REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 112 OF 2011

PETHAD RAMNIK SHANTILAL……...……1ST APPELLANT

RICHARD KARIUKI MUTAHI……..…..2ND APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

(Being an appeal against conviction and sentence in Nyeri Chief Magistrates' Court Criminal Case No. 992 of 2010 (Hon. Mr J.Kiarie, Senior Principal Magistrate) delivered on 9th June, 2011)

JUDGMENT

The appellants were amongst three persons charged with the offence of assault causing actual bodily harm contrary to **section 251** of the **Penal Code**. The particulars of the charge were that on the 29th day of July, 2010 in Nyeri Township in Nyeri Central District within Central Province, jointly with others not before court, the appellants wilfully and unlawfully assaulted Alfred Lumiti Lusiba thereby occasioning him actual bodily harm.

The court convicted the appellants who were 1st and the 3rd accused persons respectively and fined them Kshs. 50,000/= each and in default one year imprisonment. The 2nd accused person was acquitted of the charge.

They have appealed against both the conviction and sentence and in their petitions of appeal, they have raised the following common grounds:-

1. The learned magistrate erred in law and fact in failing to find that there was sufficient reason or evidence showing the appellants to have actually committed the offence;

2. The learned magistrate erred in law and fact by importing and subsequently misapplying the wrong provisions of the law to warrant the said judgment and sentence;

3. That the learned magistrate erred in law and fact in ignoring or giving no consideration to the case for the defence and submissions made thereto;

4. The learned magistrate erred in failing to note that the appellants were not charged as principal offender and as such their arraignment in court and subsequent trial, sentence and conviction was totally misconceived, misplaced and misguided;

5. The trial court erred in law in failing to find that the charges placed before it were null and void ab

initio and that the prosecution's case was full of contradictions because the complainant's evidence was uncorroborated;

6. The learned magistrate failed to properly analyse the relevance or otherwise of the whole evidence that was tendered before him, thus arriving at a wrong finding;

7. The learned magistrate erred in law and fact in basing his sentence on allegations not proved; and

8. The sentence imposed was manifestly harsh and excessive in the circumstances.

When the appeal came up for hearing, Mr Gichuhi for the appellants informed the court that he would argue grounds 1,3, 6 and 7 together and that he was abandoning the last ground. Nothing was said about the rest of the grounds and therefore they would be deemed to have been abandoned as well.

Counsel submitted that the charge of assault was not proved and that the complainant himself testified that none of the appellants assaulted him. Counsel urged that the appellants were never interrogated and that they were simply arrested and charged.

It was the appellants' case that by applying **section 20 (d)** of the **Penal Code,** the learned magistrate applied the wrong provisions of the law to sentence the appellants. I understood counsel to submit that this particular provision of the law should have been cited in the charge sheet if it was relevant to the charge against the appellants.

Counsel for the state opposed the appeal and discounted any notion that the charge sheet may have been defective; in particular counsel argued that under **section 20(d)** of the **Penal Code**, the charge against the appellants was properly drawn considering that the appellants procured the assailants who attacked the complainant.

To appreciate the competing arguments by the learned counsel for the state and the appellants and more importantly, inorder to establish whether the learned magistrate's decision is tenable, it is necessary to plough through the evidence at the trial and evaluate it afresh. With this fresh analysis of evidence, this court, being the first appellate court is not bound by the trial court's factual findings except that it has to bear in mind that the trial court had the advantage which this court does not enjoy which is that it heard and saw the witnesses and therefore such aspects of evidence as the demeanour of the witnesses may be beyond the reach of this court. The rationale behind the need to evaluate the evidence afresh at the appellate stage was succinctly captured in **Okeno versus Republic (1972) EA 32** where the Court stated that:-

> ***An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."(See page 36 of the decision thereof).***

Going back to the evidence, **Dr Alex Muturi (PW1)** testified that upon examination of the **complainant (PW2)** at the material time, it was established that his left side of the face was swollen, his lips and his upper limb were also swollen. The forearm was swollen and tender. There was also tenderness on the back. There were lacerations on the swollen upper limb. In the doctor's opinion the injuries may have been caused by a blunt object. The complainant was treated at Nyeri Provincial General Hospital and his injuries were classified as "harm". The P3 form in which the details of these injuries and the doctor's opinion were contained was admitted in evidence.

