REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NUMBER 77 OF 2019

HILLARY KIPCHIRCHIR KIMAYO.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Being an appeal from the Original Conviction and Sentence in Iten Senior Principal Magistrate's Court Criminal Case Number 198 of 2014 delivered on 14th May 2019 by Hon. H. M. Nyaberi (SPM)

JUDGMENT

1. On 26th April, 2019 the appellant Hillary Kipchirchir Kimayo, who had been charged,with and tried for the offence of **Robbery with Violence Contrary to Section 296(2) of the Penal Code** in ***Iten Senior Principal Magistrate's Court Criminal Case Number 198 of 2014***, was found guilty, convicted accordingly.

2. On 14th May, 2019, the learned trial magistrate, after considering a Probation Officer's Report, and on the basis that the appellant had other charges pending before other courts against him, sentenced the appellant to death.

3. Aggrieved, the appellant filed the petition of appeal on 22nd May, 2019, on grounds which he later amended and filed on 4th September, 2020. The new grounds were;

1. THAT the trial magistrate erred in law by failure to observe that the initial trial was commenced by an incompetent magistrate hence vitiating the whole judgment hence leading to a mistrial.

2. THAT the learned trial magistrate erred in law of made a blatant disregard to the law by failure to observe that the charge sheet was incurably defective and that not amended under section 214 of the criminal procedure code rendering the whole judgment a nullity.

3. THAT the pundit magistrate made an error of law on the face of the record and or made an error of fact by failure to evaluate the evidence of the alleged recognition by identification had a lot of drawbacks, that weakened and destroyed the inference of the appellant's guilt, which failure to observe led to a miscarriage of justice as the nature of light is doubtful.

4. THAT the trial magistrate misdirected himself by failure to evaluate the evidence which had rampant material contradictions that was not resolved hence leading to an injustice.

5. THAT the trial magistrate made a non-direction by failure to observe that the prosecution had failed to prove their case to the required standard of cogent proof beyond reasonable doubt occasioning a reasonable doubt.

6. THAT the trial magistrate erred in law by failure to observe that vital or crucial witnesses were not summoned to testify.

7. THAT the trial magistrate erred in law by convicting me basing on insufficient evidence as there was nothing linking me to the enormity of the alleged crime leading to a fetter of administration of justice.

8. THAT the trial magistrate erred in law by failure to exhaustively explain to me of what is stated under section 211 of the CPC hence bad in law as I the appellant was prejudiced.

9. THAT the trial magistrate erred in law(sic) the alleged blood stained stick, had no such bloodstain in court and or the evidence

of the P3 doctor from private clinic on 9/1/2014 approximate age of injury 3 days having material contradictions that the victim was taken to Kapsowar Mission Hospital immediately after crime occasioning a reasonable doubt.

10. THAT the trial magistrate erred in law by failure to exhaustively evaluate the appellants defence of alibi hot changed(sic) by prosecution in compliance with Section 212 of the CPC. Hence, prejudice.

REASONS WHEREFORE: I pray that may this

(a) Appeal be allowed

(b) Conviction quashed

(c) Sentence set aside

(d) And I be set at liberty

4. The particulars of the charge facing the appellant were that on 6th January, 2014 at Kapchoel Village, within Elgeyo Marakwet County, while armed with dangerous weapon namely fence droppers robbed Jacob Kipkemoi Kirui of Kshs. 50,200/=, mobile phone make Nokia 2330 valued at Kshs. 4,500/= all valued at Kshs. 54,700/= and immediately before the said robbery used actual violence to the said Jacob Kipkemoi Kirui.

5. The appellant was arrested on 29th January 2014 and was to be arraigned in court on 30th January 2014. However, he was not produced in court either on that 30th January 2014 or on the following mentions on 20th February 2014, 6th March 2014, 10th March 2014, 12th March 2014, and 26th March 2014.

6. He was only presented for plea on 26th May 2014. On that day, the prosecution began by telling the court that the complainant wished to pardon the appellant. The court directed that the matter be placed before the State Counsel for consideration. The record does not show the outcome of that direction.

