REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 243 & 244 OF 1994 (CONSOLIDATED)

1. CHARLES OYUNGE

2. KABURAI KOROSS.....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

(From original convictions and sentences of the Resident Magistrate's Court at Rongo in Criminal Case No 352 of 1994 S O Omwega Esq, RM)

JUDGMENT

These two appeals have been consolidated.

The two appellants were convicted in the court below of demanding property with menaces c/s 302 of the Penal Code and each was sentenced to 12 years imprisonment. Their appeals to this Court are against conviction and sentence.

Briefly the evidence for the prosecution was that on 30.4.1994 at about 8 am the complainant Silvanus Odhiambo Odongo (PW1) was sitting outside his house at Kodera Kwoyo in Rongo division when the two appellants who were administration policemen attached at the office of the District Officer, Rongo arrived at his house. They identified themselves as AP's. They then entered the complainants house and conducted a search therein in the course of which they found several items of medicine including panadol, capsules and chloroquine. The complainant explained to them that the medicine was for his use but they answered that they would arrest the complainant for being in possession of part 1 poison and take him to Rongo. They however added that they would release him if he gave them something small.

The complainant sent for his brother Paul Okello Odongo (PW2) who arrived as the two appellants were taking the complainant away. The two demanded Shs 10,000/- for the release of the complainant. On reaching Runga Primary School the two APs told (PW2) to go and look for money. He returned later with Shs 4000/- which he gave them. They then released the complainant. Before doing so, the local Chief Peter Makambango (PW3) who told the court below that he knew both appellants, had unsuccessfully tried to secure the complainant's release. He even promised to take the complainant to them the following day but the appellants were adamant in their refusal to release the complainant.

When the chief insisted, one of the appellants drew his gun. Later the chief wrote to the District Officer about the incident and complained about the raid by the appellants in his area without his permission.

The matter was reported to the police and the appellants arrested. At identification parades held on 4.5.1994 at Kamagambo Police Station both appellants were identified by the complainant, (PW2) and (PW3).

Both appellants made unsworn statements in their defence. The 1st appellant Charles Oyunge denied having gone to the complainants home on committing the offence. He also said that two of the witnesses who identified him at the identification parade had seen him at the DO's office one day before the parade. The second appellant made a similar claim. He also denied the offence. In their petitions of appeal which contain similar grounds, the appellants claim that the case against them was not proved to the standard required in law; that the evidence was contradictory; that the identification parade was conducted unfairly and contrary to law; that the evidence was not properly considered and evaluated; that there was no independent evidence; that the appellant was not given the benefit of doubt and that the sentences were harsh and excessive.

Mr Ochillo who argued the two appeals confined his submissions to 3 grounds *viz* lack of independent witnesses, the conduct of the identification parade and failure of the learned trial magistrate to consider the appellant's defence.

Regarding the witnesses Mr Ochillo claimed that all the material witnesses were relatives of the complainant. That was of course not factually correct. PW3 who is the chief of the area is not a relative of the complainant. He said so in his evidence in chief and repeated it when the matter was raised in cross examination. The evidence of PW3 is very clear. As a chief in the area he would be expected to know the two appellants because they are his colleagues and he works together with them in the provincial administration. He said he knew them. There was no reason advanced as to why the chief should want to implicate them in offence. Similarly the evidence of the complainant and that of his brother is consistent. There is no doubt that their evidence is true.

With regard to the identification parade the appellants claim that two of the witnesses saw them at the DO's office before the parade. But there was a third witness who did not see them and who identified them. They

cannot properly complain against their identification by him. Having examined the parade form alongside the evidence of the parade officer, I am satisfied that the identification parade was properly conducted and that the appellants were correctly identified by the three witnesses (ie PW1, PW2 and PW4) Their claim that two of the witnesses saw them before the parade is not true. It was denied by the DO (PW5).

As to the appellants defence not having been considered by the learned trial magistrate, a careful look at the judgment of the court below clearly shows that that claim lacks substance. The defences of the two appellants were given due consideration.

Although the rest of the grounds as listed above, were not argued, I have considered all of them. My findings are that they all are unmeritorious and must fail. On my own consideration and evaluation of the matter I find that the evidence in support of the prosecution case was overwhelming and that each of the appellants was properly convicted.

The sentences meted out were if anything, lenient and there is no basis for interfering.

The appeals against conviction and sentence are dismissed.

Dated and Delivered at Kisii this 3rd day of November 1994.

T.MBALUTO

JUDGE