The complainant himself, **Alfred Lumiti Lusiba (PW2),** testified that until the 29th July, 2010 he had

been employed at Samrat Supermarket in Nyeri town where he had worked for two and a half years. His job entailed packaging of customers' or shoppers' goods.

According to Mr Lumiti, on 29th July, 2010 at about 5.00 pm, he was standing behind one of the cashiers in Samrat supermarket packing or wrapping shoppers' goods as he usually did. A shopper, or so was he thought to be, came from the supermarket carrying a carpet but apparently he did not have receipt for it. The 1st appellant stopped him as he was headed for the exit. The 1st appellant enquired who it was that had wrapped the carpet; he asked the complainant to find out from the super market's attendant on upper floor where apparently these items were stocked who it was that brought the carpet to the ground floor.

The complainant testified that his job was limited to wrapping of the purchased items and that it was for the cashier to ensure that those items had been paid for. Like any other item, he simply wrapped the carpet for collection and it was someone else's duty to ensure that that whoever picked it had the requisite receipt.

The attendant at the first floor where this sort of items was displayed or stocked confirmed the shopper had selected a carpet but it was not the one that he had collected; the particular carpet in question apparently belonged to a different shopper. Suspecting that the complainant may have wanted to steal the carpet, the 1st appellant pushed the complainant to the generator room where he was locked for the rest of the evening. At 8.00 pm when the supermarket closed, and after everybody else left for the day, the complainant was told by 1st accused that the police were coming for him.

Shortly thereafter the 2nd appellant, who was described as the 1st accused person's friend appeared with five strangers. The security officer who was the second accused opened the door for the 2nd appellant and the youths who had accompanied him. The 1st appellant ordered the complainant to "follow those policemen" meaning the youths that the 2nd appellant had come along with.

The complainant complied and followed these strangers, leaving the appellants behind together with the 2nd accused. The strangers took the complainant towards Majengo area where they questioned him about who it was that had been stealing from the 1st appellant's supermarket. The complainant was then subjected to a thorough beating; he was kicked and hit with a stone as a result of which he sustained bodily injuries. Fearing for his life the complainant gave them fictitious names of the supermarket's employees who he told them were the thieves who had been stealing from the supermarket. The complainant's assailants called the supermarket to relay this information but apparently they were informed that those names did not belong to any of the supermarket's employees. It is then that the complainant decided to give the names of his co-workers, if not for anything else, to save himself. They informed him that he had to take them to where these people lived; indeed, so the complainant testified, the 1st accused sent for a taxi in which they drove around looking for the people that the complainant had mentioned. He led them to his father's house tricking them that one of these people lived there. The moment he arrived he called out his father, with whom he lived, and told him that his assailants wanted to "finish" him. As soon as his father opened the door, the complainant entered the house leaving his father to talk to the assailants.

After they left, the complainant, accompanied with his father went and reported this matter to the police who asked them to go for treatment at provincial general hospital; it is at this hospital the complainant was treated and later discharged.

It was the complainant's testimony that though none of the accused persons hit him, they procured the people who assaulted him.

His father, **Feston Vulimi Lusimba (PW3)** testified that the complainant was his son and that he lived with him. On 29th July, 2010 between 9.30 to 10 pm he heard his son shout outside the house "father….people want to finish me". Since he recognised the voice of his son, he opened the door and immediately his son dashed into the house and collapsed on the seat. The assailants pursued him but his

father stood at the door and blocked them. His son was bleeding from the noose and one side of the face was swollen.

According to this witness, his son's assailants identified themselves as police officers and they told him that his son had been found stealing a carpet at Samrat supermarket and that they had been summoned to the supermarket by "Babu" whom the witness knew as the first accused. The witness had known him for two years because he lived in the same building in which his employer lived. In fact it is this witness who introduced his son to the 1st accused for purposes of the latter employing him and he thought that if indeed his son had stolen, then the 1st accused should have informed him.

When the assailants left, the witness reported the matter to the police the same night. Upon his enquiry, the police told him no report whatsoever had been made of any particular theft at Samrat supermarket. They gave the witness a note to take his son to the hospital; he was treated at the Provincial General Hospital where the P3 form was filled.

When the events leading to the assault of the complainant happened, **Timothy Karanja Goro (PW3)** was a manager at Samrat supermarket. He testified he knew the 1st appellant as the director at the supermarket while the 2nd appellant who was the third accused at the trial was the 1st appellant's friend.