7. The Plea was taken on 9th June 2014 by the Hon *R. Ndombi Ag. SRM*. The appellant pleaded not guilty. He was released on bond on 23rd March 2015. When the matter came for hearing on 8th May 2015, the Hon *R. Ndombi Ag. SRM* stated that she did not have jurisdiction to try the matter.

8. The case proceeded for hearing before *Hon. Nyaberi PM* on 24th November 2015.

9. **PW1** was the complainant **Jacob Kipkemoi Kirui**. He testified that he was a farmer and a potato broker. On the 6th January 2014 he had gone to buy potatoes from two potato farmers Matthias Cheserek and Hezekiel whom he has earlier approached for the same. However, he did not to get them. He had cash Kshs. 50,000/=, and his Nokia Mobile phone make 2330 valued Kshs. 4,500/=. About 10.30 p.m. he left Cheptogot Trading Centre for his home. On arriving at a corner in a place known as Kapchoel, suddenly, the accused appeared from the lower side of the road carrying a wooden stick measuring about 6ft. He lifted it to strike him but he managed to hold it in midair. It still hit him slightly on the head. He screamed while running away. The accused chased him for about 5m and hit his left leg. He fell down and realized that he had sustained fracture. He lost consciousness only to find himself the following day at Kapsowar hospital where he was admitted until the 18th January, 2014 when he was discharged. He however recorded his statement while in hospital and was issued with a P3. He said he had known Hillary since 1995. He said also said that he had lost the receipt for the purchase of the mobile phone.

10. On cross examination he told the court that the accused appeared from the left side of the road. When his witness statement to the police was put to him, he confirmed that he had told the police that he heard someone following him from behind, and he had turned to see who it was. That he realized it was Hillary Kimaiyo. He testified that he used the screen light of the mobile phone to see the accused. That the accused was about 3m away from him when he flashed the screen light of the mobile phone. That it was when his leg was hit that he lost consciousness. That he asked the accused why he was attacking him but the accused did not respond. That he lost his phone while he was struggling with the accused. That the accused frisked him of Kshs. 50,000/=. On re- examination he stated that the accused appeared from the side of the road but that according to his statement, he had stated that the accused appeared from behind.

11. **PW2** was the Investigating Officer No. 57634, **Cpl Nelson Kibore** attached at Kapsowar Police Station. He testified that on the 8th January, 2014 at about 10.30 a.m., members of the public including one Jona Kanda came to the police station. He reported that the complainant namely Jacob Kipkemoi had been attacked on 6th January,2014 at about 10.30 p.m. while coming from Cheptogot heading to Kapchesat. That the said Kipkemoi was at the material time admitted at AIC Kapsowar Mission Hospital. That at the time of the attack he was robbed off Kshs. 50,200/= and a mobile phone make 2330 valued at Kshs. 4,500/=. This report was booked and the case was minuted to him to investigate. The reportees also brought a wooden stick about 6ft long which he identified it as MFI 1. On the same day, he visited the complainant at the hospital and interviewed him. The complainant told him that while on his way home on the material night someone came from behind, and as he tried to turn the person hit him with a piece of wood on the left leg below the knee and fractured it. He issued him with a P3 form which was subsequently completed and which he identified in court as MFI 1. On the 8th February, 2014, he visited the complainant at his home. The complainant took him to the scene of crime at Cheptogot village. The scene was already disturbed. He went and recorded his witness statement. He testified further that the complainant managed to identify the suspect with the light of his mobile phone before he struck him with the piece of wood. He then wrote a letter directing the In-charge Kimnai AP Camp to arrest the suspect. The appellant was arrested and brought him to the Police Station. He charged him with this offence. He added that the complainant operated an MPESA agency at Cheptogot market and was in the business of buying and selling potatoes. That on the material day he had gone to buy

potatoes but he was not successful. That the money that was stolen from him was not recovered. On cross examination he testified that his investigation diary indicated Kshs. 60,000/= plus a mobile phone were stolen from the complainant, but hastened to add that he was not the one who had booked the initial report. That according to him the correct figure of the sum stolen was Kshs. 50,200/=. He reiterated that the complainant heard someone behind him, and was attacked when he turned. That the accused was not found with any exhibit. That the piece of wood had blood stains at the time it was brought to the station but as at the time he was identifying it in court it did not have any blood stains. That the complainant had lost the receipt for the purchase of his phone. The money was not recovered.

