REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEALS 2 AND 3 OF 2015

JOSHUA MUNYAO KIILU…………………………………………….....……1ST APPELLANT

JACOB SILA MWILU………………………………….……....…………2ND APPELLANT

VERSUS

REPUBLIC…………………..…………………..…...………...…………………RESPONDENT

(An appeal arising out of the judgment and sentence of Hon. W.K. Cheruiyot Ag. SRM in Criminal Case No. 179 of 2014, delivered on 22nd December 2014 at the Senior Resident Magistrate's Court at Tawa)

JUDGMENT

On 6th June 2012 at about 7pm, Charles Muthianie Mawie, the complainant herein, was in his house in Kitondoi village in Kyuu location in Mbooni West District within Makueni County when two people entered the house, knocked him down, held him by his neck, hit him with a stick and took Kshs 5,000/= from his trouser pocket and Nokia phone worth Kshs 3,000/=.

Charles managed to scream and Fidelis Nduku Maundu, Charles' daughter-in-law, heard the scream and came running to his house. She met two men leaving the house, and her-father-in-law in the house without his trousers. She then got out of the house, at which point Mary Mutuku Muaye, a sister-in-law of Charles who had also heard the scream, came running and entered into the house, whereupon Charles explained to her how he was attacked and lost three of his teeth. Charles went and reported the attack the next day at Mbooni police station and was treated at Mbooni District hospital

Both Charles and Fidelis had torches at the time of the attack, and recognized the two men and identified them as the 1st and 2nd Appellants herein, who they said were their relatives. The Appellants were later arrested and charged in the trial Court with the offence of robbery with violence, contrary to section 296(2) of the Penal Code. They pleaded not guilty.

Charles (PW1), Fidelis(PW2) and Mary(PW4) gave the foregoing account of events in their evidence during the trial that ensued. Evidence was also given by a clinical officer attached to Mbooni sub-District hospital by the name of Geofrey Mutie (PW3), of the grievous harm suffered by Charles, and he produced as evidence a P3 form he filled using the hospital treatment notes from the time Charles was treated.

The investigating officer in the case, one PC Collins Aoko(PW5), who took over the investigation of the case produced the rungu (stick) used to attack Charles, the shirt Charles was wearing during the attack and the three teeth that Charles lost during the attack as exhibits. He also explained how the Appellants were arrested when Charles informed him that they would be attending Court for another case.

The Appellants on their part testified that they had no knowledge as to their arrest or of the charges brought against them. They were found guilty and sentenced to death. The Appellant being aggrieved by the judgment of the trial magistrate, have preferred this appeal against the conviction and sentence. The main grounds of appeal are stated in the Appellant's Petition and Memorandum of Appeal filed in Court on 25th February 2015.

These grounds of appeal are as follows:

1. The Learned Trial Magistrate erred in both law and fact in failing to note that the charge sheet as drawn was completely improper and consequently not a charge sheet at all and further that a conviction could not result there from.

2. The learned trial Magistrate erred in both law and fact in failing to find that in the view of all circumstances the Appellant had committed no offence whatsoever and therefore the meted sentence was an illegality.

3. The learned trial Magistrate erred in both law and fact in finding and clearly establishing that the appellant had committed robbery with violence contrary to the provisions of Section 296(2) of the Penal Code notwithstanding the overwhelming evidence to the contrary.

4. The learned trial Magistrate erred in both law and fact in failing to note and hold that the appellant's Constitutional rights had been contravened as the appellant was arrested, incarcerated and arraigned in court way after the mandatory period had lapsed and no explanation at all by the prosecution was tendered as to the cause of the prolonged period of confinement.

5. The learned trial Magistrate erred in both law and fact when he failed to find that the participation of the appellant in the robbery if any was doubtful.

6. The learned trial Magistrate erred in both law and fact in finding that the intensity of the torch light at the purported scene to support recognition of the appellant by the prosecution witnesses was proved to the required standard.

