REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 21 OF 2013

Consolidated with CRA NO. 65 OF 2011 AND 106 OF 2013 & CRA NO.70 OF 2011

DAVID KAUCU MUTHIK……..1st APPELLANT

KENNETTH MURITHI…..... 2ND APPELLANT

WILSON MUKINDI…..……..……3RD APPELLANT

MARTIN GITONGA……..……....…4TH APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence in criminal case No.740 of 2011 at Nkubu PM's Court before NDUBI C.N. – Ag PM on 12th April 2013)

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

JUDGMENT

The Appellants, **DAVID KAUCU MUTHIKA, KENNETH MURITHI ALIAS OSAMA, WILSON MUKUNDI** and **MARTIN GITONGA** (formerly Accused 1 – 4) were jointly charged with three counts of robbery with violence contrary to section 296 (2) of the Penal Code. The allegations against the four were that on 11/5/2011 at Mamuru Rwompo sub-location, robbed Lucy Mukami (PW1) (count 1), Catherine Kawira (PW5) (count 2) and Jennifer Kathambi (count 3) of various items which are listed in the charge sheet.

On 12/5/2011 when appellants appeared before Senior Principal Magistrate – S.M Githinji for plea, David Kaucu pleaded guilty to count 1 only, while Accused 4 Martin Gitonga pleaded guilty to all the three counts. Accused 1 was sentenced to serve life imprisonment on count 1 and accused 4 was also sentenced to life imprisonment on each count whereby the sentences were ordered to run concurrently.

The case proceeded to full trial on Count 2 and 3 in respect of 1st appellant and all the counts as respects 2nd and 3rd appellants. After a full trial accused 1 was convicted on Count 2, while 2nd and 3rd appellants were convicted on Counts 1 and 2 and were sentenced to life imprisonment. The 3rd complainant did not attend court and 1st , 2nd and 3rd appellants were acquitted under Section 215 of the CPC. They were

aggrieved by both conviction and sentence and preferred **CRA 65 /2011 – David Kaucu – CRA 70 of 2011- Martin Gitonga, CRA 21 of 2013 and CRA 106 of 2013 Kenneth Murithi alias Osama Versus Republic.** When the appeals came before court for hearing on 25/5/2015, they were consolidated to proceed in CRA No.21/2013 as the lead file and the appellants appeared as were numbered in the charge sheet in the trial court. A summary of the grounds of appeal are as follows;

1. ***That the convictions were based on a defective charge sheet;***
2. ***That vital witnesses were not called;***
3. ***That the identification of the appellants was improper;***
4. ***That the prosecution evidence was full of contradictions;***
5. ***That there was no medical evidence to support the charge;***
6. ***That Accused 2 and 3 were convicted based on accomplice evidence;***
7. ***That the appellants' defences were not considered;***
8. ***That the conviction went against the weight of the evidence;***
9. ***That the plea of guilty in respect of 1st and 4th appellants was not unequivocal.***

The appellants therefore pray that the convictions be quashed and sentence set aside. The 4th appellant in addition prays that he be accorded a retrial. All the appellants relied on their respective written submissions at the hearing and appeared in person.

The appeals were opposed. Mr. Kariuki, Counsel for the State submitted that the evidence tendered by the prosecution was sufficient to find a conviction because after the 1st appellant was arrested, he led to the arrest of his accomplices with whom the stolen items were recovered; that 1st appellant was arrested with 1st complainant's phone, money and an axe used in the robbery; that other appellants were arrested in their respective homes; that the evidence was consistent and devoid of any material contradictions; that the trial court did consider the appellant's defences. As regards the 4th appellant, Counsel argued that the plea was properly taken after the appellant was warned of the consequences of pleading guilty to the charge being a serious one; that having been convicted on his own plea, the appeal has no substance and should be dismissed.

The case in the trial court was as follows; Lucy Mukami (PW1) a resident of Miguru Mitunguu, was asleep in her house at about 2.00 am on 11/5/2011 when the door of her house was hit open. Four people entered and started beating her demanding for money. She had about KShs.3,800/= on the chair and some tied to her *leso* which they took; the cell phones, and radio. After they left, she reported to the chief. She said that the people had torches and they helped her see Kaucu who wore a white jacket with stains and sandals, Murithi 2nd appellant who wore a checked shirt and black shoes (accused 1 and 2). She did not see the other suspects. She denied having known 1st and 2nd appellants before but saw them when arrested by the villagers who were mobilized by the Sub-Area. She said that the 1st appellant was arrested first, at about 5.00am while in possession of her Nokia phone 1650 (Exh. No.3) and some cash. She said that 1st appellant led them to the house of Murithi (4th appellant) where they recovered some weapons called dragons, axe and torch which had been used during the robbery at her house, a *kikoi* and some cash. From there, he led them to the house of 3rd Appellant Mukundi where other things belonging to other people were found i.e. loaf of bread and radio Sonitec (Exh. 6), her Nokia phone 1202 (exh.7).