On the material date between 3.00 to 4.00 pm, this witness was in the supermarket when he was summoned by the 1st appellant. The 1st appellant informed him that the complainant had attempted to steal a carpet. He instructed him to take up the issue. His office was on the third floor while the accused was on the ground floor. He went to the attendant in charge of carpets and indeed established that the attendant, one Nicholas, had issued a receipt for the carpet.

When this witness proceeded to the ground floor, he found the complainant locked in the generator room by the 1st appellant. The 1st appellant told him he will see what to do with the complainant at 8.00 pm when the supermarket usually closed business.

At 8.00 pm all the workers, except the complainant, assembled to pray and collect their national identity cards which they would usually surrender to the management of the supermarket every morning they reported to work. When they enquired about the complainant, the 1st appellant told the witness to tell them to leave because he knew what he would do with the complainant. Similarly, this witness was also asked to go and that he would know what the 1st appellant did with the complainant the following day.

The following day, the complainant and his father came and called the witness outside the supermarket. The complainant told him that after he left, the previous night, the 2nd appellant came with five strangers. The 2nd accused person opened the door for them. The 1st appellant asked the complainant to go with these strangers whom he described as police officers. He confirmed that the complainant had a black eye and was visibly in pain.

The appellant testified that the complainant told him that he had been led to Majengo where he was assaulted and asked to name those who used to steal from the supermarket.

The witness testified that the owner of the Supermarket one Anil had called him and told him that he would not be wasting time taking shoplifters to the police but rather he would be beating them as had no faith in the justice system.

When the witness went to record a statement with the police, he was sacked by his employer, Robinson Investment, which was in the business of hiring employees to work in supermarkets. He said that he was sacked because he recorded a statement against his employer's client.

The last prosecution witness was the investigations officer inspector of police **Patrick Lumumba (PW4).** He testified that on 29th July, 2010 at 10:40 pm, Alfred Lumiti Lusiba reported a case of assault. He

issued him with a note for treatment and later issued the P3 form. On 29th July, 2010, the appellants were arrested and charged.

According to this witness, the 1st appellant and the 2nd accused told him that the complainant intended to steal a carpet from the supermarket. He established that they locked the complainant in the store until 8.00 pm when the 2nd appellant came with strangers who ended up assaulting the complainant so that he could reveal those who used to steal from the supermarket.

The witness testified that the complainant had visible injuries. He also gave evidence that nothing had been presented to the police by the accused persons as stolen property and neither had any report of theft been made.

The appellants chose to give unsworn testimony. In his evidence, the 1st appellant **(DW1)** admitted that indeed he was the director of Samrat supermarket. He testified that on 29th July, 2010 at around 5.30 pm the complainant wrapped a carpet and passed it to a customer; however, when he enquired whether the customer had paid, the complainant told him that he had paid but that he could not produce any receipt for this payment. He asked him to wait at the accounts office after work. At 7.00pm her interrogated the complainant about the carpet; according to the 1st appellant, the complainant told him that a cashier had asked him to wrap the carpet but when the 1st appellant enquired from the cashiers who worked at the supermarket, none of them admitted having given such instructions. He then asked the complainant to go but denied having invited strangers to assault the complainant. He admitted having sacked **Timothy Karanja Goro (PW3)** because he used to come to work drunk.

The 2nd accused **Aden Mohamed Ali (DW2)** testified that he worked at the supermarket as a security officer. He told the court that on 29th July, 2010, the 1st appellant called him and showed him a carpet wrapped for a customer. The customer did not have a receipt for payment but somehow he was allowed to leave. According to this witness the complainant wrapped the carpet without instructions from the cashier who only could have asked him to wrap the carpet after it had been paid for.

At 8.00 pm after the rest of the workers had left, the witness together with the first appellant interrogated the complainant and, more particularly, whether he had any knowledge of the people who used to steal from the supermarket. The complainant denied having known any thief and also denied that he was a thief himself. The appellants then left him to go.

The **2nd appellant (DW3)** testified that he was a communication officer at Outspan Medical College but that he used to do a part-time job at Samrat supermarket. On 29th July, 2010 he went to the supermarket at around 6.00 and left at about 8.30 pm. A month later he was bonded to attend court where he was charged with the offence with which he was convicted. He denied that he knew the complainant and that he only saw him for the first time in the dock testifying. He said that he was not aware of the complainant's assault.

