REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 42 OF 2015

EMMANUEL MWADIME……..…….... APPELLANT

VERSUS

REPUBLIC……...…… RESPONDENT

(From original conviction and sentence in Criminal Case Number 275 of 2013 in the Principal Magistrate's Court at Taveta delivered by Hon R.M. Ondieki (PM) on 30th April 2015)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Emmanuel Mwadime, had been jointly charged with Kadenge Kuyayi (hereinafter referred to as (DW 1"), Rose Mwalili (hereinafter referred to as "DW 2"), Juliana Alfred (hereinafter referred to as "DW 4"), Stephen Mwakazi (hereinafter referred to as "DW 5") and Ngoira Salim (hereinafter referred to as "DW 6") for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code Cap 63 (Laws of Kenya).

2. It was evident from the Trial Court proceedings that the Prosecution applied to consolidate **PMCRC No 275 of 2013 Republic Kadenge Kuyayi and Rose Mwalili** with **PMCRC No 402 of 2012 Republic vs Emmanuel Mwadime** and **PMCRC No 491 of 2013 Republic vs Stephen Mwakazi, Juliana Alfred and Ngoira Salim** which application was allowed. The charges were read to the Appellant and his Co-Accused persons again and they all pleaded not guilty to the new charges.

3. The Learned Trial Magistrate acquitted all the Accused persons of the said offence apart from the Appellant whom he found guilty, convicted and sentenced him to death as prescribed by the law.

4. The particulars of the charge were that :-

> **"On the 18th day of May 2013 at Rekeke Village within the Taita Taveta County, jointly with others not before the court, being armed with offensive weapons namely a pangas and rungu** (sic) **robbed NICODEMUS MUSAU KAKULI Ksh 7,300/=, To mobile phones Make Galaxy GTS 3650 valued at Ksh 60,000/=, a loaf of bread, pair of shoes, a packet of cigarettes all valued at Ksh 71,950/= and at** (sic) **immediately before or immediately after the time of such robbery used actual violence to the said NICODEMUS MUSAU KAKULI."**

5. Being dissatisfied with the said judgment, through his advocates M/S Marende, Birir Shimaka & Company Advocates, the Appellant filed a Memorandum of Appeal dated 15th May 2015 on the same date at the High Court of Kenya, Mombasa. The grounds of appeal were:-

1. THAT the Honourable Magistrate erred in law and fact by not appreciating that the Complainant was a well known trouble maker in the Village.

2. THAT the Honourable Magistrate erred in law and fact by ruling that he was to blame for the injuries whereas the evidence clearly shows that the Complainant was beaten by a mob because he was a Village irritant.

3. THAT the Honourable Magistrate erred in law and fact by relying on the evidence of witnesses who were not called to give evidence like Prof Machibuko who is said to have taken the Complainant to hospital after suffering injuries.

4. THAT the Honourable Magistrate erred in law and fact by concluding Section 296(2) of the Penal Code had been met and hence convicting and sentencing him whereas if he had applied the law correctly, he would have been convicted, if at all, on a lesser charge.

5. THAT the Honourable Magistrate erred in law and fact by not considering that the Complainant was beaten by a mob and in the circumstances (sic) **it was not possible to know who inflicted the injuries from him and stole the items if at all they were stolen.**

6. THAT the Honourable Magistrate erred in law and fact by failing to consider his defence considering that he had stated in his defence that he had been injured also (sic) **by the Complainant and that he had reported the matter to Taveta Police Station which in essence made the whole episode as** (sic) **a village brawl.**

6. The matter was subsequently transferred to the High Court of Kenya, Voi where the Appellant indicated that he would be representing himself. On 20th July 2016, this court directed him to file his Written Submissions. Instead of doing so, on 6th September 2016, he filed his Written Submissions along with Amended Grounds of Appeal. He relied on the following grounds of appeal:-

1. THAT the Pundit trial magistrate erred in both law and fact to convict him by failing to note that the charge sheet was defective (sic)**.**

2. THAT the Pundit trial magistrate erred in both law and fact to convict him with the offence of robbery with violence c/s 286(2) of the Penal Code in failing to note that PW 1, the Complainant did not lay a report of robbery c/s 296(2) of the Penal Code as alleged by the Prosecution instead PW 1 reported that he had been assaulted by members of public by unknown people vide PW 1's first report dated 18/5/2013 at 0830 hours OB 11 at Taveta Police Station attached with the Written Submission (sic)**.**

3. THAT the Pundit trial magistrate erred in both law and fact to convict him in failing to note that PW 1 the Complainant did not give the physical descriptions/appearances and names of his assailants to the police nor did he give or mentioned or prescribed the alleged stolen items to the police PW 1's first report dated 18/5/2013 at 0830 hours OB 11 at Taveta Police Station attached with the Written Submission (sic).

