REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO.80 OF 2015

1. CYRUS MWANIKI SAMWEL

2. SIMON NJOROGE MWANIKI

3. PETERSON MUNYI THOMAS

4. JAMES NYAGA NDEGWA.....APPELLANTS

VERUS

REPUBLIC.....RESPONDENTS

JUDGMENT

The appellants were charged with the offence of assault causing actual bodily harm Contrary to Section 251 of the penal code. The particulars of the offence are that the four appellants on the 28th day of September, 2012 at Kibugu location in Embu Municipality within Embu County jointly together unlawfully assaulted JOSPHAT KIURA thereby occasioning him actual bodily harm.

The trial magistrate convicted the appellants and sentenced them to pay a fine of Ksh.10,000 each and in default to serve three months imprisonment. There are five grounds of appeal which are: -

1. The learned Resident Magistrate erred in law and misdirected himself in conducting the entire trial in violation of the appellant's constitutional rights to a fair trial and representation to an advocate of their choice as provided for in the bill of right.

2. The learned Resident Magistrate erred in law and misdirected himself in relying on foreign decisions in preference to local jurisprudence and even failing to warn himself on the application of foreign decisions whose jurisprudence is only persuasive on the main.

3. The learned Resident Magistrate erred and misdirected himself in relying on P3 as evidence when the same was not produced by the prosecution.

4. The findings and conclusion of the learned Resident Magistrate were against the weight of the evidence.

5. The sentence was contrary to law and principle.

I have read the submissions by counsel for the appellants. The submissions raise two main issues. The first issue is that the appellants were denied their right of representation by an advocate. The appellants applied for adjournment but the trial court declined the request yet counsel for the appellants was appearing before the court of appeal. The decision by the trial court to deny the appellants their constitutional right of representation was unfair. Counsel relies on the case of **Olima & another Versus Republic [1991] 1 KLR 539,**

It is also submitted that the conviction is against the weight of the evidence. The prosecution did not prove its case beyond reasonable doubt. There was evidence that the complainant was assaulted by demonstrators who were armed with rungus. The trial court shifted the burden of proof against the appellants.

The state did not file any submissions.

This is a first appeal and the court has to evaluate the evidence afresh and makes its own conclusion.

PW1 Josphat Kiura was the complainant. On 28.9.2012 he was at the Embu stage when he was informed that there was a problem between matatu drivers and probox owners. He is a taxi driver. The matatu drivers did not want the probox vehicles to ply the Kithure route. The appellants were asking why the probox were going along that route. The fourth appellant deflated the tyre of his vehicle. The appellant had rungus and they attacked him using blows. He managed to escape and his shirt was torn. He was attacked together with fellow taxi drivers. The matter was reported to the Police and he was taken to Embu General

Hospital for treatment. **PW2 Julius Waweru Njoka** is also a taxi driver. It is his evidence that three of the appellants are matatu drivers while one of them is a bodaboda operator. On 28.12.12 he was told to go and meet the chief at Kithure to resolve a dispute between matatu owners and Probox owners. He went to Kithure. There were many people who were armed with stones twigs and sticks. They were attacked. PW1's shirt was torn and money in his pocket was lost. They reported to the Police

PW3 Jeremiah Gichovi Njuku was with PW2 when they went for the meeting at Kithure. PW2 was driving his vehicle. People emerged and stopped the vehicle and they were attacked. The appellants alledged that they were the only ones entitled to use that route. **PW4 PC Timothy Ndiwa** was stationed at the Manyatta Police station. On 21.11.2012 two suspects were taken at the station. They were booked and later charged for assault. **PW5 Cpl Josephat Munyage** was also stationed at Manyatta Police station. On 28.12.2012 they got information that taxi drivers and matatu drivers were protesting along the Kithure – Kibugu road. They rushed to the scene and found motor vehicle KBS 822F Toyota probox white in colour. The tyres of the vehicle were deflated. One of the owners of the vehicle complained that they were beaten by demonstrators. He talked to the owners of the matatu who were complaining that the probox were interfering with the transport business yet they have no PSV.