12. **PW3** was **Mr. Korir Martius** from Cheptogot Sub-Location Elgeyo Marakwet County. He testified that the complainant who he described as a cobbler and a farmer was his neighbour. That on the 6th January, 2014 at about 9.30 p.m. he was in his house when he heard some screams coming from about 500m away. He said that it was a dark night but he rushed to the scene and found the complainant about 10m from the road and his leg was broken. He also found other people had arrived. Arrangements were made and the complainant was rushed to Kapsowar Mission Hospital. He did not know what had happened to him. On cross examination he told the court that he never heard anyone mention the accused's name that night. That he had nothing to link him to the case.

13. **PW4 Jonah K. Kimutai** from Cheptobot Sub-Location was sleeping on the night of 6th January, 2014. At about 10.00 p.m. he heard some screams emanating from the road about 10m away. He woke up and went towards the road. He heard the victim saying "*Chirchir why are you killing me"*. When he got to the scene he did not find anybody. He however proceeded to state, *"He was bleeding from the head and leg. He was lying down."* He screamed and neighbours responded. They made arrangements and took him to Kapsowar Hospital. He testified further that "*next to him, there was a big wood. It is the one I used to close the gate to the cowshed. It had some blood stain."* The following day they took the wooden log to Kapsowar Police Station. That it was the about 2m which he identified as MFI 1.On cross-examination he testified that he was Jonah Kimutai. That he was the one who took the wooden log to the police station. That his house was about 10m from the road. Shown the statement he had recorded at the police station he said that he had told the police that his house was 100m from the road. He said he did not find the accused at the scene. That he was aware that there are many people who bear the name Chirchir. He confirmed that nothing was found at the scene to connect the accused to the offence.

14. **PW5 Isaac Kibet Kirui** was also from Cheptobot Sub-Location. On the night of 6th January, 2014 at about 10.00 p.m., he was heading home from Cheptobot Trading Centre when he heard screams coming from about 10m off the road. It was a person was wailing for help. He stopped and went close. He said he saw Chirchir standing holding a wooden stick whereas Jacob, his brother was lying on the ground. That when Chirchir saw him, he ran away. He said he saw him with the aid of moonlight. He said that the moonlight was bright. Several people came to the scene. That Jacob had an injury on the left leg and was unconscious. That he and others made arrangements and took him to Kapsowar AIC Mission Hospital. That when Jacob regained consciousness, he told him that he was assaulted by Chirchir. He identified that Chirchir as the accused in court. He said his brother did not tell him that he had lost anything during the attack. He later recorded his statement with the police. He identified the wooden stick MFI1. On cross-examination he confirmed that was his brother. That Jonah Kanda was his neighbour. That the distance between Cheptobot to the scene of crime was about 500m or 1/2km. That he was the first to arrive at the scene of crime. That he had not bypassed the scene of crime when he heard the screams from about 200m away. That he ran towards the scene where the screams were coming from. That the wooden stick MFI1 was at the scene where his brother was. On re-examination he stated that Jonah Kanda and Jona Kosgei were two (2) different people. He maintained that he was the first one to arrive at the scene and if there was anyone else may be that other person was on the other side and he was unable to see him.

