



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL APPEAL NO. 34 OF 1975**

**BARNABA ONDIEK.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

On September 20, 1975 the learned Resident Magistrate of Kisumu convicted the appellant, the then chief of West Kano, of wrongfully confining Mr Samson Okuni, Mrs Leonida Munga, Mr Opemo Misanga and Mr Otieno Owuor in the cells at his 'command post' at Rabuor on December 11, 1974 contrary to Section 263 of the Penal Code. He sentenced the chief to nine months imprisonment.

Each victim, or complainant, was the subject of a separate count, namely, counts 1, 3, 4, 5 and 6. It was not specified to which count this sentence related and, if it were to each, whether the sentences were concurrent.

He acquitted the appellant on the other counts, counts 2 and 4, which alleged Mr Samson Okuni and Mrs Leonida Munga were each the subject of an unlawful assault causing them actual bodily harm contrary to Section 251 of the Penal Code.

The prosecution case, briefly, was this. Mr Samson Okuni was visited by Mrs Leonida Munga, Mr Opemo Misanga and Mr Otieno Owuor, all from Alego, at about 12.30 pm on December 11, 1974. They had some suitcases with them but no medicines. They had known one another since 1963 or 1965 but this was their first visit. Mrs Leonida Munga's husband, Mr Joseph Owuor, died in 1971 but in his life, he had been a faith healer or witch doctor. His brother was Mr Otieno Owuor. The witch doctor had treated in 1967 a Mr Caleb Odeny, who lived near Mr Samson Okuni, and this Mr Caleb Odeny had been healed, or, at any rate, he had survived his treatment, but had not paid for it. So his visitors from Alego, the wife, brother and friend of the witch doctor, had come to stay a night with Mr Samson Okuni and he would take them to Mr Caleb Odeny to collect the fees he owed for the witch doctor's services.

Half an hour after these Alego visitors came Assistant Chief Morris Otieno, Mr Charles Ochiako (a son of the appellant), Mr Martin Abuto (the father of the neighbour patient, Mr Caleb Odeny), Mr Mathayo Abuogi (Caleb's uncle), Mr Onyango Bitonge and a Mr Elijah Sure. They told Mr Samson Okuni and the Alego group they were under arrest and were to be taken to the appellant together with the visitors' luggage.

Off they went to the camp of the chief at Rabuor where they met the appellant in his office. They were interviewed by him there in the presence of about fifteen people who were already there on other matters. They included Mr Naftali Ongore, Mr Jafeth Odeny, Mr Francis Onyacha, Mr Nyagol Ongany, Mr William Onyacha, Mr Johannas Ologa and Mr Omeda Obura. They were joined by a Mrs Teresia Obiero

who is the appellant's mother. Mr Mathayo Abuogi was at the door. Mr Onyango Bitonge was on the verandah at the office window which was open. Mr Okere Onya and Mr Charles Adiko Oliech were unknown to Mr Samson Okuni.

The luggage was searched by the appellant and yielded nothing suspicious. The visitors had brought along only their blankets and bed-sheets. The appellant questioned Mr Samson Okuni and the latter admitted the strangers with him were from Alego and had come to visit him. The appellant's mother could not contain herself and she said the visitors had 'witchcraft medicines' with them and all Alego people were steeped in witchcraft. Mr Samson Okuni was given permission by the appellant to question her but he did not get very far for when he asked if what she said had any value, particularly after the unsuccessful search, the appellant said that was a 'political question' and forbidden. Mr Samson Okuni did not press it but, instead, asked why this had to be the subject of an official inquiry at the camp rather than a friendly one at home. The appellant stood up, struck Mr Samson Okuni on his left cheek and caught him by the shirt collar. Mr Francis Onyuka held Mr Samson Okuni by his arms. Mr Jafeth Odeny hit Mr Samson Okuni on the left side of his neck. Mr. Elijah Sure took off one of his shoes and hit Mr. Samson Okuni on the right side of his face. Mr Nyagol Ongany rammed his fist into his chest on his left hand side saying, "Do you not realise you are now being beaten by dogs?" He also unbuttoned Mr Samson Okuni's shirt and tore his hat. Mr William Onyacha hit him on the back of his shoulder. Mr Naftali Ong'ore and Mr Omeda Obura ran out of the office.

The appellant picked up a walking stick and laid into Mrs Leonida Munga and Mr Otieno Owuor. He hit the lady on the left side of her neck and the gentleman on the back and left hip with it. She fell down and screamed.

Two Administration policemen, Mr Joseph Bunde and Mr Adigo Awuor, rushed in and asked why the prisoners were being beaten. They threatened to arrest those who were doing so. The appellant countermanded that idea and the policemen cleared the office of all, save the Alego visitors and Mr Samson Okuni.