4. THAT the Pundit trial magistrate erred in both law and fact to convict him in failing to consider that the Prosecution's case was founded on the evidence of a single witness.

5. THAT the Pundit trial magistrate erred in both law and fact to convict him in failing to note that the alleged stolen items brought to court as exhibit were not proved to belong to PW 1 the Complainant in that no document or receipt was produced by PW 1 to prove the ownership(sic).

6. THAT the Pundit trial magistrate erred in both law and fact to convict him in failing to note that the Prosecution's evidence adduced in of their case were contradictory and inconsistence c/s 163 of the evidence act (sic).

7. THAT the Pundit trial magistrate erred in both law and fact to convict him in failing to note that the Prosecution failed to prove their case beyond reasonable doubt c/a 107, 109 of the evidence act(sic)**.**

8. THAT the Pundit trial magistrate erred in both law and fact to convict him in failing to note that Corporal Geofrey Kaunda PW 5 was not the right man to produce the alleged P3 forms as required by law (sic).

9. THAT the Pundit trial magistrate erred in both law and fact to convict him without considering some of the crucial prosecution's witnesses were not brought to court to ascertain the truth c/s 150 of the CPC(sic).

7. The State filed its Written Submissions dated 27th September 2016 on 28th September 2015 while in response thereto, the Appellant filed his Further Written Submissions on 10th October 2016.

8. When the matter came up on 9th November 2016, both the Appellant and the State asked the court to rely on their respective Written Submissions in their entirety as they did not wish to highlight the same. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

9. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

"**On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".**

10. This court noted that the Appellant's Amended Grounds of Appeal were convoluted and had actually been addressed in the initial Memorandum of Appeal that had been filed by his advocate. His Written Submissions were also unnecessarily long running to over sixty (60) pages. However, as he was now representing himself, the Amended Grounds of Appeal superseded the said initial Memorandum of Appeal.

11. In establishing whether or not the Appellant's guilt was proven in the charge of robbery with violence, this court identified the following issues, that were dealt with under separate heads herein below, to really have been pertinent for its determination:-

a. Whether or not the Charge Sheet was defective;

b. Whether or not the Appellant was positively identified;

c.Whether or not the Prosecution proved its case beyond reasonable doubt.

I.DEFECTIVENESS OR OTHERWISE OF THE CHARGE SHEET

12. Amended Ground of Appeal No 1 was dealt with under this head.

13. The Appellant submitted that the Charge Sheet did not indicate the time of the alleged offence and it was therefore not clear whether the said offence was committed during the day or during the night. It was his argument that the same was relevant because it could not be assumed that it occurred during the day which raised doubts as to whether or not there was light.

14. On its part, the State argued that the Complainant, Nicodemus Musau Kakuli (hereinafter referred to as "PW 1"), Ramadhan Ali (hereinafter referred to as "PW 2"), Moddy Ayubu (hereinafter referred to as "PW 3"), Fridah Nyanyalu (hereinafter referred to as "PW 4") and the Appellant all testified about the happenings on the morning of 18th May 2015 and consequently, the Appellant could not purport not to have understood that the incident was said to have happened during the day.

15. It was correct as the Appellant submitted that the Charge Sheet did not indicate the time of the alleged incident. It was equally correct as the State pointed out that all the witnesses were clear that the alleged incident happened in the morning hours.

16. PW 1 stated that he was going to the shop at about 8.00 am when he met the Appellant and PW 3. PW 2 testified that he was informed that someone was being beaten up at about 9.00 am. On his part, PW 3 stated that at about 9.00 am, the Appellant and PW 1 were quarrelling in his compound but he chased them away. PW 4 said that she was at her home at about 8.30 am when she heard a commotion at a nearby road.

17. DW 1 testified that at about 9.00 am, the Appellant informed him that he had been assaulted. DW 2 said she was at her home when she heard commotion at a nearby road. DW 4, DW 5, DW 6 and the Appellant did not indicate the time of the altercation although the latter alluded to the fact that he was working at a farm belonging to one Ruth.