PW2 Joel Kathama, area manager of Mtitu testified that on 11/5/2011, the Assistant Chief called and informed him that PW1 had been robbed and the robbers escaped towards his area. Together with some

other men, they laid an ambush and arrested 1st appellant about 3.00 a.m. and he was in possession of a Nokia phone 1680 and battery which was inscribed **"MUKAMI".** They escorted him to Mitunguu Police Station.

PW3 Joel Gichunge – Assistant Chief of Rwompo sub-location confirmed that he received a report from PW1 and he called several people including PW2, told them to mount road blocks and look out for the robbers. PW2 later called him having arrested 1st appellant with a phone. PW2 and 3 said they are the ones who saved the 1st appellant from the mob that was baying for his blood. PW3 said he accompanied police when 1st appellant offered to take them to other suspects and that they arrested 2nd appellant with dragons, axe, phone and bread and another accused had a *kikoi* and a radio.

PW4 Severina Kaimatheri, a clinical officer at Kanyakine District Hospital examined PW1 on 11/5/2011 with a history of assault and assessed the degree of injury as harm.

Catherine Kawira (PW5), the complainant in count 2 who testified as PW5 was asleep in her house and in the next room, Gacheri was asleep. She heard a knock on Gacheri's door, about 3.00 am, called out her name and somebody else told her to be quiet. Her door was broken open and 4 men entered, took money from the shelf, i.e. 2,500/=, a radio and 3 loaves of bread. She said a torch was shone at 1st appellant's face and she was able to see him. Next day, 1st appellant led the police and her with a crowd to 2nd and 3rd suspects' houses. She found her radio, make Sonitec 3030 and bread in 4th appellant's house.

PW6 PC William Kipruto of Mitunguu Police Post was at Police post about 5.00 a.m. when PW1, 3 and other members of public took 1st appellant to the station and made a report of robbery and that he had been found with a Nokia 2680 and cash KSh.250/=; that after interrogation of the 1st appellant, he led them to the home of his accomplices. In 2nd appellant's house PW6 searched and found coins, axe, dragons, knife and bread. In 4th appellant's house, they found 2 Sonitec radios SD 2200 and SD3030, a *leso (kikoi)*, a phone Nokia 1202 and cash 195/= and *panga*. In 3rd appellant's house they recovered Nokia 1202, cash 880, *panga* and he produced all the recovered items as exhibits.

The three accused were acquitted on count 3 because the 3rd complainant Jennifer did not testify. They were called upon to defend themselves on the other charges.

1st appellant (accused 1) testified on oath. He said that on 10/5/2011 he went to buy bananas at Mitunguu. He got the bananas at the home of a teacher but since it was late, he went to spend the night at Salama Bar and Restaurant at Mitunguu market and early next morning, when on his way to the place he was to get bananas, he met some people who arrested him and took his money 260/=, a phone, took him to Police Station where he found other people arrested and was transferred to Nkubu Police Station. The 2nd appellant told the court that he was going to look for casual work at Mitunguu on 10/5/2011 when he met an officer who asked where he was going, took his cash, took him to Mitunguu Police Station then transferred him to Nkubu Police Station. He denied knowing anything about the charges he faced nor did he know the witnesses.

The 3rd appellant stated that he had rented a house at Mitunguu market where he used to do casual jobs. He was contracted by one Douglas for the job, was paid with 1000/= deposit and next day he took his *panga* and headed for work when he met with 8 people and 2 police officers who interrogated him, found him with KShs.880/= and took him to the Police Station. He denied knowing those who arrested him.

Having reviewed the evidence we shall go ahead to consider each ground raised by the appellants. The first ground for consideration is whether the plea of guilty in respect of the 1st and the 4th appellants were unequivocal?