7. The learned trial Magistrate erred in both law and fact in filing to appreciate that there was no independent witness who witnessed the alleged attack on the complainant and therefore the Learned Magistrate misdirected himself in holding that PW.2 was an independent witness which inevitably occasioned prejudice to the appellant.

8. The learned trial Magistrate erred in law in failing to avail a chance to the appellant to cross-examine all the prosecution witnesses in total disregard to Section 208(3) of the Criminal Procedure Act and in so failing occasioned a miscarriage of justice.

9. The learned trial Magistrate erred in both law and fact by failing and/or disregarding the mitigating circumstances whilst sentencing the Appellant which was unfair under the circumstances.

The Appellants' learned counsel , Mutinda Kimeu & Company Advocates, filed written submissions dated 19th November 2015 wherein it was urged that there was conflicting evidence about the fact of robbery between Charles and Fidelis as to the number of goats that Charles sold in the market, and therefore the money he received on the day of the robbery. Further, that the phone that was stolen was not included in the charge sheet.

It was also submitted that there was no evidence of any weapons found on the Appellants as Charles and PC Collins Aoko testified that the exhibits including the rungu alleged to have been used in the robbery were taken to the police station by Charles himself. Lastly, that the evidence as to identification was also contradictory as Mary, who was also a relative of the Appellants claimed not to know of them or their names.

Ms. Rita Rono, the learned Prosecution counsel, filed submissions in response to the Appellant's appeal dated 30th June 2016, wherein it was argued that the witnesses were cogent and concise in their account of the events of the day of the robbery, which evidence was corroborated. Therefore, that the ingredients of the offence of the robbery with violence were proved.

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**). The two issues raised by the Appellants' grounds of appeal and submissions are firstly, whether there was proper identification of the Appellants; and secondly, whether the Appellants' conviction for the offence of robbery with violence was based on consistent and sufficient evidence.

On the issue of identification, it was urged by the Appellants that the charge sheet did not capture the time of the alleged offence, and the evidence showed that the offence occurred at night. However, I note in this regard that from the evidence of Charles and Fidelis who both testified that the robbery took place at 7pm and that they had torches at the time, they were able to recognise the Appellants who they knew before, as they are related. Charles also testified that he had been with the Appellants earlier on the same day.

It has been stated by the Court of Appeal in **Anjononi and Others vs Republic, (1976-1980) KLR 1566** that when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other. In the circumstances I find that the Appellants were positively identified.

On the issue of whether there was consistent and sufficient evidence to convict the Appellant for the offence of robbery with violence, section 296 (2) of the Penal Code provides as follows:

> **"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."**

The prosecution must therefore prove theft as **a central element of the offence of robbery with violence, as the offence is basically an aggravated form of theft. The** other elements of the offence of robbery with violence were elaborated by the Court of Appeal in ***Ganzi & 2 Others v Republic*** **[2005] 1 KLR and** in **Johanna Ndungu Vs Republic, Cr. App No. 116 of 2005 (unreported)** as follows:

> **ately before or immediately after the time of the robbery, he wounds, beats strikes or uses any other violence to any person.**

I am alive in this regard to the requirement that proof of any one of the ingredients of robbery with violence is enough to base a conviction of robbery with violence under section 296 (2) of the Penal Code as was held in **Oluoch vs Republic, (1985) KLR 549**.

In the present appeal, it is only Charles who testified as to the theft of Kshs 5000/= from his pocket, and of his Nokia phone. No other witness saw the said items or the Appellants appropriating them. According to Charles, the money was the proceeds from a sale of two of his goats in the market earlier that day, and that the Appellants had seen the money as Charles treated them to a beer in a bar after the sale. Fidelis stated that Charles had taken one goat to the market, but did not give any evidence as to having seen the money. None of the other witnesses gave any evidence as regards the money, neither was it recovered from the Appellants who were alleged to have disappeared after the alleged robbery.