18. From the said evidence on record, there was no doubt in the mind of this court that the incident occurred in the morning hours and the Appellant was aware of the same. If it was at night, he did not raise the same in the proceedings in the Trial Court. His arguments about the lighting conditions at the material time of the incident therefore fell by the wayside as one could see another during the day.

19. Notably, an appellate court will not make a finding that a charge has prejudiced an accused person or occasioned him injustice unless the same is properly demonstrated. Although the time in the Charge Sheet was not indicated which was an omission, the Appellant did not demonstrate what prejudice he suffered as required by Section 382 of the Criminal Procedure Code Cap 75(Laws of Kenya).

20. The said Section provides as follows:-

> **"… no finding sentence or order passed by 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 trial or in any inquiry or other proceedings under this code unless the error mission or irregularity has occasioned failure of justice."**

21. In the absence of any evidence that the Appellant suffered any prejudice or was occasioned injustice by failure of the Prosecution to indicate the time of the alleged occurrence, this court was not persuaded to find that he ought to be acquitted on account of a defective Charge Sheet.

22. In the premises foregoing, Amended Ground of Appeal No 1 was not merited and is hereby dismissed.

II. IDENTIFICATION OF THE APPELLANT

23. Amended Grounds of Appeal Nos 3 and 4 were dealt with under this head as they were both related.

24. The Appellant argued that the Learned Trial Magistrate convicted him based on the single evidence of PW 1. He contended that PW 1's First Report dated 18th May 2013 at Taveta Police Station at 8.30 am indicated that he had been assaulted by unknown people. Although he said the time of the incident had not been indicated in the said First Report, this court disregarded this argument as it had found hereinabove, that the incident was said to have occurred in the morning hours.

25. On the issue of identification, he referred the court to the case of **Oluoch vs Republic 1985 KLR** in which the Court of Appeal stated as follows:-

> **"A fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness in respect of identification especially when it is known that the conditions favouring a correct identification were difficult."**

26. The State submitted that in this particular case, the incident occurred at 9.00 am and that PW 1 identified him as "Mwadime" which evidence was supported by PW 4. It placed reliance on the case of **Kiilu & Another vs Republic [2005] eKLR** in which the Court of Appeal stated as follows:-

> **"Subject to well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness in respect of identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, whether it be circumstantial or direct, pointing to guilt, from where a judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can be safely accepted as free from possibility of error."**

27. A perusal of the proceedings shows that PW 1 testified that the Appellant accosted him in PW 3's compound. PW 3 testified that PW 1 went to his compound to borrow an axe and shortly thereafter the Appellant also came to his compound while armed with a panga and a spade and starting quarrelling PW 1. On her part, PW 4 stated that PW 1 was holding a piece of wood and corroborated PW 3's evidence that the Appellant was holding a panga.

28. As this court found hereinabove, the incident occurred during the day. Both the Appellant and PW 1 appeared to have been known to each other and several witnesses placed the Appellant at the scene of the incident. Indeed, PW 5 told the Trial Court that the two (2) were neighbours.

29. As it was evident that the placing of the Appellant at the said scene was not by a single witness but several witnesses, a fact that was rightly pointed out by the State, the said Learned Trial Magistrate did not therefore need to warn himself of the dangers of relying on the evidence of PW 1 alone. He reached a correct conclusion that the Appellant was identified as having been one of the persons who were present at the material time and date. Whether the Appellant was the one who injured or robbed PW 1 was a different matter altogether.

30. In this regard, this court did not find merit in Amended Grounds of Appeal Nos 3 and 4 and the same are hereby dismissed.

III. PROOF OF THE PROSECUTION'S CASE

31. Amended Grounds of Appeal Nos 2, 5, 6, 7, 8 and 9 were dealt with under this head as they were all related.

32. As had been indicated hereinabove, the Appellant had submitted that PW 1 had reported that he had been assaulted by unknown persons which meant that PW 1 did not know his attackers. It was his contention that since PW 1 had purported to know who his attackers were, he ought to have recorded that information in the said First Report of 18th March 2013 that was made at 0830 hours and that in any event, the same showed that PW 1 was attacked by one Bakari, who was not called as a witness in this case.

33. In addition, he stated that PW 1 never averred in the First Report that he had been robbed of any items. He was emphatic that the said First Report by PW 1 related to an assault arising out of a beating he received from members of the public and had nothing to do with robbery with violence.

