**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**CRIMINAL APPEAL NO. 10 OF 2015**

**TITUS KATEMBU NZUKI.....APPELLANT**

**VERSUS**

**REPUBLIC …….....…… RESPONDENT**

*(Being an appeal from the original conviction and sentence in **Kitui Chief Magistrate's Court Criminal Case No. 356 of 2011** by **Hon. B. M. Kimemia P M on 05/03/14)***

**J U D G M E N T**

**1. Titus Katembo Nzuki,** the Appellant, was charged with the offence of **Robbery with Violence** contrary to **Section 296 (2)** of the **Penal Code.** Particulars of the offence were that on the **30th** day of **April, 2011** at around **6.30 p.m.** at **Matinyani Location, Matinyani Shopping Centre** in **Kitui County,** jointly with another not before court robbed **Kimanzi Mangui** one mobile phone make **Tecno** valued at **Kshs. 2,000/=,** one radio make **Sonitec** valued at **Kshs. 700/=** and cash **Kshs. 5,000/=** all valued at **Kshs. 7,700/=** and immediately before or immediately after the time of such robbery used actual violence to the said **Kimanzi Mangui.**

2. It was the Prosecution's case that on the **30th April, 2011** at **6.30 p.m.,** PW1, **Kimanzi Mangui,** the Complainant, was at **Kaumoni Bar** drinking alcohol sitting by the counter between **Mwanzia** and the Appellant. Having drunk alcohol for about **30 minutes** he left the bar. The Appellant and **Mwanzia** went ahead of him. The Appellant hit him on the chin an act that made him fall down. He took his wallet which contained **Kshs. 5,000/=** from his jacket, a phone and radio make **Sonitec** valued at **Kshs. 700/=.** He handed it over to **Mwanzia** who rode off his motorcycle leaving the Appellant who continued beating him. He reported the matter to the **D.O's** office and sought treatment at **Kitui District Hospital.** He reported the matter to the police. The Appellant was arrested and charged.

3. To support the Complainant's case the Prosecution called 4 other witnesses. PW2 **Nzumbi Musyimi** stated that he was playing pool (game) when he saw PW1 coming from the bar. He saw the Appellant hit him with a stick on the chin. He fell down and the Appellant took a wallet from his trouser back pocket, a **Tecno phone, Kshs. 2,000/=** and radio make **Sonitec.** He gave the items to **Mwanzia Lundi** who left on a motorcycle. He assisted him by taking him to his mother's home then the police station.

4. PW3 **Muthui Kitheka** found the Complainant already injured. PW4 **Dr. Patrick Mutuku** a Medical Officer examined the Complainant who went to hospital with allegations of having been assaulted. He assessed the degree of injury sustained as grievous harm. PW5 **No. 89329 P C David Maina** investigated the case and formed the opinion to charge the Appellant. He stated that the Complainant reported the matter to the police on **11th May, 2011** two weeks later. He issued him with a P3 form that was subsequently filled. He did not make any recovery of items alleged to have been stolen.

5. When put on his defence the Appellant elected to give sworn evidence. He stated that on the **16th May, 2011** two civilians and a police officer went to his place of work, a shop. They asked to be served with two (2) bottles of beer. He served them and they asked him for a licence which he did not have. They arrested him. He was taken to the police station where he was charged. On cross examination he stated that PW1 constructed for him a house but did not adhere to the specification given. He paid him **Kshs. 200/=** instead of **Kshs. 500/=.** PW2 was a cousin to PW1 and that he was framed up.

6. He called a witness **James Mulu Mbuvi** who stated that on the **30th April, 2011** he was at the shop with the Appellant from **3.45 p.m.** till night.

7. The learned Trial Magistrate considered evidence adduced and reached a finding that the Appellant stole the Complainant's property mentioned above, and he injured him. In the premises actual violence had been used. Dismissing the alibi defence given by the Appellant he stated that the Appellant was properly identified. She convicted him and sentenced him to suffer death.

8. Being dissatisfied with the conviction and sentence the Appellant appealed on grounds that:

- The charge of robbery with violence was not supported by the actual evidence adduced in the trial.
- The findings were based on insufficient evidence.
- Evidence tendered by the Prosecution justified an acquittal.

9. Being the first appeal, I am duty bound to subject evidence adduced at trial to a fresh and exhaustive analysis while bearing in mind that I had no opportunity of hearing and seeing witnesses who testified. **(See Okeno vs. Republic (1972) EA 32).**

10. The charge herein having been of robbery with violence I must consider what constitutes the offence. The ingredients of the offence of robbery with violence were set out in the case of **Oluoch vs. Republic (1985) KLR** where the Court of Appeal held:

***"Robbery with violence is committed in any of the following circumstances:***

> ***a. The offender is armed with a dangerous and offensive weapon or instrument; or***
>
> ***b. The offender is in company with one or more person or persons; or***
>
> ***c. At or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person..."***

11. Evidence adduced and not controverted was that the Complainant was drinking at a bar. The Complainant was categorical that other patrons inside the bar were the Appellant and one **Mwanzia** who sat on his left hand side while the Appellant was on his right hand side. He drunk alcohol for about **30 minutes** and decided to leave. According to him, the owner of the bar and an attendant were present. The incident occurred after the three left the bar. It is argued that crucial witnesses were not called to testify. In the case of **Mwangi vs. Republic (1984) KLR 595** it was stated that:

> ***"Whether a witness should be called by the prosecutor is a matter within the discretion of the prosecutor and the court will not interfere with that discretion unless it may be shown that the prosecutor was influenced by some oblique motive."***

12. The incident having occurred after the Complainant, Appellant and **Mwanzia** left the bar, the owner of the bar and the attendant cannot be viewed to have been crucial witnesses.