The time was now about 2.30 pm. They were taken to the nearby cells and locked in for the afternoon, evening and night. The next morning, armed with a letter from the appellant, AP Adigo Awuor and Mr Elijah Sure took Mr Samson Okuni to Ahero Police Station. The Alego trio remained at Rabuor until the appellant released them at 3 pm saying they were never to visit his bailiwick again.

At Ahero Police Station, Mr Samson Okuni reported the events of the previous afternoon, evening and night. He saw the Alego visitors come later. He was charged with conduct likely to cause a breach of the peace and bonded in the sum of Kshs 100. He was given a P3 Form (Exhibit 1) which he fetched to Kisumu General Hospital where Dr Tarlok Singh examined him and wrote his findings on it.

The Alego visitors reported their experience to the Kenya Police, Ahero, too, including the fact that the appellant took Kshs 200 from Mr Otieno Owuor. Mrs Leonida Munga was given a P3 Form which she took to the Ahero Health Centre two days later where a clinical officer, Mr Apolo Dango, examined her and wrote down on the form what he had discovered.

Mr Otieno Owuor was beaten on the back by the appellant but no one gave him a P3 form so there was no evidence by any medical man about his injury. Mr Opemo Misanga was merely pushed around by the appellant so he was uninjured.

No one at the Ahero Police Station said he saw any injuries on any of those who claimed they had been beaten up.

Dr Tarlok Singh found bruising on Mr Samson Okuni's face on the right side and chest at the front on December 14. It was about two days old, caused by a blunt instrument and amounted to "harm", It could have been the result of slaps by one or more persons

Mr Apolo Dango found a hematoma and abrasion over Mrs Leonida Munga's right scapula which was

about three days old and consistent with the use of a blunt instrument on her. He classified these injuries as "harm".

Chief Inspector Emmanuel Lesororo of Ahero Police Station looked into the allegations of AP Midigo and Mr Samson Okuni and the Alego group. He found no fault with the latter but he released Mr Samson Okuni on bond of Kshs 100 to answer a charge of creating a disturbance, if called upon later, which he never was. He asked the appellant to come and see him and he did so on December 16. He sent his file off to various superiors.

The appellant was arrested on April 5, 1975 and made a voluntary exculpatory statement in the evening at Ahero Police Station to IP John Muelthi.

The defence story was different. The appellant was told by his son Charles (not his mother, Teresia Obiero) that three strangers had been to their home and then left for that of Mr Samson Okuni. He sent for them. They came into his office, where he already had about sixteen people whom he had called in to see what he was going to do. An AP stood outside. After the strangers and Mr Samson Okuni came in, the door was closed. The four were not under arrest. He questioned the latter. The time was 1 pm.

Mr Samson Okuni said he knew Mrs Leonida Munga, a friend of his family, but not Mr Opemo Misanga or Mr Otieno Owuor. They had been to his home and then to that of the appellant. He did not know why they would not answer the questions of the appellant's mother and son there and suggested the appellant should ask them.

He did so. It transpired that they had come to recover Kshs 500 from Mr Caleb Odeny for the treatment he was given by the late Mr Joseph Owuor, the husband of Mrs Leonida Munga, and they had gone to the appellant's home to find out where Mr Samson Okuni lived. They were refreshed with tea there. The appellant's mother was allowed to begin her version of their sinister behaviour in her home.

She was interrupted, by Mr Samson Okuni who banged the table and demanded to be heard to the end. He said he would not be stopped from talking in any office in Kenya. The appellant tried three times to quieten him but without success. The Alego team broke in demanding Mr Samson Okuni should speak for them. The others in the office wanted to run away and made for the door. They created a disturbance, a cognizable offence, in his office so he called in the AP to arrest them and that was done. It was 5 pm.

The appellant did not bang any table or beat, whip, push or try to throttle anyone. There were two windows to his office and there was no one at them. Two prosecution witnesses, Mr Samwel Bitonge and Mr Joel Odhiambo, were not at them.

The disturbers of the peace were in the cells from 5 pm on December 11 to 8 am on December 12. AP Noa Midigo took Mr. Samson Okuni to Ahero Police Station together with an explanatory letter from the appellant. The others were released at 9 am. They all made statements to Corporal Jeremiah Mabwa at Ahero Police Station.

On December 13 he made a routine statement about all this to PC Situma, in the presence of Corporal Jeremiah Mabwa, and then another after he had been arrested and when he had been charged and cautioned by IP John Mueithi on April 5, 1975.

