery, unless the prosecution substituted the charge, the learned trial magistrate could not convict the respondents for an offence they had not been charged with.

8. Section 179 of the *Criminal Procedure Code* provides:

(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved to reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

9. From the preceding provisions, the learned trial magistrate could only convict for a lesser offence if this is proved and not for a more severe offence than the one charged.

10. My perusal of the evidence on record indicates that the appellant testified on the alleged robbery. The evidence could not sustain a robbery charge, and it may explain why the prosecution charged the respondents with an offence they could have proven.

11. An appellate court would interfere with the trial court's sentence only where there exists, to a sufficient extent, circumstances entitling it to vary the trial court's order. These circumstances were well illustrated in the case of *Nillson v Republic* [1970] E.A. 599, as follows:

> The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in *James v. RE*X (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor. To this,

we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. *R v. Shershewsity* (1912) C.CA 28 T.LR 364.

12. No sufficient reasons have been adduced to show that the learned trial magistrate acted upon some wrong principle or overlooked some material factor. The appeal is therefore dismissed.

DELIVERED AND SIGNED AT HOMA BAY THIS 19TH DAY OF MARCH 2024

KIARIE WAWERU KIARIE

JUDGE