15. **PW6 Gideon Yego** was 65 years old at the time of his testimony and a retired Clinical Officer from Kapsowar. He testified on the complainant's P3. He said it originated from Kapsowar Police Station. That the patient one Jacob alleged to have been assaulted. He had injury on the head, and fracture on the leg. He assessed the approximate age of injury as three (3) days and the probable weapon as having been a blunt one. He testified that the patient had been treated taken to theatre where a metal plate fixed to the fracture. He assessed the degree of injury to be grievous harm. He signed the P3 form on 9th January 2014. He produced the P3 as P. Exhibit 2. On cross-examination he testified that the complainant went to his Private Clinic on 9th January 2014, and had sustained the injury on 8th January 2014. That the P3 form had his official stamp – Senior Clinical Officer. On re -examination he testified that he completed the P3 form on 9th January 2014.

16. At the close of the case for the prosecution the learned trial magistrate found that the prosecution had established a prima facie case against the accused person to warrant his being put on the defence.

17. In his defence he made a sworn statement and testified that his name was Hillary Kipchirchir from Kapchelega Village, Kaptich location. That in 2014 on a date he did not mention, at about 6.00 a.m. he was at home when Administration Police Officers from Kimunai AP Camp came and arrested him and escorted him to their camp. He said they did not inform him of the reasons for his arrest. The same day about 9.00 a.m. they took him to Kapsowar Police Station where he was informed that he had caused grievous harm to Jacob Kipkemoi. The following day, he was arraigned in court. Later he was granted bond terms which he raised and was released in March, 2015. On the 25th May 2014 he was presented in court and was surprised to find that he was now not facing a case of grievous harm but a charge of robbery with violence. When it was read to him he denied committing the offence. On cross examination he conceded that the complainant and him came from the same location but their homes were about 8km apart. That they were not related and they not friend either. That on the date and time of the alleged robbery, the 6the January 2014 he was in his house sleeping. That the complainant lied when he alleged that he had attacked him at around that time. He could not tell why the complainant was lying against him.

18. From the appellant's grounds of appeal , the issues that present for determination are;

- *Whether the charge sheet was defective.*
- *Whether the plea was taken by a magistrate without jurisdiction, rendering the whole trial a mistrial.*
- *Whether the trial court complied with Section 211 of the Criminal Procedure Code.*

- *Whether the case for the prosecution was riddled with material contradictions*

- *Whether the prosecution proved its case beyond a reasonable doubt.*

- *Whether the appellant was properly identified and or recognised. Whether the evidence of identification was contradictory.*

19. The appellant is entitled to a review and re consideration of the evidence and for this court to draw its own conclusions always bearing in mind that it neither saw nor heard the witnesses. See **Okeno vs Republic**

20. The ingredients for the offence of Robbery with Violence are set out under **Section 295 as read with 296(2) of the Penal Code.** Theft committed by a person who either:

- Was in the company of another.

- was armed with a dangerous weapon.

- Inflicted/threatened to inflict harm on the victim.

21. But, let me begin with the preliminary issues:

(1) Whether the charge sheet was defective vis a vis the provisions of Section 214 of the Criminal Procedure Code.

The appellant submitted that the learned trial magistrate was bound by **Section 214** to ensure that the charge sheet was in accordance with the evidence given at the trial, and that it did not give a mis-description of the particulars of the offence**. Section 214(1) of the Criminal Procedure Code states:**

> *(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case."*

It is evident that Section 214 of the **Criminal Procedure Code** comes into play when it comes to the attention of the court that the charge sheet is defective. Then the court has the discretion to have the charge sheet amended or substituted subject to **Section 214(2).** There is nothing on the record to show that such an issue was raised, and the learned trial magistrate failed to act. I also perused the charge sheet and did not see any fatal defect.

The appellant may have intended to say that the evidence did not support the charge**.** That does not make the charge sheet defective.

(2) Whether the plea was taken by a magistrate without jurisdiction

It is a fact that the magistrate who took the plea was an *acting Senior Resident Magistrate (Ag. SRM)*. The appellant submitted that the **Criminal Procedure Code** does not recognize the rank of an Acting Senior Resident Magistrate, accordingly, this magistrate was not competent to take his plea, hence rendering the whole trial a nullity *ab initio* and ultimately, a mistrial.