No one beat anyone in his office between 1 pm and 5 pm on December 11, 1974 and the confinement of Mr Samson Okuni and his three visitors was lawful and justified. The three had only one bag carried by Mrs Leonida Munga and in it he found some soil and wheat. These were 'charms'. They had no 'witchcraft chemicals'. He took no action against the threesome and Mr Samson Okuni for disturbing the peace.

Two different accounts and just looking at the cold typescript it is clear that there are discrepancies and lacunae in both. The doctor found injuries on different sides of Mr Samson Okuni's face and he did not say it was the cheek and the clinical officer did too on Mrs Leonida Munga's neck or shoulder blade from

those the complainants mentioned. Mr Samson Okuni's injuries two days later, as seen by Dr Tarlok Singh, appear to be fewer than would be expected after the hail of blows from a stick, a shoe and fists from three or four assailants. Mrs Leonida Munga's number of injuries were about the same three days later.

Then there are the differences in their testimony and their statements to the corporal on December 14. There is no suggestion that the four were arrested at Mr Samson Okuni's house at 1.30 pm, the appellant's mother is there when they enter the appellant's office, the visitors (and not their bags?) are searched by the appellant and the Administration Policemen; the appellant said during the interview he and Mr Samson Okuni had had a running battle since 1966 and he had been waiting his opportunity and now he had it, they had nothing to eat between 2 pm and 8 am the next day, Mrs Leonida Munga is not a widow but married, Mr Opemo Misanga was beaten and not just shoved around by the appellant, there is no mention of the appellant taking Kshs 200 off any of the four and so forth.

There were also differences within what the prosecution witnesses swore and from one another in the evidence.

Again, there is the question of whether Mrs Teresia Obiero was there in the appellant's office or arrived later, whether she spoke before Mr Samson Okuni or interrupted his complaint, finished her story or was shouted down by Mr Samson Okuni, who banged the table, the appellant or Mr Samson Okuni, or who banged it first, hardest or longest, whether or not a whip was used, at what time these events occurred, began or ended and who directed, took, preceded or followed the Alego visitors to Mr Samson Okuni's home.

There is also the fact that Mr Samson Okuni served under former Chief Ezekiel Osiga, who left that employment for some unrevealed reason sometime in 1974. The appellant succeeded him. Mr Samson Okuni's brother had brought an action for trespass against the appellant some time before this in the court of the district magistrate at Ahero. The unfortunate Mr Samson Okuni attended the trial and went to gaol for two months or one month. The appellant says it was for some false allegations he made and Mr Samson Okuni declares it was for contempt of court. He dozed off during the trial. The claim was dismissed. Mr Samson Okuni was also interdicted from duty as an assistant chief by a Mr Oyugi, the District Officer 1, for illegally collecting money for an irrigation scheme. Mr Samson Okuni was to be restored on July 1, 1975 but he had not been because of this charge against the appellant.

There were, too, discrepancies, differences and gaps in the testimony of the appellant and his witness. Corporal Jeremiah Mabwa, Assistant Chief Morris Otieno, schoolmaster and ex-chief of West Kano, Mr Naftali Ong'ore and Mr Onyango Bitonge, a civil servant in the Ministry of Agriculture at Kawino. Did the Alego three make any disturbance in the office? If not, why were they detained? Did they carry any luggage, one bag and or a packet? Did anyone look in it or them? Was anything or anything there incriminating found in it or them? Were there more than fifteen or sixteen in the office?

It was conceded that the discrepancies were, in the end, minor. We note that the appellant's mother and son were not called or said to be in any way not available as witnesses to the disturbing visit of the strange Alego necromancers.

There were obviously about twelve people in that office that afternoon. Some were in an irritable mood. It was a mid-December afternoon in West Kano and almost certainly a very hot one. The three from Alego were strangers to most of them and they came with something in a box or bag or packet. The appellant and the man the strangers came to see, Mr Samson Okuni, cordially disliked one another. They were all Luos. So there was bound to be a commotion of some sorts.

All this must have made it difficult for any of them to remember in court, about seven months later, all that happened and, in any event, they could not be expected to remember the same details. Their statements to the Ahero police corporal would be the freshest recollections they had. Some gave them in Dholuo which someone called Mr Nicholas Arungo put into Kiswahili for Corporal James Mabwa to type out in English. His English is 'local' English: witnesses reside 'fon' an address, they do not stay in peace

with one another, they become very harsh, blow one another on the neck, chest, back, feel sick later through these heatings, reply one another, stick one another with a stick and so on. It is colourful, adequate but imprecise. When they come to the court it goes through the same process with the prosecutor, advocate, interpreter and magistrate.