13. While inside the bar the Complainant did not seem to have seen the Appellant with any weapon or instrument. At the point of being attacked he could not tell what instrument the Appellant used to injure his chin. However, there was PW2 at a corridor outside a room where pool (game) was being played. He saw the Appellant hit the Complainant on the chin with a stick and he tripped and fell on the stairs per the

evidence he adduced in chief. However, on cross examination he said he hit him with a metal. This was a contradiction that would have called upon the court to test the witness's evidence with care. It is therefore questionable if the Appellant was armed with a weapon.

14. It cannot be said with certainty that the Appellant was in company of **Mwanzia** for purposes of committing some mischief. The three of them were drinking in the bar. Per the Complainant, he left going outside and the Appellant and **Mwanzia** were ahead of him.

15. Whether items he alleged to have possessed were actually stolen is an issue to be interrogated. It is not in doubt that the Complainant withdrew **Kshs. 20,000/=** from **Equity Bank** on the **29th April, 2011** a day preceding the incident. He may have had the sum alleged or not. He stated that he carried the sum in his wallet which was removed from his jacket pocket. Ownership of the cellphone and radio alleged was not established. PW2 alleged that he saw the Appellant hitting the Complainant and also taking his wallet from his trousers' back pocket, cellphone and radio. Having been at a distance of **30 – 50 meters** away, it was unlikely that he could have seen what exactly happened. I say so, considering the fact that he contradicted the Complainant as to where the wallet was taken from.

16. Looking at the P3 form, the brief details of the alleged offence was that the Complainant had been attacked by people known to him. There was no mention of items stolen. Yet, the P3 form was filled two (2) weeks later. At the point of being examined by the Doctor, the brief history given was that the Complainant was assaulted by people known to him. There was no mention of having been robbed.

17. The Complainant stated that he made a report to the **D.O's** office then sought treatment whereafter he reported to the police on the fateful night but he was advised to wait until he healed. He returned **7 days** later to record a statement. Evidence was tendered of the fact of having sought treatment at **Kitui District Hospital** on the **30th April, 2011.** A treatment card (Exhibit 1) issued gave the history of the patient having been assaulted by a person well known to him. The injuries sustained are indicated and the nature of treatment given.

18. On the material day the Complainant sustained a cut wound on the chin that was two (2) cm deep and 1cm in length. Tenderness on the back of the neck, bruise on the lower part of the neck interiorly and tenderness on the right upper chest. Two lower teeth were loose. The degree of injury sustained was assessed as grievous harm. This was proof that on the material evening the Complainant was assaulted and following the assault occasioned on his person he suffered grievous harm.

19. The learned Trial Magistrate has been faulted for recording that she had complied with **Section 200** of the **Criminal Procedure Code** after the charge was substituted, a provision of the law that was not applicable in the circumstances. **Section 200** of the **Criminal Procedure Code** provides:

> ***"(1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may—***
>
> > ***(a) deliver a judgment that has been written and signed but not delivered by his predecessor; or***
> >
> > ***(b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummon the witnesses and recommence the trial.***
>
> ***(2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.***
>
> ***(3) Where a succeeding magistrate commences the hearing of proceedings and part of the***

***evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.***

***(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial."***

On the **27th November, 2012** an application for amendment of the charge was made by the Prosecution. The Magistrate allowed the application and gave the Appellant an opportunity of stating whether he wished to have any witness recalled. He stated thus:

***"Accused – I wish for PW1 to be recalled for further examination."***

This was followed by words stated by the court namely:

***"Court – The Prosecution to avail PW1 for further examination, Kimanzi Mangui, I have complied with the provisions of S 200 CPC."***

**20. Section 214** of the **Criminal Procedure Code** provides for amendment of the charge. It states thus:

***"(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:***

***Provided that—***

***(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;***

***(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.***

***(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.***

***(3) Where an alteration of a charge is made under subsection (1) and there is a variance between the charge and the evidence as described in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary."***

It is important to note that the Magistrate intended to comply with **Section 214** of the **Criminal Procedure Code** but not **Section 200** of the **Criminal Procedure Code.** The question to be answered is whether the error in the circumstances; that is, the indication that she complied with **Section 200** of the **Criminal Procedure Code** was fatal? Such an error is curable under **Section 382** of the **Criminal Procedure Code** that provides:

***"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of***

***an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:***

***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."***

The error was not fatal to the charge as it did not occasion a failure of justice. It is therefore disregarded.

21. From the analysis of evidence adduced at trial, it is apparent that doubts emerged if indeed the Appellant stole from the Complainant but there was watertight evidence that he attacked him, injured him and caused the grievous harm that he sustained.

22. In the result, I allow the appeal, quash the conviction for the offence of **Robbery with Violence** and set aside the sentence of death imposed. I proceed to substitute it with a conviction for the offence of **Causing Grievous Harm** contrary to **Section 234** of the **Penal Code** on the Appellant and impose a sentence of **3½ years** to be served with effect from the date of conviction by the Trial Court.

23. It is so ordered.

**Dated, Signed** and **Delivered** at **Kitui** this **20th** day of **July,** 20**16.**

**L. N. MUTENDE**

**JUDGE**