REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 96 OF 2013

Consolidated with CRA NO. 95 OF 2013

CHARLES MICHUBU.....1st APPELLANT

PETER MWITHALIE.....2ND APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence in criminal case No.3265 of 2010

at Maua CM's Court before KINGORI J.G. – CM on 28th October, 2013)

R.P.V. WENDOH AND J. A. MAKAU JJ

JUDGMENT

The Appellants **CHARLES MICHUBU** and **PETER MWITHALIE** were charged with the offence of **robbery with violence contrary to section 296 (2) of the Penal Code CAP 63 of the Laws of Kenya**.

The particulars of the offence were that on the 21st day of April 2010, at Kimogoro Location, Igembe South District of Eastern Province, jointly with another not before court, while armed with *pangas*, robbed **YUSUF MUTUMA M'MUTIA** of KShs.18,000/= and immediately before or after the time of such robbery used actual violence to the said Yusuf Mutuma M'Mutia.

The Appellants were tried, convicted and sentenced to death. The Appellants were aggrieved by the conviction and sentence and therefore filed their respective appeals. CRA 96/2013 - Charles Michubu v Rep and CRA 95/2013 – Peter Mwithalie v Rep. The two appeals were consolidated and proceeded as CRA 96/2013 and the appearance of the appellants are as they did in the trial court.

In summary the appellants' grounds of appeal were as follows:

1. **That the trial magistrate erred in both law and fact when he failed to consider that no occurrence book was availed;**

2. **That the trial court failed to consider the appellants' defences;**

3. **That the charge sheet was defective;**

4. **That the prosecution failed to call vital witnesses;**

5. **That the conviction went against the weight of the evidence and the burden of proof required in law was not discharged.**

The appellants therefore plead with the court to quash the conviction, set aside the sentence and set them at liberty. The appellants appeared in person and filed written submissions on which they relied. Mr. Musyoka, Learned Counsel appeared for the State.

The appeal was opposed by Mr. Musyoka, Counsel for the State, who submitted that the evidence tendered by PW1,2 and 3 was consistent and overwhelming to warrant the conviction; that the offence was committed at 3 PM in the presence of PW1,2 and 3. He further submitted that the evidence of PW1 as to the nature of injuries sustained by PW1 was corroborated by the evidence of PW 4, the doctor who examined PW1.

Being the first appellate court, we shall subject the entire evidence adduced before the trial court to a fresh examination and analysis and make our own determinations. We are alive to the fact that we neither saw nor heard any of the witnesses and so cannot comment on their demeanor. We are guided on the duties of a first appellate court by the Court of Appeal decision of ***Kiilu and Another v R (2005) 1 KLR 174 .***

Briefly, the prosecution's case was as follows; On 21/4/2010, about 3.00 p.m. **PW1 YUSUF MUTUMA** left his home for his shamba at Kiguru to harvest bananas. He arrived at the shamba and found the appellants with Karwigi and Karia taking tea at the canteen. He then asked Karwigi to look for him trees to buy to make timber. He then went to one Paul's home to pick his wife and children. They arrived at the shamba at 3.00 p.m. and Paul went to borrow a panga to cut the bananas. Suddenly he saw the 2nd appellant running towards him followed by the 1st appellant and Karwigi. The 2nd appellant grabbed him and in the ensuing scuffle, the 1st appellant cut him on the right hand severing it. Karwigi then hit him on the back with the flat part of the panga and dipped his hand into his pocket and removed Kshs.18,000/=. Paul (PW2) arrived and intervened and stopped them from assaulting him further. The 3 then walked towards the kiosk and his wife who had now come to the scene started screaming. He was later assisted to a vehicle and taken to Maua Methodist hospital and later to Meru and Embu hospital where his hand was amputated. The 1st appellant was later arrested and so was the 2nd appellant but Karwigi escaped. He further testified that he knew all the 3 persons who attacked him.

PW2 PAUL MURUNGI testified that on the material day, they went to PW1's shamba with PW1, his wife and children. PW1's wife then sent him to go and borrow a panga and as he returned, he heard screams in the shamba and rushed there and saw the 1st appellant, Karwigi and the 2nd appellant struggling with PW1 and PW1's hand had been cut and he was bleeding. He then hit the 1st appellant and the panga that he had fell down. He saw Karwigi dipping his hand into PW1's pockets and removed something. The appellants then took off and he asked PW1 who had cut him and PW1 replied saying that it was the 1st appellant. They then reported the incident at Maua Police station. The 1st and 2nd appellants were later arrested at Tigania and Muthara respectively. He further testified that he had known the 1st and 2nd appellants since 2000 and 1999 and that he had no grudge against them.