The record of the trial court shows that the appellants did not testify. The case was listed for further hearing of the prosecution case on 13.7.2015. On that date the prosecution closed its case. The case was fixed for defence hearing on 13.8.2015. The appellants informed the court that they had advocates and were not ready to proceed. The trial court observed as follows

> **Since this case started the accused person or their advocates have never been ready to proceed in this case. This I believe is a tactic to frustrate this case. The Court will not be party to this tactics. Consequently, the defence case is closed. Judgment will be on 17.8.15.**

The judgment was not ready on 18.8.2015 and it was delivered promptly on 24.8.2015. Counsel for the appellants contend that the appellants were denied their right of representation by an advocate. The records shows that the case proceeded all along and the appellants represented themselves. Although counsel had appeared in court initially, he never participated in the hearing. On 27.5.2014 Mr. Njagi appeared in court and directions were given that the matter was to proceed *denovo*. By that time two witnesses had testified. A hearing date was fixed by consent and the case was to be heard on 28.7.2014. On that date counsel did not attend court and there was no explanation about his whereabout. The case proceeded and four witnesses testified. The case was once again adjourned and the next date when it was heard was 16.4.2015. That is when Mr. Andande appeared and informed the court that Mr. Njagi was appearing before the Court of Appeal in Nyeri. The case was fixed for hearing at 2.30p.m on that date. One of the appellants informed the court that their advocate had not arrived. The case was heard and PW5 testified. Mr. Njagi appeared on 26.8.2015 and applied to have the cash bail that had been cancelled reinstated. A ruling was made the following day and the application was denied.

Given the record of the trial court I do find that the court cannot be faulted for having proceeded with the case in the manner it did. When the first four witnesses were heard the appellants did not tell the court that they were not ready. The date was taken by consent. For the second hearing there were no details of the alledged court of appeal case in Nyeri where counsel was attending. Although the convenience of counsel representing a party has to be considered when applications for adjournment are made the trial courts are the one in control of the proceeding and can decide to either grant an application for adjournment or decline it depending on the circumstances of each case. The trial court was of the view that there was a deliberate attempt to delay the case. The case had been partly heard and it was being heard *denovo.* Plea had been taken on 17.10.2012 and the fresh hearing started on 8.9.2014. On 27.5.2014 counsel for the appellants was present when directions were given but he was absent on 28.7.2014 when the case was fixed for hearing. The court cannot be faulted for having proceeded in his absence. I therefore find that as far as the proceedings were done in the absence of the appellants' counsel there was no violation of the appellants constitutional right to representation.

Section 211 of the C.P.C requires that after the prosecution closes its case, if the trial court is of the view that a case has been made against the accused then the accused will be called upon to make their defence. The court is supposed to explain the substance of the charge to the accused and ask him that he has a right to give evidence on oath which shall lead to cross examination, or to make a statement not on oath from the dock and shall also ask the accused whether he has a witness. Article 50 of the constitution provide for fair hearing. Article 50(i) gives an accused person the right to remain silent and not to testify during the proceedings. Article 50(k) gives an accused person the right to adduce and challenge evidence. The record of the trial court show that when the appellants stated that they were not ready, the court did not make an order that their application for adjournment had been declined. The court simply went ahead and closed the defence case. It would have been fair and procedural if the court had asked the appellants to give their evidence in the absence of their advocate. The appellants did not tell the court that they were not going to testify because their advocate was absent. The trial court took it upon itself and closed the defence case. Although section 211 is indicated as having been complied with, I do find that the appellants were not allowed to give their evidence. Their defences were closed by the trial court for the simple reason that they were not ready. It is one thing to say that one is not ready and it is another thing to say that one is not adducing evidence because his advocate is not in court. There was no defiance by the appellants. They did not refuse to tender their defences.

Given the record of the trial court I do find that the trial was not fair. The appellants were denied their constitutional right either to remain silent or to tender evidence in their defence. That denial renders the conviction by the trial court unprocedural. It is against the constitutional provisions. The dispute was between probox drivers and matatu drivers. There was need to ask the appellants to tell the court their side of the story. Had the appellants declined to give their evidence despite having been told to do so then that would have been a different case and the trial court could have indicated that the appellants had opted to remain silent. I do find that the trial process was not fair and the conviction

cannot be upheld.

The dispute occurred in 2012. It is now almost six years. It is not prudent for this court to order for a retrial. I do find that the appeal is merited and is hereby allowed. All the appellants shall be set at liberty unless otherwise lawfully held. Any fine paid to be refunded.

Dated and Signed at Marsabit this 30th day of May 2018

S. CHITEMBWE

JUDGE

Dated, Signed and Delivered at Embu this 27th day of June, 2018

F. MUCHEMI

JUDGE