REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 36 OF 2018

MWASYA MULI.....................APPELLANT

VERSUS

REPUBLIC........................RESPONDENT

(Being an Appeal from Original Conviction and Sentence in ***Mwingi Senior Resident Magistrate's Court Criminal Case No. 163 of 2016*** *by* ***Hon. G. W. Kirugumi (SRM)*** *on* ***17/04/18)***

J U D G M E N T

1. On arraignment in Court on the **13th** day of **May, 2016, Mwasya Muli** faced two (2) Counts as follows:

Count 1 – Robbery with Violence contrary to **Section 295** as read with **Section 296(2)** of the **Penal Code.** Particulars of the offence were that on the **25th** day of **April, 2016,** at about **9.30 p.m.,** within **Mwingi Township** in **Mwingi Central Sub-County** of **Kitui County,** jointly with another not before Court, robbed **MMM**of **Kshs. 3,500/=** (Three Thousand Five Hundred) and at the time of such robbery used actual violence to the said **MMM.**

Count 2 – Committing an Indecent Act with an Adult contrary to **Section 11(A)** of the **Sexual Offences Act No. 3 of 2007.** Particulars of the offence were that on the **25th** day of **April, 2016** in **Mwingi Township** within **Mwingi Central Sub-County** of **Kitui County,** intentionally touched the breasts of **MMM**against her will.

2. After full trial the Appellant was convicted on both Counts, sentenced to suffer death on the 1st Count. Regarding the 2nd Count the learned Magistrate stated that the sentence was suspended.

3. Aggrieved, the Appellant appeals on the grounds that: The charge was duplex therefore defective, evidence adduced supported a charge of assault but not of robbery with violence and **Section 169(1)** of the **Criminal Procedure Code** was not complied with in dismissing the defence put up.

4. Facts of the case were that on the **25th April, 2016** at about **9.30 p.m.** PW1 **MMM** was from collecting money that **Wanza Kilonzi** owed her when she encountered the Appellant and two (2) other men, persons that were well known to her. The Appellant allegedly told **David,** a police officer, his companion that he would rape her. **David** held her hand and the Appellant held another. They pulled her and in the process the Appellant held her breast and removed **Kshs. 3,500/=** that was kept in the brassiere and hit her on the back. **David** pulled her hair and removed part of the weave on her head. People who gathered rescued her. She reported the matter to the police and sought treatment at **Mwingi District Hospital.**

5. When put on his defence the Appellant stated that on the **20th March, 2016** the Complainant was at his house and they slept and he told her of his intention to marry. She was angered and she threatened him and even caused him to be arrested. At the outset he was charged with the offence of assault. Ten (10) days later the charge was substituted.

6. The Appeal was canvassed by way of written submissions. It was urged by the Appellant that the charge as drawn indicated the offence as **Robbery with Violence** contrary to **Section 295** as read with **Section 296(2)** of the **Penal Code,** a mistake that was not curable since the fairness of the process of trial was compromised. In this regard he cited the case of **Joseph Njuguna Mwaura & Others vs. Republic Criminal Appeal No. 5 of 2008 (CA)** where it was stated that:

> ***"The ingredients that the Appellant and for that matter any suspect before the Court on a charge of robbery with violence in which more than one person takes part or where dangerous or offensive weapons are used or where the victim is wounded or threatened with actual bodily harm or occasioned actual bodily harm is Section 296(2) of the Penal Code. It is these ingredients which need to be explained to such accused person so as to enable him know the offence he is facing and prepare his case. In short, Section 296(2) is not only a punishment Section, but it also incorporates the ingredients for that offence which attracts punishment. It would be wrong to charge an accused person facing such offence with robbery under Section 295 of the Penal Code as would not contain the ingredients that are in Section 296(2) of the Penal Code and might create confusion …. the offence of robbery with violence is totally different from offence defined under Section 295 of the Penal Code which provides that any person who steals anything, and at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to steal it. It would not be correct to frame a charge for the offence of robbery with violence under Section 295 and 296(2) as this would amount to duplex charge."***

That evidence on record supports the charge of assault but not robbery with violence.

7. On sentence he called upon the Court to consider the Supreme Court Case, **Petition No. 15 of 2015** of **Francis Karioko Muruatetu vs. Republic** which declared the sentence of death unconstitutional.

8. The State through learned Counsel, **Mr. Mamba** opposed the Appeal. He urged that a charge sheet can only be fatally defective if it does not allege the essential ingredients of the offence. Citing the case of **Yosefa vs. Uganda (1969) EA 236** and **Sigilani vs. Republic (2004) 2 KLR 480** he urged that the charges were read to the Appellant on **17th May, 2016,** who denied the charge which signified that he understood it and the facts were not true according to him. That ingredients of the offence of Robbery with Violence were proved, and **Section 169(1)** of the **Criminal Procedure Code** was not violated.