PW3 MIRIAM GITUMA, the wife of PW1 testified that on 21st April 2010, she was at their shamba with PW1, their children and one Paul (PW2) who oversees their *shamba*. She sent Paul (PW2) to go and borrow a panga for her to cut bananas. Shortly after, he heard Yusuf (PW1) scream as she had gone further inside the farm to inspect bananas. She rushed to the scene and found three persons namely; the appellants and one Karwigi struggling with PW1. She then saw Karwigi dip his hand into PW1's pocket and remove money. Paul (PW2) then rushed and hit the panga that the 1st appellant had. They then assisted PW1 and took him to hospital and later reported the incident at Maua Police station. She further

testified that she knew the appellants and that she had no grudge against them.

PW 4 SALESIO MURUNGI ITHAE, a medical practitioner at Laare testified to having examined Yusuf Mutuma (PW1) on allegations of assault by people known to him on 21st April 2010. He had a completely amputated arm and the degree of injury was grievous harm.

PW5 INSPECTOR JAMES OTIENO testified that on 21st April 2010, he was working as OC crime Maua police station when he was called by the report office personnel and informed that there was a badly injured reportee. He went to the front office and found PW1 who told him that he had been attacked by 3 men who were all known to him and gave their names as Karwigi, Michubu and Mwithalie. He further told him that Michubu (1st appellant) was the one who cut him and that he had been robbed Kshs.18,000/=. He further testified that he looked for the appellants in the area without success after which he enlisted the assistance of community policing and provincial administration and that the 1st and 2nd appellants were arrested in May and September respectively but to date Karwigi was still at large. PW1 later indentified the appellants.

After close of the prosecution case the Learned Trial magistrate found that the appellants had a case to answer and placed them on their defence.

The 1st appellant denied having committed the offence and stated that he was framed by PW2 as they had a dispute over *miraa*; that after his arrest on 21st June 2010 is when he came to know of the reason of the arrest.

The 2nd appellant also denied having committed the offence and testified that he was arrested by John Mbiti and Cyprian Kobia who were his miraa colleagues and to whom he had sold *miraa* worth Kshs.40,000/= and had refused to pay for the same and told him that they would have him jailed.

We have carefully considered and reevaluated the evidence on record, the grounds of appeal and the submissions by the appellants and the State Counsel.

Was the charge sheet defective? The appellants contend that the charge sheet was defective because it did not indicate the OB number and the date of arrest. It is noteworthy that the appellants did not raise this issue during the hearing of the case. Even when they later asked for production of the OB towards the end of the hearing, they did not disclose the reason why they wanted the OB produced.

Section 134 of the CPC stipulates what should be contained in a charge sheet. It reads:

> ***"Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences which the accused person is charged together with such particulars as may be necessary after giving reasonable information as to the nature of the offence charged."***

In this case we are of the view that the charge satisfied all the ingredients of a charge in accordance with **Section 134 of CPC.**

The above notwithstanding, we are of the view that if indeed there was any defect in the charge sheet, it is curable by dint of **Section 382 of the CPC** which provides as follows:

> ***"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".

There is no evidence that failure to state the OB Number or date of arrest occasioned any miscarriage of justice or was in any way prejudicial to the defence. The fact remains that they were arrested and they admitted as much. There is no dispute as to the dates of arrest. In this case, the OB Number and date of arrest are peripheral to the charge.

The appellants also complained that some vital witnesses were not called. The 1st appellant admitted that the neighbours who were mentioned were not called as witnesses. The prosecution also said that one John Mbithi who assisted in the arrest was in remand and the other was AP Joseph Iguka who had been transferred. It is the discretion of the prosecution to determine which witnesses to call for the just determination of the case. The prosecution can only be faulted if they omit to call a witness for an ulterior motive. In this case, PW2 was present when the appellants were arrested and it would not be necessary to call witnesses who will repeat the same evidence. No prejudice was suffered as none was alluded to. That ground must fail.

PW1 gave a detailed and vivid account of the events of the fateful day. He was attacked by the appellants and one Karwigi (who is still at large) in broad daylight, was seriously injured and robbed of KShs.18,000/=. All the three assailants were known to him prior to this incident. He vividly narrated that it is the 2nd appellant who got hold of him, the 1st appellant who cut him on the right hand, severing it, while it was one Karwigi who dipped his hand into his pocket and took KShs.18,000/= from him. His evidence was further corroborated by the evidence of PW2 and 3 who were eye witnesses' to the attack. Though both PW2 and 3 had moved away from the scene shortly, upon return they found the 1st appellant had the *panga* by then PW1's hand was injured and they saw one Karwigi dipping his hands into the pocket of PW1 and removing something thus corroborating PW1's evidence. PW3 also corroborated PW2's evidence that it is PW2 who hit the *panga* that the 1st appellant had and it fell. The evidence of all these three witnesses all of whom were known to the appellants prior to this incident remained consistent and unshaken even in cross examination. There is therefore no way that these three witnesses could have been mistaken as to the identity or otherwise of the appellants all of whom were well known to them prior to this incident. According to PW3 the incident happened at about 3.00 p.m. and the conditions were therefore favourable to a positive identification.