34. He contended that the Prosecution had fabricated the present charges so as to fix him as he not mentioned anywhere in the First Report. He added that PW 1 had grudges with many people and that is why he was being beaten.

35. Further, he averred that Patterson Mwapulu did not feature anywhere in the proceedings or in the Charge Sheet as a witness but that he only appeared for the first time in the Judgment. It was his contention that the author of the P3 Form that was produced by PW 5 was unknown and the Learned Trial Magistrate ought not to have indicated the said Patterson Mwapulu as PW 5 because he never testified during the Trial.

36. He was categorical that police officers should tender in evidence P3 Forms. He submitted that a party who does not call a witness does so at his own peril and that an adverse inference should be drawn if he is not called as a witness. He referred this court to the case of **Julius Karisa Charo vs Republic [2005] eKLR** where Ouko J (as he then was) stated as follows:-

> **" it appears to us that production of P3 forms in courts is not taken seriously and we wish to impress upon trial magistrates to be careful in admitting P3 forms when the maker is not called."**

37. On its part, the State submitted that there was no error in PW 5 having tendered in evidence the P3 Form as the Appellant never objected to the production of the same and that he could not therefore raise the same at this appellate stage. It added that the evidence by the Prosecution witnesses, P3 Form and treatment notes was proof that PW 1 actually saw the Appellant who caused him injuries.

38. It contended that it was not mandatory to call a particular number of witnesses as stipulated in Section 143 of the Evidence Act Cap 80 (Laws of Kenya) that provides **"that no particular number of witnesses shall in the absence of any provision to the contrary be required to prove any fact."**

39. It was therefore its submission that the Prosecution proved its case beyond reasonable doubt by demonstrating the ingredients of the offence of robbery with violence set out in Section 296(2) of the Penal Code which are that :-

> **a. the offender must be armed with any dangerous or offensive weapon or instrument; or**
>
> **b. the offender must be in the company of one or more other person or persons or;**
>
> **c. 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.**

40. It submitted that PW 1 was attacked by a number of people including the Appellant herein, he was robbed and wounded as was evidenced by the P3 Form. It stated that the fact that PW 1 did not produce receipts of the items he was robbed of did not in any seem to suggest that he was not possessed of the said items mentioned in the Charge Sheet. In addition, it stated that it would not have been expected for an injured person such as PW 1 was to have given a full account of what had really transpired as the injuries had led to his loss of consciousness.

41. This court carefully considered the evidence on record and right at the outset wished to point out that although the Appellant had contended that PW 1 was assaulted by Bakari, it was evident from the First Report, that the said Bakari is the one who took PW 1 to report the assault incident. This is because No 64416 PC Andrew Kinyua (hereinafter referred to as "DW 6") had testified that there was another report that had been made by the said Bakari that PW 1 had assaulted him. The court did not see this Report in the Trial File.

42. Be that as it may, as was pointed out hereinabove, there was no doubt in the mind of this court that the Appellant was present at the scene at the material time and date. The question that comes to its mind, however, was, did the Prosecution prove beyond reasonable doubt that it was the Appellant who wounded

and robbed PW 1 and thus satisfy the ingredients of the offence of robbery with violence.

43. According to PW 1's evidence, he was beaten by several people who he said included the Appellant and his Co-Accused during the Trial and consequently lost consciousness, a fact that was confirmed by PW 2. In particular, he stated that the Appellant struck him on the back of the head with a spade, which PW 3 confirmed the Appellant to have been carrying at the time he was quarrelling with him. He said that the Appellant tried to cut him with a panga, again which was confirmed by PW 3, but he managed to dodge. He added that other suspects were still at large. It was his testimony that they robbed him of the items set out in the Charge Sheet.

44. PW 2 testified that they rushed to the scene and found PW 1being beaten by people who were armed with jembes, pangas and clubs but he did not know why he was being beaten. He stated that he did not see any exchanges while he was at the scene.

45. PW 3 told the Trial Court that after he chased the Appellant and PW 1, he rushed to the scene after hearing screams and saw PW 1 had already entered a motor vehicle that was leaving the scene. He said that he did not know who beat PW 1.

46. PW 4 stated the struggle between PW 1 and the Appellant, who was carrying a panga, extended to her compound and that many people came and undressed PW 1. She was categorical that the Appellant was the one who chased PW 1 to her house. She said that there were about fifty (50) people at the scene and that she did not see anyone steal from PW 1.