From the record, when the charges were read to all the appellants, the 1st appellant admitted the first charge but denied the rest. The 4th appellant however admitted all the charges. The court then cautioned

the appellants of the consequences of pleading guilty and 1st and 4th appellants persisted in the plea of guilty. The facts were read to them and they admitted that the facts as read to them were correct. As a result the court convicted them on their own plea of guilty and proceeded to sentence them after mitigation. The 1st and 4th appellants were given a chance to deny or change their plea before the facts were read to them. After the facts were read and even after conviction, they could have changed plea or explained themselves if indeed they were coerced into admitting or were sick as the 4th appellant now alleges. The main ground of appeal by 4th appellant is that he was very sick and confused at the time of plea. However nowhere does the record disclose this fact. In mitigation, he only said he has 4 children and the wife suffers from T.B. If he was indeed sick, there is no reason why he did not state that fact. Section 281 of the Criminal Procedure Code allows a person to plead guilty or not guilty to a charge he faces. The section does not however set out the stages to be taken by the court in recording a plea of guilty. That issue was resolved in the case of ***Adan v Rep [1973] EA 445*** when the Court of Appeal set out in detail how a plea of guilty should be recorded. The court stated;

> ***"(i) the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;***
>
> ***(ii) the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;***
>
> ***(iii) the prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;***
>
> ***(iv) if the accused does not agree the facts or raises any question of his guilt his reply must be recorded and change of plea entered;***
>
> ***(v) if there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded."***

In ***Njuki v Rep [1990] KLR 334,*** the court cited ***Hando v Rep [1951] 18 EACA 307*** where it emphasized that the court needs to caution the accused in recording a plea of guilty to every element of it unequivocally. This is what transpired before the court when the plea was taken;

"12/05/11

Before: S. M. Githinji, SPM

Prosecutor: I.P. Mbonge

CC: Kinoti

Accused present

Charge read over and explained to accused in English/Swahili/Kimeru who replies:-

1st Count

Accused ***1. Not true***

2. Not true

3. True

4. True

2nd Count

Accused ***1. Not true***

2. Not true

3. True

4. True

3rd Count

Accused ***1. Not true***

2. Not true

3. Tue

4. True

COURT: ***Accused are cautioned that plea of guilty in any of the offence may give rise to death sentence. They are asked to plead afresh and confirm their earlier on pleas.***

COURT: ***For the 2nd time the accused are cautioned that convictions for the offences may lead to a death sentence.***

1st accused ***– I still plead guilty to the 1st count.***

3rd accused ***– I plead not guilty to all counts now.***

4th accused ***– I still plead guilty to all counts.***

COURT: ***Pleas of guilty entered for the 1st accused and 4th accused in relation to count 1.***

Pleas of not guilty also entered for 4th accused in counts 2 and 3.

Plea of not guilty is entered in all the counts against 2nd and 3rd accused person. It's also entered against first accused in counts 2 and 3.

PROSECUTION: ***I am not ready. There is mix up in the files presented. I pray it be put aside for clarification.***

COURT: ***Mention later today.***

S. M. GITHINJI

SPM 12/5/2011

(FACTS)

> *1st accused*: ***The facts are correct as they relate only to count 1 of which I have pleaded guilty.***
>
> *4th Accused*: ***The facts are correct in relation to all the counts. They are true. It was as stated.***
>
> *Court*: ***1st accused is convicted of the offence in the 1st count on his own plea of guilty.***
>
> ***4th accused is convicted of all the counts on his own pleas of guilty.***

Prosecution: ***They are first offenders.***

> *1st accused in Mitigation*: ***My wife deserted me and I left me with two children. One is in hospital undergoing an operation.***
>
> *4th Accused in Mitigation*: ***My wife has 4 children and she suffers from T.B.***
>
> *Court 1*: ***I have considered the mitigations and the fact that accused have pleaded guilty to the offence/offences.***
>
> ***1st accused will serve life imprisonment in relation to the offence in count 1 and 4th accused will serve life imprisonment for each of the offence in count 1, 2 and 3.***
>
> ***Sentence in respect of 4th accused will run concurrently as it's the only way it would make sense.***

Right of Appeal 14 days.

S. M. GITHINJI

SPM

12/5/2011"

Having set out above the manner in which the court took plea we are satisfied that the plea was unequivocal and we uphold the finding of the trial Magistrate as regards the plea of guilty in respect of 1st appellant on count 1 and 4th appellant on all counts.

Section 346 Criminal Procedure Code provides;

> ***"No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on his plea by a subordinate court, except as to the extent of the legality of the sentence".***

Ordinarily an appeal will not lie against a conviction when the accused pleads guilty except on the extent and legality of the sentence. There is however, a wealth of authorities to the effect that the bar to an appeal against a conviction based on a guilty plea is not absolute. In ***Ndede v Rep [1991] KLR 567***, the court held that the court is not bound to accept the accused person's admission of the truth of the charge and conviction as there may be exceptional circumstances such as an injury of the accused or he is confused or there was inordinate delay in bringing the accused person to court from the date of arrest. In

this case, we find no such special circumstances to warrant interference with the trial court's decision and reiterate our satisfaction that the plea of guilty was unequivocal. We find that the convictions were solidly predicated on the law and that ground fails.