It is correct that the **Criminal Procedure Code** confers the jurisdiction to try robbery with violence on the magistrate of the rank of Senior Resident Magistrate and above. Does an Acting Senior Resident Magistrate have jurisdiction?

This is not a novel issue. The Court of Appeal in **Stephen Mutinda Mwanzia [2014] eKLR** dealt with the issue where the appellant faced a similar charge as the appellant herein, and three witnesses testified before the Acting Senior Resident Magistrate. The Court of Appeal stated-

> ***"The competence of an Ag. SRM is the same at that of an SRM. This ground has no merit."***

I need not say more.

22. ***Whether the appellant was accorded a fair trial?*** The appellant argued that he was not accorded a fair trial because **Section 211 of the Criminal Procedure Code** was not explained to him.

Section 211 is states: Defence

> *" (1) At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).*

(2) If the accused person states that he has witnesses to call but that they are not present in court, and the court is satisfied that the absence of those witnesses is not due to any fault or neglect of the accused person, and that there is a likelihood that they could, if present, give material evidence on behalf of the accused person, the court may adjourn the trial and issue process, or take other steps, to compel the attendance of the witnesses."

23. The record shows that on 11th February 2019 the prosecution closed its case. On 13th February 2019 the learned trial magistrate delivered the ruling that a *prima facie* case had been made out to warrant the appellant to be put on the defence. The record states;

"*Section 211 of the Criminal Procedure Code complied."*

"*Accused: I will give sworn statement. No witness to call."*

A date for defence hearing was then set, when the appellant proceeded to give his defence. It is evident that on this issue the record speaks for itself. The fact that the accused person made his options clear as to how he would proceed, that he would testify and not call any witnesses is evidence that the court complied with **Section 211.**

24. ***On whether the prosecution proved its case beyond a reasonable doubt? Whether the case for the prosecution was riddled with material inconsistencies? Whether identification was proper?*** The complainant testified that the offence happened on 6th January 2014 at 10.30 p.m. He said the accused appeared from the lower side of the road armed with a 6ft wooden stick. He screamed and ran, but the attacker followed him for about 5m, hitting him in the leg, he fell down and lost consciousness. However, on cross-examination it turned out that in his statement to the police, made long before the trial he had told the police that the attacker came from behind him. This is also what was reported to the police and this is what he told the Investigating Officer. From the outset the complainant's testimony is problematic. He said he was attacked, suddenly by a person who appeared suddenly from either his left, the lower side of the road or from behind him. Hence his changing the story creates the impression at the onset that he may not be totally truthful, or that the attack happened so fast that he could not tell exactly what happened or that it did not happen as he alleged. He gives two (2) scenarios of the attack, one where upon the attacker showing up suddenly he ran screaming and was chased for 5m before being hit, falling to the ground and losing consciousness, and another where the attacker appeared, he and his attacker engaged in a struggle in which he lost his phone. This scenario was not shared with the Investigating officer as he never mentioned it. These are not idle inconsistencies as they feed into the question as to whether taking into consideration the manner of the attack, the appellant had ample opportunity to identify the attacker.

25. Regarding identification, the complainant's testimony was that he had known the appellant since 1995, and identified him vis the screen light of his mobile phone. This evidence of knowing the appellant was not given in any detail to establish how he knew him. Simply stating that he had known him since he was in primary school was not enough to establish that he could recognise him in the circumstances described. Were they school mates? Since primary school, had they interacted as adults? How often were these interactions? When was the last time he had seen and or interacted with the appellant? Answers to these questions would have lay a basis for the calm that he recognised the person who attacked him to be the appellant.

26. Let us look further at the evidence of how he recognised him.

In the scenario where the attacker is following him from behind he says at 3m away he flashed the screen light of his phone and saw it was the appellant. This was a Nokia 2300. There was no interrogation of the strength of this light and whether a flash of it at 3m it was enough to see a person and identify him, especially when, in addition to his testimony. we have the contradictory evidence of the other two witnesses as to state of that night and the available natural light. PW3 said it was a very dark night, while the PW5, the brother to complainant said there was a bright moon. You cannot have both these statements being correct about the same night the same location, about the same time. Someone was not being truthful.