47. PW 2 and PW 4 were unanimous that PW 1 was being beaten by many people. PW 3 and PW 4 were also clear that the Appellant had a panga with him. It was, however, apparent that neither PW 2 nor PW 3 nor PW 4 saw the Appellant hit PW 1.

48. It did also emerge from the defence that the Appellant had also reported that he was assaulted by the said Bakari. In the First Report of 18th March 2013, the Appellant was referred to Taveta District Hospital for treatment while awaiting police investigations. PW 5 stated that he did not arrest PW 1 because the Appellant did not produce a P3 Form.

49. The evidence that was adduced showed that PW 1 was injured during mob justice by several villagers, what the Appellant's advocates had described in their Memorandum of Appeal as a "village brawl." It appeared so to court as PW 1 had contended that several other suspects were still at large.

50. What occurred between PW 1 and the Appellant could best be described as "affray" whose penalty is to be found in Section 92 of the Penal Code Cap 63 (Laws of Kenya). The same provides as follows:-

> **"Any person who takes part in a fight in a public place is guilty of a misdemeanour and is liable to imprisonment for one year."**

51. However, as was pointed out by PW 5, PW 1 was not charged because the Appellant did not obtain a P3 Form. He adduced in evidence treatment notes and confirmed that he had not been issued with a P3 Form. As indicated in the proceedings, the Appellant tendered in evidence the said treatment notes.

52. However, it is important to note that the said treatment notes were not recorded in the Exhibit List. Neither was the OB that was tendered in evidence by DW 6 recorded in the said Exhibit List. This omission was addressed later in in the decision herein.

53. If as PW 1 stated that the Appellant and his Co- Accused robbed him of his items in the course of the affray, it would not in any way amounted to robbery with violence. Whereas PW 1 was wounded and may have lost his property during the altercation, it was the view of this court that the Prosecution had stretched the definition of "robbery with violence" to new lengths.

54. Indeed, robbery with violence can only occur where person(s) accost(s) another solely with the

intention of dispossessing a person of his property by use of force and would not arise during a fight between parties fighting like in the instant case. In any event, there was a mob of about fifty (50) people at the scene and it could not be known who stole PW 1's items, if at all the same were stolen.

55. Having said so, in view of the fact that PW 1 was not charged with assaulting the Appellant as the Appellant did not obtain a P3 Form, the charge of affray could not have been preferred against both of them. The likely charge this court could see was one of the Appellant having caused PW 1 grievous harm contrary to Section 234 of the Penal Code. This is because this court believed PW 1's testimony that the Appellant did actually hit him with a spade at the back of his head.

56. The said Section provides that:-

> **"Any person who unlawfully does grievous harm to another is guilty and liable to imprisonment to life."**

57. The question that would then arise was whether this court could substitute the charge and convict the Appellant for the said offence of causing grievous harm to PW 1. Notably, Section 179(2) of the Criminal Procedure Rules Cap 75 (Laws of Kenya) provides that a court may convict a person on a charge he was not initially charged with.

58. The said Section provides as follows:-

> **"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."**

59. In addition, while hearing an appeal, the High Court has power under Section 354(3)(ii) to alter the nature of the sentence. The said Section stipulates as follows:-

> **a. The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may—**
>
> **(iii) with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence** (emphasis court)**;**

60. Against the backdrop of the aforesaid powers, this court nonetheless came to the firm conclusion that it could still not convict the Appellant on the charge of grievous harm. Appreciably, as was rightly pointed out by the Appellant, PW 5 had no power or authority to tender in evidence the P3 Form on behalf of Patterson Mwapula, who the Learned Trial Magistrate indicated to have been PW 5.

61. This was in contravention of Section 77 of the Evidence Act Cap 80 (Laws of Kenya) that provides as follows:-

> **"In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence."**

62. However, a P3 Form, being an expert report can only be tendered in evidence by a skilled expert as provided in Section 48 of the Evidence Act. The same provides as follows:-

> **"When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions."**

63. Evidently, PW 5 was not skilled in medical matters. It was irrespective that the Appellant did not object to him producing the P3 Form because he did not lead evidence to demonstrate that he knew the signature of Patterson Mwapulu, attest that the said Patterson Mwapulu was the one who signed the said P3 Form or that he was well versed in medical matters. The situation would have been different had the said P3 Form been produced by a medical person and the Appellant failed to object to the production of the same.