Much depends, of course, on what questions are put to a witness before or during a trial. Thus, Corporal Jeremiah Mabwa said Mr Odhiambo never told him where he was standing at the time of the incident because he was not asked about this. If Mr Odhiambo was later asked and he said "at the window" that would be 'all right', according to the corporal, by which he means, the truth.

The ill-feeling between the appellant and Mr Samson Okuni works both ways for each, we have no doubt, and their supporters too. Evidence of injuries depends very much on whether the patient or doctor locates the injury when it comes to which side of the patient it is found. There is not necessarily a discrepancy if they say different sides.

Anyway, we have carefully reviewed, all the evidence as a whole. We find that the prosecution version rang true and the defence did not do so.

The learned magistrate went through what each witness said to the police and in court with a fine toothcomb, sometimes twice. He came to nearly the same conclusion. He was anxious about the accuracy of their allegations of the assaults by the appellant. The medical evidence did not support the alleged assaults by the appellant. He had a doubt, which he thought was a reasonable one, so he acquitted the appellant on those counts. This was right.

The point is the magistrate not only wrote down most of what the witnesses said, which we now have as our record, but he saw them do so. He had 'the feel' of the case. His assessment of their credibility was correct. The fact that he was not satisfied that the appellant was proved guilty beyond a reasonable doubt of the assaults does not weaken his finding that by the same standard he unlawfully and wrongfully confined each from about 3 pm or 5 pm on December 11 to about 9 am the next day.

The appellant was entitled to ask what three Alego people were doing in his location. He should not have been stirred up by his mother's or son's opinion that they were strange suspicious evil doers into having them fetched to him for an inquisition before a dozen others in his office at his camp. Nor should he have allowed his dislike for their host to boil over into a shouting match, a scuffle and later this confinement. He says, himself, that whatever they had in their bags did not prompt him to put the Alego lot or Mr Samson Okuni in the cells. The former went there so he could investigate why they were in West Kano. This will not do in 1976 in this country. There is no law that justifies that action. It was wrong and unlawful.

We find, as the learned, magistrate did, that Mr Samson Okuni did not create any disturbance in that office though he was probably tiresome or impertinent or both. His guests were innocent. So was he. His confinement was wrong and unlawful. The convictions will be maintained.

The maximum for wrongful confinement is one year's imprisonment or a fine of fourteen thousand shillings. The appellant had a clean record which was credit on which he could draw in time of trouble. He had not been in custody during his trial. He was acquitted of the assault charges. We cast them out of our mind. Nine months on each count was a firm sentence and probably more than we would have given in this case but if each nine months is to run consecutively that would make it three years and becomes, in our view, manifestly excessive.

The learned magistrate wrote that he sentenced the appellant to nine months. If this was an omnibus sentence it was illegal. There must be a separate sentence for each count on which the appellant was convicted: *Mohamed Warsama HT Musa Aboker Bah Majelo v Republic* [1956] 23 EACA 576 (CA-Som).

The practice is that where someone commits more than one offence at the same time and in the same

transaction, save in very exceptional circumstances, to impose concurrent sentences: *Republic v Sawedi Mukasa s/o Abdulla Aligwansa* [1946] 13 EACA 97 (CA-K). There are no exceptional circumstances here. The learned magistrate signed a sentence warrant in this case. We have looked at the duplicate in his trial file. It shows the sentences were nine months on each count and they were to run consecutively making three years. We were told the appellant served less than three months because he was released under an amnesty order so we do not have to do anything about the sentence.

The learned magistrate has certified, that our copies of the case file were true copies of what he wrote. This is far from correct. When a (certified) copy of a magistrate's record of a witness's evidence reads -

“ ... I saw nobody open the beez. The main issue being dismitted at accused office was why the 3 visitors had gone to accused home and left suspiciously ... “

(See page 43 TSS) it leads an appeal court to wonder if anyone checked the draft or first typed copy at all. There are at least seventeen typing errors in the judgment and eighty-three in the proceedings and exhibits. We ask him to check carefully at least the top one in future so that his certificate means what it says, or nearly so. The staff will do the others from his corrected copy.

We also suggest it is time he referred to witness by name (one name will do) or position (eg the corporal) or even relationship to the appellant (eg mother) or complainants (neighbour, friend, etc.) PW 1, PW 7, PW 9 or DW 2, DW 5, makes tedious reading and calls for constant references to a list of them which is not provided by the staff of the magistrate's court.

We direct that one copy of this judgment be posted to the Provincial Commissioner of Nyanza and to the District Commissioner, Kisumu.

Order : Conviction upheld.

: Sentences maintained on each count but ordered to run concurrently from September 20, 1975.

**Dated and Delivered at Nairobi this 13th day of May 1976**

**A.H.SIMPSON**

**A.A.KNELLER**

**JUDGE**

**JUDGE**