That the complainant was assaulted is not in doubt; he himself testified that he was assaulted as a result of which he sustained bodily injuries which, in the doctor's opinion were categorised as "harm". His own father testified that when his son escaped from his assailants' captivity he had a swollen face and that he was bleeding from the nose. The investigations officer, **Patrick Lumumba (PW4)** testified that the complainant had visible injuries when he saw him at the station where he had accompanied his father to lodge the complaint of assault on 29th July, 2010. More importantly, **Dr Alex Muturi (PW1)** submitted a report in which the details and the extent of the complainant's injuries were captured. There was conclusive and uncontroverted evidence that the complainant was assaulted as a result of which he was injured.

It was also clear from the evidence that none of the accused persons or the appellants assaulted the complainant. Indeed none of the prosecution witnesses including the complainant himself alleged that any of the accused persons assaulted him.

The **complainant (PW2)** and his **father (PW3)** were firm in their testimony that the complainant was assaulted by strangers and apparently it is this sort of evidence that the appellants heavily relied upon to claim their innocence and urged the court to hold that the state had not proved the case against them beyond reasonable.

The appellants may not have touched the complainant but the prosecution evidence that they were linked, albeit indirectly, to the complainant's tribulations was not displaced.

The complainant testified that he was locked in a generator room from about 5.00 pm until sometimes after 8.00 pm. The manager of the supermarket in which the complainant worked also testified that the 1st appellant confined the complainant in a store and by the time he left for the day after 8.00 pm the complainant was still locked up in the store. As the manager of the supermarket, he was curious about what the 1st appellant intended to do with the complaint after everybody else had left but his enquiry of the 1st appellant's intentions did not yield much except for the appellant to tell him that he would know the following day.

The 1st appellant himself testified that he asked the complainant to wait in the accounts office.

If the complainant was caught stealing from the supermarket or was an accomplice of such a theft at 5.00 pm or thereabouts, there is no viable reason and none was given why an action was not taken against him until three hours later. It is not plausible that he could possibly have been waiting in the accountant's office for the 1st appellant and the second accused person to interrogate him because if such interrogation was necessary then complainant should have been interrogated immediately.

Aden Mohamed Ali (DW2) testified that the 1st appellant confronted the shopper on whose behalf the complainant is alleged to have wrapped the carpet for. There is no evidence that any attempt was made to arrest this shopper who was carting the carpet away without paying for it. If he was a thief or a part of a syndicate to steal from the supermarket it does not add up that he was given uninterrupted exit from the supermarket having been caught red-handed. The least that was expected from the appellants was to arrest the suspect or suspects and report the matter to the police.

I agree with the learned magistrate's finding that the 1st appellant confined the complainant for ulterior reason which manifested itself when he released the complainant to thugs whom he described as "policemen".

The 2nd appellant testified that he was at the supermarket until 8.00 pm. Though he denied any knowledge of what transpired at the material time I find that the complainant's evidence against him that he is the person who procured the thugs who assaulted the complainant credible and unshakeable. There is no reason and none was suggested as to why the complainant should possibly have implicated him with this offence.

In convicting the appellants, the learned magistrate relied on **section 20(1) of the Penal Code** and found the appellants to be guilty as charged yet they did not assault the complainant directly. To understand why the learned magistrate was right in this regard, it is appropriate to look at the entire **section 20** of the **Penal Code**; it states as follows:-

20. Principal offenders

> ***(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say—***
>
> > ***(a) every person who actually does the act or makes the omission which constitutes the offence;***

(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) every person who aids or abets another person in committing the offence;

(d) any person who counsels or procures any other person to commit the offence, and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.

(2) A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.

(3) Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with doing the act or making the omission.

The evidence on record points to the fact that though the appellants did not, by themselves, assault the complainant, they counselled or procured other persons to commit the offence and under **section 20(1) (d)** of the Penal Code they are as much culpable as the principal offenders. It follows that, under **Section 20(2)** of the **Penal Code** the consequences of the offence of assault attach to the appellants as much as they would have attached to the complainant's assailants.

For the reasons I have given, I find that the appellants were properly convicted and sentenced and therefore their appeal is dismissed.

Signed, dated and delivered in open court this 23rd October, 2015

Ngaah Jairus

NGAAH JAIRUS