64. In the case of **Julius Karisa Charo vs Republic** (Supra), Ouko J also expressed similar reservations about police officers tendering in evidence P 3 Forms because they should only restrain themselves to tendering documents that would fall in their docket. He stated as follows:-

> **"To my mind police officers role in the production of documentary evidence ought to be restricted police abstracts and other non-technical documents. For the reasons stated I find and direct that PC Sang cannot produce the post-mortem report on behalf of Dr. Olumbe who has relocated at Australia and the efforts made in trying to procure his attendance, from what I have stated above, there must be pathologists who are conversant with his writing and signature."**

65. There is no doubt in the mind of this court that PW 1 sustained injuries as was evident from the photographs that were adduced in evidence. However, the P3 Form was critical to corroborate the injuries that he sustained because it is normal for it to be inconsistent with oral evidence that is tendered by witnesses. Failure to call Patterson Mwapulu thus dealt a fatal blow to the Prosecution's case as this court not therefore consider as the possible charge of the Appellant having caused grievous harm to PW 1 herein.

66. In the circumstances foregoing, Amended Grounds of Appeal Nos 2, 5, 6, 7, 8 and 9 had merit and the same are hereby allowed.

IV. INTEGRITY OF PROCEEDINGS

67. The court did hereinabove indicate that it would address the question of the failure by the Learned Trial Magistrate to have the evidence that was adduced by the Appellant herein recorded in the Exhibit List. That may have been a failure on the part of the Court Clerk. However, when considering the defence case, it was an issue that the said Learned Trial Magistrate ought to have picked up and addressed in his judgment, even if he thought the same was worthless.

68. The Learned Trial Magistrate may very well have indicated that in his Judgment that the Appellant did not produce the treatment notes. However, that it not what was discernible to this court. However, it was clearly indicated in the proceedings that the Appellant tendered in evidence the said treatment notes. He produced the same and they were shown to have been as D Exhibit 1. DW 6 also produced the OB as Exhibit 1.

69. Further, it was evident that the OB that was tendered by DW 6 was neither recorded in the Exhibit List nor addressed in the Learned Trial Magistrate's Judgment. This omission was prejudicial to the Appellant herein as no reason was shown to explain why his Exhibits were never recorded as having been tendered in the Trial Court.

70. If indeed the same were not adduced as the Learned Trial Magistrate had contended in his Judgment, nothing have been easier than him to have recorded that fact in the proceedings when the Appellant purported to produce the same but did not actually produce the same. Left as it is, this court can only conclude that the said medical treatment notes were and OB but were not recorded in the Exhibit List.

71. Going further, this court was completely puzzled how the said Learned Trial Magistrate recorded Patterson Mwapulu as PW 5. This is because Corporal Geoffrey Kaunda who was actually PW 5 was the one who tendered into evidence the P3 Form. Corporal Kaunda was the last witness before the Prosecution closed its case and he was marked as PW 5.

72. As this court would not be able to seek comments from the Learned Trial Magistrate regarding this issue, it must go by what is on record. The Appellant was quite justified in raising this issue that went into the integrity of the proceedings in the Trial Court. The only conclusion this court could make was that the manner in which the trial herein was conducted obviously caused the Appellant prejudice and occasioned him great injustice as he was denied the right to put the purported evidence of Patterson Mwapulu to the test under Cross-examination. This was to his detriment.

CONCLUSION

73. Accordingly, having considered the Appellant's Appeal, his Written Submissions and those of the State and the respective law that they each relied upon, this court came to the firm conclusion that the Prosecution did not prove its case to the required standard, that of, proof beyond reasonable doubt.

74. Indeed, it was the considered opinion of this court that if the said Learned Trial Magistrate had considered the facts of this case vis-à-vis- Section 296(2) of the Penal Code, he may have arrived at a very different conclusion and not have convicted the Appellant for the offence of robbery with violence.

DISPOSITION

75. For the foregoing reasons, the upshot of its decision was that the Appellant's Petition of Appeal that was lodged on 15th May 2015 was merited and the same is hereby upheld. This court hereby quashes the conviction and sets aside the sentence that was meted upon the Appellant by the Trial Court as it would be clearly unsafe to confirm the same. The court hereby orders that the Appellant be set free forthwith unless he be held or detained for any other lawful reason.

76. It is so ordered.

DATED and **DELIVERED** at **VOI** this **20TH** day of **DECEMBER** 2016

J. KAMAU

JUDGE

In the presence of:-

Emmanuel Mwadime.....……..Appellant

Miss Anyumba.....…….……for State

Josephat Mavu– Court Clerk