27. It is trite that the identification of the offender in a criminal case is central to the case. The offender is the key actor, the person who has broken the law and the one upon him the penalty will land if found guilty, and in this case, the death penalty. It is the reason why courts are minded to examine contested evidence of identification thoroughly, and demonstrate that they have done so. The learned trial magistrate in this case did not act as is required by **Wamunga vs Republic (1989) KLR 424, Maitanyi vs Republic 1986 KLR 198, Republic vs Turnbull (1976) 3 All ER 549, Kurui vs Republic (1984) KLR 739, Simiyu & Another vs Republic 2005 KLR 192.** It was necessary for the trial court to determine what was the quality of the identifying light, what was its nature, what was the size of that screen?, what about the appellant's position in relation to the light. What was going on when this light was allegedly flashed? Was he to the left of the complainant, behind him or in front of him when he flashed the screen at him? How far? In **Wamunga vs Republic (1989) KLR 424** the Court of Appeal said:

"*Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach evidence of visual identification was succinctly stated by Lord Widgery C.J, in the well-known case of* **R v Turnbull [1976] 3 All E.R. 549 at page 552** *where he said: "Recognition may be more reliable than identification of a stranger;* ***but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made." (Emphasis mine)***

28. Evidently, from the foregoing, the alleged identification or recognition of the appellant by the complainant was doubtful. There was the testimony PW5 the complainant's brother that he saw the appellant at the scene holding a piece of wood and standing over the complainant. His evidence must be looked at together with that of PW3 and PW4, the other witness who came to the scene. He said he heard the screams from either 200m away. He reached the scene and found the complainant about 10 m off the road. He claimed to have been the first one at the scene. He never saw the other two witnesses there, even PW4 who said his home was about 100m from the scene, and who ran there as

soon as he heard the screams. Neither did he see the informant, Jona Kanda who made the report to the police. It is curious that the complainant did not mention to him. That apart from being attacked by the appellant, the appellant had also robbed him of the substantial amount of Kshs. 60,000/= or was it Kshs. 50,200/=? And his mobile phone? His testimony that the complainant was calling out the name Chirchir was not heard by PW4 who was nearer the scene than PW5 or PW3 when he arrived. If indeed he heard the complainant calling out the appellant's name, why did he not tell those who came to the scene immediately? Neither of these witnesses saw the other at the scene yet they were key witnesses. More importantly save for PW5 whose testimony is doubtful none heard anything that night to connect the appellant to said robbery. All these questions make PW5's testimony doubtful as to whether he actually saw anyone at the scene when he arrived. The piece of wood that was recovered was said to have blood stains. Jonah Kanda is the one who took it to the police on 8th January 2014. He did not testify in this case. On the other hand, the Investigating Officer did nothing to match the alleged blood with that of the appellant to actually confirm that it is what was used to hit the complainant. That would have been a sure way of placing the said piece of wood at the scene as the weapon that was used to cause the complainant the injury he sustained. The person who reported to the police and delivered the exhibit did not testify. There is no knowing where or how he recovered the piece of wood. The prosecution did not establish that the said piece of wood was used in the alleged attack of the complainant. Leaving the fact as to whether or not the complainant was attacked with a wooden piece of wood was not established to the required standard, especially because of PW5's doubtful testimony.

29. Whether the prosecution discharged the burden of proof of beyond a reasonable doubt. To answer this, the question that begs is whether the prosecution established that the complainant was robbed as alleged. To establish that he had Kshs. 60,000/= or 50,000/= on the material night the complainant said he was a farmer and a potato broker. On the material date he had a deal with two named farmers. He also told the Investigating Officer that he operated an MPESA agency at the local trading centre. His own neighbour said he was a cobbler and a farmer. His own brother told the court that the complainant never told him he had lost anything on the night he was attacked, this was incredible. That having been attacked and robbed of a substantial amount of money and his mobile phone, why would he leave out such a crucial detail of the attack? It clearly creates a tingling doubt about the alleged robbery that night.