As regards the phone that was stolen, Charles did not provide any evidence of the existence of the phone or ownership of the same. The other witnesses did not give any evidence of the existence of the phone,

other than the account given to them by Charles of the phone having been stolen. Of more concern as regards the evidence about the stolen phone, is that the charge was amended while PW5 was giving evidence during his cross-examination, to include the phone as one of the items stolen. The 2nd Appellant did object to the amendment of the charge, and the trial magistrate ruled as follows:

> "**I have considered the application by the prosecution. The same is almost being late(sic), but is has come before the close of the prosecution case. I shall allow the application but the accused person will be at liberty to cross-examine the witness in the above on the said amended charge sheet if they so wish".**

I confirmed with the original record that this is what appears to have been ruled, although it was difficult to read the trial magistrate's handwriting. The direction therefore seemed to have been that the Appellants could only cross-examine PW5 on the issue of the phone. The Appellants proceeded to plead to the amended charge, and indicated that they had no questions in cross-examination, and the cross-examination of PW5 continued without his recall, or the recall of any of the other four witnesses who had already given evidence.

Section 214(1) of the Criminal Procedure Code in this regard provides for the rights of an accused person upon the amendment of a charge as follows:

> **"(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."**

The direction by the trial magistrates and proceedings that followed after the amendment of the charge in the trial court were to this extent irregular. This irregularity is not one that can be cured under section 382 of the Criminal Procedure Code, as it prejudiced the Appellants who did not cross-examine the other witnesses, particularly the complainant about a key item alleged to have been stolen during the robbery, and on which he had earlier on given evidence. It is also noted in this regard that the right to challenge evidence through cross-examination is one of the rights of a fair trial pursuant to Article 50(2)(k) of the Constitution.

This evidence by Charles as to the robbery is therefore uncorroborated, and in light of the gaps and irregularities noted in the evidence on the items that were alleged to have been stolen by the Appellants, this Court finds that the robbery was not proved beyond reasonable doubt.

In light of this finding, it is not necessary to consider if the other elements of the offence of robbery with violence were met. However, given the positive identification of the Appellants at the scene of the alleged offence by both Charles and Fidelis, and the evidence by PW3 as to the results of the medical examination of Charles, I am of the view that there is evidence that shows that the Appellants did injure the complainant.

This Court is empowered under section 179 of the Criminal Procedure Code to substitute an offence with one for which the evidence is established , provided that the offence being substituted is cognate and

minor to the offence the accused person was initially charged with. The said section provides as follows:

> **"(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.**
>
> **(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."**

The offence that commends itself to me for purposes of conviction and sentencing is that of assault causing actual bodily harm, contrary to section 251 of the Penal Code, for which the punishment is imprisonment for up to five years. I agree with the Appellants' arguments in this regard that PW3 could not legally change the assessment of the degree of injury suffered by the complainant from harm to grievous harm, while copying the contents of the P3 form that had been filled by the doctor who examined the complainant.

This change was not only contrary to sections 66 and 68 of the Evidence Act as regards production of secondary evidence, but also contrary to section 48 and 54 of the Evidence Act, as there was no basis for the opinion by PW3 that the complainant suffered grievous harm since he did not examine the said complainant. However and this finding notwithstanding, it is evident from the treatment cards and original P3 form that were filled by the doctor who examined the complainant and that were produced as exhibits in the trial Court, that the complainant suffered tenderness in his neck and lower jaw and three missing teeth. The complainant testified that the injuries were caused by the Appellants, which evidence was corroborated by the evidence that placed the Appellants at the scene of the crime by both the complainant (Charles) and Fidelis.

Pursuant to the provisions of section 179(2) of the Criminal Procedure Code, I accordingly hereby quash the conviction of the Appellants for the offence of robbery with violence, and substitute it with the conviction of the Appellants for the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code. I also substitute the death sentence imposed upon the Appellants with a sentence of five (5) years imprisonment for assault causing actual bodily harm, which sentence is to run from the date of conviction by the trial Court.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 22ND DAY OF SEPTEMBER 2016.

P. NYAMWEYA

JUDGE