We find that the appellants were properly recognized by the prosecution witnesses and the circumstances were free from any possibility of error. Having found that the evidence of prosecution witnesses and particularly that of PW1, 2and 3 was strong, clear, overwhelming and consistent, we are unable to agree with the appellants' assertions that the evidence in this case was insufficient and inconsistent to found a conviction.

It was also contended by the appellants that even after the complainant (PW1) recognized them, he did not give their names to the police in his first report and their application for the OB was denied. PW5 Inspector James Otieno testified that PW1 reported to him that he had been attacked by three men who were known to him and gave their names as Karwigi, Michubu and Mwithalie. He further testified that PW1 told him that it was Michubu (the 1st appellant) who cut him on the right hand with a *panga*. In cross examination by the 1st appellant PW5 stated ***"I can remember you as Charles Michubu".*** PW2 corroborated PW5's testimony that after the attack on PW1, they hired a taxi which first took them to Maua Police Station where they reported and thereafter, were referred to Hospital. We have read and reviewed the evidence. On 21/3/2012 the 1st appellant asked for a copy of the OB. On 27.3.2013 after the prosecution said that the OCS could not trace the OB, the appellants decided to forego it and proceeded with their defences. The appellants' contention that PW1 did not give out their names when he made his first report are unfounded and without basis. With regard to the other assertions by the appellants that the OB of 21st April 2010 was not produced, the same was not fatal to the prosecution's case as there is no requirement in law that the OB be produced in criminal trials. The same was immaterial and no prejudice was occasioned to the appellants by non production of the OB. In any event,

as we have observed above, when PW1 and 2 made the first report to PW5, he informed PW5 that he had been attacked by persons well known to them and gave out their names. Consequently, nothing turns on this point.

With regard to the complaint that the Trial Court erred in not considering the appellants' defences, the same is far from the truth. The Learned Trial Magistrate in his judgment observed as follows:-

> ***"The last issue is whether or not the accused persons were among the assailants. The accused have denied being present at the scene and have claimed were elsewhere. They did not present any evidence to back up their alibi defences. I have found their alibis to be mere denials that do not serve to cast doubt on the prosecution's case……..."***
>
> ***"I have given due consideration to issue of grudge raised by both accused. The 1st accused claims PW2 framed him over a grudge over miraa but PW2 is not the complainant here. It is not PW2 who is telling the complainant who attacked him. The complainant saw and knew the attackers and PW2's role is simply corroborative. I dismiss that defence. Similarly the 2nd accused claims he had a grudge with John Mbiti and Cyprian Kobia who participated in his arrest. These 2 are not the complainants and their grudge is irrelevant to this case. At any rate they were not even called as witnesses. I also dismiss that defence of grudge…"***

From the above passage and contrary to the appellants' contentions, it is evident that the Learned Trial Magistrate did indeed consider the appellants' defences and gave his reasons as to why he rejected the allegations by the appellants that they were framed. We are in agreement with the reasons advanced by the Trial Court in rejecting the said defences. The appellants did not raise the issues that they purported to raise in their defences in cross examination and the only logical conclusion that we arrive at is that the same were afterthoughts. That ground must fail.

Whether the conviction went against the weight of the evidence? The ingredients of the offence of robbery with violence were elaborated by the Court of Appeal in the case of ***Oluoch v Rep (1985) KLR*** where the court held that the offence is committed in any of the following circumstances:-

> ***"(a) the offender is armed with any 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 before of immediately after the time of the robbery the offender wounds, beats, strikes, or uses other personal violence to any person …"***

Later in ***Mohamed v Rep (2013) KLR***, the Court said:

> ***"the use of the word OR in this definition means that proof of any one of the above ingredients is sufficient to establish an offence under Section 296 (2) of the PC"***

It means that if any of the three conditions is fulfilled, then the offence of robbery with violence will be committed. Without seeming to repeat ourselves, there is evidence on record that the appellants were more than one, three of them to be exact; they were armed with an offensive weapon i.e. *panga* and they visited violence on the complainant by chopping off his hand. As earlier noted, the offence took place in broad day light at 3.00 p.m. PW1's evidence was materially corroborated by PW2 and 3 and we find that there was overwhelming evidence in support of the prosecution evidence.

Having considered the totality of the evidence tendered by both sides in this case, we find that the prosecution evidence was overwhelming, to found a conviction, that it was indeed the appellants and another not before court that viciously attacked and robbed PW1. We uphold the conviction and confirm the sentence. The appeal lacks merit and is dismissed.

DATED AND SIGNED AT MERU THIS 29TH DAY OF OCTOBER, 2015.

R.P.V. WENDOH **J. A. MAKAU**

JUDGE **JUDGE**

DELIVERED AT MERU THIS 29TH DAY OF OCTOBER, 2015

R.P.V. WENDOH **J. A. MAKAU**

JUDGE **JUDGE**

PRESENT

Mr. Mungai for State

Ibrahim/Peninah, Court Assistants

In Person, Appellants