Whether the charge was defective? The appellants urged that the charge was defective because it did not include the words that ***"the robbers were armed with dangerous weapons".*** We do agree that the particulars of the charge did not include the words that the robbers were armed yet evidence was adduced by PW1 and 5 that the robbers were armed. The particulars of count 1 read;

> ***"On the 11th day of May 2011, at Mamuru, Rwompo sub-location in Imenti North District within Eastern Province, jointly robbed LUCY MUKAMI of cash Kshs. 5,600/=, 2 mobile phones make Nokia 1202 and 1650, one radio make Sonitec St 2200 and one Kikoi all valued at Kshs.11,500/= and at or immediately before or immediately after the time of such robbery used actual violence to the said LUCY MUKAMI".***

Section 134 of CPC provides for what the ingredients of a charge will be. It reads:

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

The court dealt with the ingredients necessary in a charge sheet and stated as follows in the case of ***Isaac Omambia v Rep (1995) KLR:***

> ***"In this regard, it is pertinent to draw attention to the following provisions of Section 134 of the CPC which includes particulars of a charge an integral part of the charge. Every charge or information shall contain and shall be sufficient if it contains a statement of the specific offence or offences with which the accused is charged together with such particulars as may be necessary for giving reasonable information as to the nature of the offence."***

A charge can be defective if it is at variance with the evidence or if the defect is not curable under **Section 382 of the Criminal Procedure Code** and therefore, it will occasion a miscarriage of justice against the appellant. **Section 382** 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."***

Faced with such a challenge in ***Njuguna v Rep (2002) KLR (CAR) 3735*** the court held;

> ***"We think, like the learned judges of High Court did, that stating in a charge sheet a lesser amount than the amount which was actually stolen was no more than an irregularity, in the charge sheet and it did not render the charge defective. It was an irregularity curable under the above quoted section of the Criminal Procedure Code and the appellant did not point to us any sort of prejudice which the irregularity could or did occasion to him".***

In this case indeed PW1 and 5 mentioned that the robbers were armed with *pangas* and weapons called dragons which were recovered in the appellants' houses. The police did not include these particulars in

the charge. However, it is noteworthy that for an offence of Robbery with Violence to be established, certain particulars must be proved. In ***Oluoch v Republic [1985] KLR*** the court said that Robbery with Violence 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 of one or more person or persons; or***

(c) At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person"

See also ***Mohamed Ali v Rep [2013]KLR.***

The use of the word **'or'** implies that if any of the three conditions is fulfilled, then the offence would be said to have been committed. In the instant case, we find that failure to state that the appellants were armed with dangerous weapons was a mere irregularity because the prosecution needs only to prove one of the ingredients. The robbers were said to be four in number and violence was visited on the complainants and hence, the offence of Robbery with Violence was proved. PW1 was injured during the robbery and was treated as per evidence of PW4. For the above reasons, we find that the omission to include the words 'dangerous weapons' which the robbers had does not occasion any prejudice to the appellants because the particulars gave reasonable information as to the nature of the offence the appellants faced.

Whether the complainants identified the robbers? In her evidence in chief, PW1 told the court that she was attacked at 2.00 a.m. when robbers broke into her house and with the help of the torches that the robbers had, she was able to see 1st and 2nd appellants and purported to describe how they were dressed. They were not people she knew before. In cross-examination by the 2nd appellant, PW1 admitted that she told police that she did not identify any of the robbers. The first report to police was important because the facts were still fresh in her mind and there was no possible interference with her to change her story. We are of the view that under the prevailing circumstances, at the time of attack and drawing from the two conflicting versions PW1 gave, it is unlikely that PW1 identified any of the robbers at the scene.

In PW5's evidence in chief, she stated that she saw the face of the 1st appellant. However, when cross-examined by 3rd appellant, she denied having identified anybody during the robbery and she did not know any of the appellants before the incident. We are also of the view that PW 5 did not identify any of the appellants due to the prevailing unfavourable circumstances.

