REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 165 OF 2015

(An Appeal arising out of the conviction and sentence of Hon. C. OBULUTSA – (CM)

delivered on 20th November 2016 in ELDORET CM CR. Case No. 3297 of 2012)

AINEA MUSUDE ABABU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Ainea Musude Sila was charged with another with the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 6th March 2012 at Lunyito Village, Lugari Location, Kakamega County, the Appellant, jointly with others not before court while armed with dangerous weapons namely pangas and rungus robbed William Sire Ababu of Kshs.30,000/- and immediately before the time of such robbery used actual violence to the said William Sire Ababu. The Appellant was further charged with **assault causing actual bodily harm** contrary to **Section 251** of the **Penal Code**. The particulars of the offence were that on the same day and in the same place, the Appellant jointly with others not before court unlawfully assaulted Justus Omukuka thereby occasioning him actual bodily harm. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty for both counts. After full trial, the Appellant was convicted of the charge of **robbery with violence** but acquitted of the charge of **assault**. He was sentenced to death. The Appellant was aggrieved by his conviction and sentence. He filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He faulted the trial magistrate for convicting him on the charge of robbery with violence yet the ingredients to establish the offence had not been established by the prosecution witnesses. The Appellant took issue with the fact that the convicting magistrate did not read him his rights as provided under **Section 200** of the **Criminal Procedure Code** when he took over proceedings from the previous magistrate. The Appellant was aggrieved that he was convicted on the basis of the evidence of identification yet the circumstances conducive to positive identification were absent when the robbery is said to have taken place. The Appellant faulted the trial magistrate for failing to take into account that there existed a grudge due to a land dispute between the complainant and the Appellant. This, according to the Appellant, is what motivated the complainant to lodge a false complaint against him to the police. The Appellant was finally aggrieved that his defence had not been taken into consideration before the trial court reached the verdict to convict him as charged. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. He urged the court to allow the appeal. Ms. Oduor for the State opposed the appeal. She submitted that the Appellant was recognized by the prosecution witnesses during the robbery. There was no doubt that he had been recognized during the robbery and therefore his conviction ought not to be disturbed. She urged the appeal to be dismissed. This court shall revert to the arguments made on this appeal at the later part of this judgment.

As the first appellate court, this court is required to re-evaluate and to reconsider the evidence adduced before the trial magistrate's court so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. In doing so, this court is required to always put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot give any comment regarding the demeanour of the witnesses. (See **Okeno –vs- Republic [1972] EA 32).** In the present appeal, the issue for determination by this court is whether the prosecution adduced evidence to establish the Appellant's guilt on the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

The Appellant was tried with his father David Arrison Sila for the offence that he was convicted. The trial was before Hon. E. Tanui (SRM). Before the proceedings were concluded, the Appellant absconded from court. This was after the Appellant had been put on his defence. The

court proceeded with the case against the Appellant's father (his co-accused). In her considered judgment, the trial magistrate, while acquitting the Appellant's father made the following observation:

> ***"In this case it is not in doubt the complainant was attacked and robbed of Kshs.30,000/- in the night of 6.3.2012. What is in issue is whether the 1st accused was among the people who attacked and robbed him. Though PW1, PW2, PW3 and PW4 have all testified that they saw the 1st accused at the scene of crime, the said evidence is doubtful. What came out during trial is that the complainant and the 1st accused have a deep hatred for each other which hatred have been borne out of a long standing dispute over family land. The 1st accused almost managed to convince me that this case has been brought against him because of the land dispute. It's doubtful that he took part in harming and stealing from the complainant on 6th.3.2012. The 1st accused therefore created a doubt on the prosecution's case."***

After the delivery of the judgment, the prosecution applied to have the case against the Appellant in this appeal withdrawn under **Section 87(a)** of the **Criminal Procedure Code** pending the execution of the warrant of arrest. The application was allowed. This was on 16th April 2016. On 5th October 2015, the Appellant was arrested and brought before Hon. C.Obulutsa – SPM. The prosecutor applied for the case to proceed from where it had reached. The trial court ordered the Appellant to proceed with his defence. The Appellant gave unsworn defence. The court then reserved the case for judgment.

With greatest respect to the subsequent trial court, there was no case upon which the prosecution could request the trial court to proceed with. This was because the prosecution had withdrawn the case, as it was entitled to, under **Section 87(a)** of the **Criminal Procedure Code**. The prosecution was required to prefer new charges against the Appellant. The trial court did not have jurisdiction to set aside the order previously issued by the previous court at the request of the prosecution.

If the subsequent trial court was minded to continue with the proceedings from where it had reached, it would have asked the High Court to exercise its revisionary powers under **Section 362** of the **Criminal Procedure Code** to have the order that had the charges against the Appellant withdrawn under **Section 87(a)** of the **Criminal Procedure Code** set aside. In the premises therefore, it is clear from the foregoing that the Appellant's conviction was made on the basis of proceedings which had been withdrawn. The trial court had no basis or evidence upon which to evaluate and reach the conclusion that the Appellant was guilty as charged. On that ground alone, the Appellant's appeal against conviction is allowed. The conviction is quashed and the sentence imposed upon the Appellant is set aside.

The issue that remains for determination by this court is whether there is sufficient basis for this court to order for the Appellant to be retried. The principles upon which this court is required to consider in determining whether or not to order a retrial were considered by the court in **Kelvin Ochieng Tom -vs- Republic [2018] eKLR** A.C. Mrima J, when he held thus:

> ***"18. The principles upon which this court can order a retrial are well settled. The Court of Appeal in the case of Ahmed Sumar –vs- Republic [1964] EA 483 offered the following guidance:***
>
> ***"…in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficient of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessary follow that a trial should be ordered."***
>
> ***…***
>
> ***That decision was echoed in the case of Lolimo Ekimat –vs- R Criminal Appeal No.151 of 2004 (unreported) when this court stated as follows:***
>
> ***"…the principle that has been accepted to courts is that each case must depend on the particular facts and circumstances of that each case but an order for retrial should only be made where the interests of justice require it.""***

In the present appeal, it was clear from the evidence presented by prosecution witnesses that the prosecution was relying on the evidence of identification in its bid to secure the conviction of the Appellant. As observed by the first trial court, that evidence was brought in question when it emerged that the complainant and the Appellant are close relatives who have had a long standing land dispute. This court's re-evaluation of the evidence showed glaring contradictions in regard to the eye witnesses' account in respect to what actually took place on the material night. Their evidence did not disclose the source of light. Neither did it indicate how the said witnesses were able to be positive that it was the Appellant who had robbed the complainant. None of the witnesses gave the description of the assailant.

In the hectic circumstances of the robbery, it was possible that the identifying witnesses may have been mistaken that they had identified the Appellant as one of the robbers. Taking into consideration that there existed a land dispute between the complainant and the Appellant's family, it cannot be ruled out that the complainant took the opportunity of the robbery to remove the Appellant and his father out of the land equation. It will be difficult for a trial court when re-hearing the case against the Appellant to ignore the verdict reached by the first trial court which acquitted the Appellant's father and co-accused.

In the premises therefore, it will not be in the interest of justice for the Appellant to be re-tried. It will serve no useful purpose if the Appellant is subjected to a re-trial whose likely outcome would be an acquittal. This court therefore holds that the Appellant is acquitted of the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. He is ordered set at liberty and released from prison forthwith unless otherwise lawfully held. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF SEPTEMBER 2018

L. KIMARU

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 26TH DAY OF SEPTEMBER 2018

HELLEN OMONDI

JUDGE