30. He said he had lost the receipt for his phone but there were other means the Investigating Officer would have used to establish that the complainant actually owned such a phone, for instance, he owned a line which the service provider would have established was the appellant's and was used in a certain mobile phone. With proper investigations, and availability of the technology to do so, this fact would have been established.

31. Was the complainant injured? The retired Clinical Officer testified that the complainant attended his private clinic. He examined him and filed the P3 on 9th January 2014. He established that the injury was three (3) days old, and it was grievous harm as there was fracture on the leg. He said the complainant was injured on 8th January, 2014 and he completed P3 on 9th January, 2014. A perusal of the P3 shows that the report was made on 8th January, 2014 that the complainant was assaulted by a known person. The brief details of the offence as reported to the police indicate that it is an assault that was reported, not a robbery. The brief medical history also indicate that it was an assault. He had been injured on head and had fracture of the left leg. The P3 was signed on 9th January, 2014.

32. It is noteworthy that the complainant testified that he was injured on 6th January, 2014, admitted in hospital and was discharged from hospital on 18th January, 2014. However, PW6 says the complainant was injured on 8th January, 2014, and attended the clinic on 9th January, 2014 when the injuries were three (3) days old. How is that possible? The learned trial magistrate recorded that he observed that this witness appeared to have a problem with his memory. However, no question was put to him to determine this, and neither did the prosecution do anything to deal with the alleged situation. The question is whether then his evidence can be relied upon to establish the other ingredient of the charge? Granted, there is consistency in the dates that the robbery allegedly happened, on the 6th and by 9th the injuries were three days old. There are however some disconcerting inconsistencies. I examined the P3 in the original record. It reads that it was completed by the witness at Kapsowar. That the complainant had injury on head and a complete fracture on left tibia /fibula. That when he was examined on 8th his clothes were blood stained. That he was taken to theatre and three metal plates fixed. On the other hand, according to the complainant at that time he had just been admitted in hospital and had not been discharged. No x-rays or treatment notes or discharge summary was produced together with the P3. This is so important because in the P3 it was indicated that on 8th when he visited the clinic he was an outpatient Out Patient Number 14137/2014, yet he was supposedly admitted in the ward. So, yes, the P3 clearly indicates that the complainant sustained injury. But there was need on the part of the Prosecution to connect the dots. How does the evidence on the injury connect with the evidence of the alleged attack and how it happened? That he was unconscious, that an ambulance was called to take him to hospital, that he was admitted till the 18th of January from the night of 6th January 2014. That on 9th January he visited the clinical officer's private clinic for filling of P3, yet was still in the ward? Without other supporting documents e.g. the discharge summary from the hospital, the evidence is not adding up.

33. Taking into consideration the totality of the evidence, the complainant's testimony is clearly unreliable how the attack took place, and whether or not he was able to identify the attacker.

34. **PW3, 4 and 5's** testimony did not assist either. None of them even mentioned the other. It is as if they were all at different scenes involving the complainant. The exhibit, wooden stick alleged to have had blood stains was not examined to confirm that it was actually the weapon that was used to assault the complainant. No blood match was made between the blood on the stick and that of the complainant. Curious that offence happened on 6th January 2014 that PW5 saw the appellant but did not report to the police, but a 3rd party made the report, how he knew, where he found the weapon, the court will never know,

35. In the upshot the prosecution had the burden to prove beyond a reasonable doubt that the complainant was robbed of Kshs. 50,200/=, his mobile phone Nokia 2300 after being attacked with a wooden pole, and that he had identified the attacker. It is my considered opinion that this did not happen.

36. The appeal succeeds. The conviction is quashed. The sentence is set aside. The Appellant be set at liberty unless otherwise legally held.

Dated and Delivered virtually this 30th December, 2020.

Mumbua T. Matheka

Judge

In the presence of:

Court Assistant Martin

Appellant: Present

Respondent: Ms. Limo for the state