Despite the fact that the appellants were not identified at the scene of crime, the 1st appellant was arrested soon after the commission of the offence on the same night. We are satisfied that there was overwhelming evidence from PW1, 2, 3, 5 and 6 that the 1st appellant was arrested only a few hours after the robbery while in possession of PW1's phone which bore her name 'Mukami'. That did not end here. We are satisfied that the 1st appellant led to the arrest of the other three appellants within hours of the robbery where more property stolen from PW1 and 5 were recovered. The 4th appellant already pleaded guilty to all the charges and is serving sentence. The 1st appellant has also pleaded guilty to count 1. The 3rd appellant was found in possession of PW1's second phone, a *kikoi* and radio which she identified with a mark.

The 2nd appellant was not found with any of the stolen property save for offensive weapons that may have been used in the robbery and some money. The money could not be positively identified. The 1st appellant who led to 2nd appellant's arrest is an accomplice to this offence and even though we are convinced that the 1st appellant was one of the robbers, it is unsafe to find that the 2nd appellant was party to the robbery when no other evidence connects him to the offence.

It is trite law that the courts do not base a conviction on uncorroborated evidence of an accomplice. In

Anyuma s/o Omolo v Rep 1953 EACA 21, the court said:

> ***"A confession by an accused involving his co-accused when unsupported by other testimony, is evidence of the weakest kind against such co-accused. It is accomplice evidence needing corroboration."***

In ***Wadingumbe bin Mkwende v Rep (1941) EACA 33***, the court said:

> ***"It would be difficult to conceive a case in which it would be proper to convict on the unsupported evidence afforded by the confession of a co-accused."***

The 2nd Appellant may be a prime suspect because of the weapons found in his possession but that is not sufficient to connect him to the offences committed herein. We are of the view that his conviction which was based on accomplice evidence alone was unsafe. However, as regards the 3rd and 4th appellants, the evidence was materially corroborated by the recovery of the complainant's goods with them only hours after the robbery. All the three appellants 1, 3 and 4 were in possession of recently stolen goods.

The principles to be followed in recent possession were laid down in the case of ***Arum v Rep CA KSM APP 85/2005*** where the court held that the prosecution must prove the following:

1. ***That the property was found with the suspect;***

2. ***That the property was positively identified by the complainant;***

3. ***That the property was recently stolen from the complainant.***

PW1 positively identified her two mobile phones recovered from the 1st and the 3rd appellants which bore her name and initials. Although the other things like radio were not positively identified, PW1 said the receipts were stolen and the appellants never laid claim to them. The recovery was only a few hours after the robbery. It leads to the inevitable conclusion that the appellants were the robbers.

Whether vital witnesses were not called? **Section 143 of the Evidence Act** does not require the prosecution to call any particular number of witnesses to prove a fact unless specifically spelt out by statute. The prosecution has a duty to call all relevant witnesses to prove the truth and it can only be faulted if failure to call a witness is coated with ulterior motive. In ***Bukenya v Rep (1972) EA 549***, the court held:

> ***"the court can only draw an adverse inference that had the witnesses been called their evidence would have been adverse to the prosecution case."***

None of the appellants pointed to any witness who should have been called but was not. It is not possible to call the crowds at the scene as witnesses. Only some can be called.

The appellants urged that their defences were not considered and that the trial court did not comply with **Section 169 of the CPC. Section 169 of the CPC** stipulates what a well structured judgment will contain. The judgment must be in the language of the court, shall contain the point or points for determination, the decision thereon and the reasons for the decision, be dated and signed. The Trial Magistrate did summarise the evidence that was adduced before the Trial Court and in a summary arrived at a decision. We do agree that the court did not analyse and evaluate the evidence in depth before arriving at the decision. The above notwithstanding, it is the duty of this court to review, examine and analyse the evidence afresh before arriving at our own determination. See ***Okeno v Rep (1972) EA 32.*** The appellants will not suffer any prejudice as a result.

Having duly considered all the evidence, the grounds of appeal and submissions, we come to the conclusion that the 1st, 3rd and 4th appellants were properly convicted and we uphold the convictions. As

regards the 2nd appellant, for reasons stated in this judgment, the conviction is unsafe, we quash it and set aside the sentence. He is set at liberty forthwith unless otherwise lawfully held.

As for sentence, the appellants were given an illegal sentence of life imprisonment. Under Section 296 (2) of the PC, the only sentence provided is death. We hereby set aside the sentence and sentence each appellant to suffer death on Count 1.Sentence on Count 2 is held in abeyance.

It is so ordered.

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

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

JUDGE **JUDGE**

DELIVERED THIS 29TH DAY OF OCTOBER, 2015

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

JUDGE **JUDGE**

In the presence of:

Mr. Mungai for State

In Person, for Applicants

Ibrahim/Peninah, Court Assistants

4 Accused, Present