9. This being the first appellate Court, I am duty bound to re-evaluate the evidence that was adduced before the trial Court and come to my own conclusion bearing in mind that I never saw or heard the witnesses who testified. **(See Okeno vs. Republic (1972) EA 32).**

10. It is urged that the charge was duplex and defective having been stated to be contrary to **Section 295** as read with **Section 296(2)** of the **Penal Code.**

Section 295 of the **Penal Code** reads thus:

> ***"Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery."***

This is the definition section of the offence of robbery.

Section 296(2) of the **Penal Code** on the other hand provides thus:

> ***"(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."***

This provision of law provides for the penalty for the offence of aggravated robbery.

11. In the case of **Joseph Njuguna Mwaura & 2 Others vs. Republic (2013)** a 5 Bench Court of Appeal stated thus:

> ***"We reiterate what has been stated by this Court (sic) in various cases before us: the offence of robbery with violence ought to be charged under Section 296 (2) of the Penal Code. This is the section that provides the ingredients of the offence, which are either the offender is armed with a dangerous weapon, is in the company of others, or if he uses personal violence to any person. The offence of robbery with violence is totally different from the offence defined under Section 295 of the Penal Code, which provides that any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to steal. It would not be correct to frame a charge for the offence of robbery with violence under Section 295 and 296(2) as this would amount to a duplex charge."***

12. However, the Court of Appeal in the case of **Cherere s/o Gakuli vs. Republic (1955) 622 EA AC** clearly stated that:

> ***"The test still remains as to whether or not a failure of justice has occurred. In our opinion, the result of the Applications of the test must depend to some extent upon the circumstances of the case and the nature of the duplicity."***

The question to be posed is therefore whether the Appellant was prejudiced as a result of the duplicity: When the charge was read to the Appellant as correctly submitted by Counsel for the State, it disclosed the offence he was facing, he understood the allegations and prepared his defence. This enabled him raise an argument that he should not have been charged with **Robbery with Violence** but **Assault Causing Bodily Harm.** In the premises, he was not prejudiced.

13. This therefore brings us to the issue whether the Appellant should have been convicted of assault but not robbery with violence. In **Johana Ndungu vs. Republic (Criminal Appeal No. 116 of 1995) UR** the ingredients of robbery with violence were stated to be:

> ***"(i) If the offender is armed with any dangerous or offensive weapon or instrument; or***
>
> ***(ii) If he is in company with one or more other person or persons; or***
>
> ***(iii) If, at or immediately before or after the time of robbery, he wounds, beats, strikes or uses any other violence to any person."***

14. It is not denied that the Complainant encountered the Appellant while he was in company of two (2) other individuals. The argument that the Appellant should have been charged with assault confirms the evidence adduced by the Complainant that the Appellant assaulted her. The evidence of the Complainant was corroborated by that of PW2 **John Vundi Muusi** who saw the Appellant assaulting her. PW4 **Dorcas Ndemi Kaluma** a Clinical Officer examined her and confirmed the fact of assault. She sustained actual bodily harm. This was evidence of violence having been used upon her.

15. The Complainant stated that she had **Kshs. 3,500/=** in her brassiere that the Appellant took away from her. PW2 and PW3 who witnessed the assault did not see the money being taken and when she went to seek medical attention the history she gave was that she had been assaulted by three (3) men. On cross examination the Clinical Officer stated that the Complainant did not make any allegation of the money

having been stolen from her. Therefore, evidence adduced fell short of proving the offence of robbery. In the case of **Ndaa vs. Republic (1984) KLR** the Court stated what consists of elements of assault causing actual bodily harm as:

(a) Assaulting the Complainant or victim;

(b) Occasioning actual bodily harm.

16. All these elements were present in the case save that the assailants were three (3) in number.

17. With regard to the 2nd Count, it is alleged that the Appellant committed an indecent act by touching the breasts of the Complainant against her will. From the evidence adduced this happened in the process of the assault. The brassiere got torn and some braids were pulled off the head. It was therefore a misdirection on the part of the trial Magistrate to convict the Appellant on the 2nd Count.

18. The learned Magistrate has been faulted for not complying with **Section 169(1)** of the **Criminal Procedure Code** that provides thus:

> ***"(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it."***

It is a requirement for a Judgment to contain issues for determination. The Judgment ought to be reasoned based on issues raised for determination. The learned Magistrate failed to comply with this provision of law but gave reasons for the determination. In the premises the Appellant was not prejudiced and the Appeal cannot be allowed on that particular ground.

19. From the foregoing I do set aside the conviction by the trial Court and substitute it with an order, convicting the Appellant for the offence of **Assault Causing Actual Bodily Harm** contrary to **Section 251** of the **Criminal Procedure Code.**

Regarding the second Count, the case against the Appellant having not been proved, he is acquitted of the same.

20. Regarding sentence, in his mitigation the Appellant sought the Court's leniency. In the premises, I sentence the Appellant to **four (4) years imprisonment** to be effective from the date of conviction.

21. It is so ordered.

Dated, Signed and **Delivered** at **Kitui** this **30th** day of **April, 2019.**

L. N. MUTENDE

JUDGE