REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 148 OF 2012

(From the original Conviction and Sentence in the Criminal Case No. 61/2010 of the Principal Magistrate's Court at Kwale: E.K.Usui – PM)

MUTINDA SAMUEL KANYALU……..……APPELLANT

VERSUS

REPUBLIC……..……..RESPONDENT

JUDGMENT

The appellant **MUTINDA SAMUEL KANYALU** has filed this appeal against his conviction and sentence by the learned Senior Resident Magistrate sitting at Kwale Law Courts. The appellant had been arraigned before the trial court on 14th January, 2010 facing two counts as follows

COUNT NO. 1

ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) PENAL CODE

> **"On the night of 20th and 21st day of December, 2009 at Mgome village in Msambweni District within Coast Province, jointly with others not before court robbed MBODZE NDEGWA of two she goats valued at Kshs. 3,000/= and at or immediately before or immediately after the time of such robbery killed the said MBODZE NDEGWA."**

COUNT NO. 2

ASSAULT CAUSING GREVIOUS HARM CONTRARY TO SECTION 234 OF THE PENAL CODE

> **"On the night of 20th and 21st day of December, 2009 at Mgome village in Msambweni District within Coast Province jointly with others not before court unlawfully did grievous harm to UMADZE KUTO."**

The appellant entered a plea of 'Not Guilty' to both counts and his trial commenced before the lower

court on 10th May, 2010. The first trial magistrate **HON. OGEMBO** heard a total of four (4) witnesses. On 2nd November, 2010 **HON. USUI** took over the case and the hearing began '*de novo'*. The prosecution led by **CHIEF INSPECTOR WAITHAKA** called a total of eight (8) witnesses in support of his case. The brief facts of the case were as follows. **PW1 KUTO MWALUCHI** told the court that he is a peasant farmer who resides in Mgome village in Msambweni County where he farms and rears livestock for a living. On 20th February, 2009 he and his wife had travelled and left their two daughters **UMAZI** and **MBODZE** in the homestead under the care of his elder brother who lives nearby. Later **PW1** received an urgent call that his home had been broken into and two of his goats stolen.

At this point the narration is taken up by **PW2 MWANGIMA NULE** who told the court that he is a goat trader at Mwangulu market. On 21st December, 2009 at 7.00 a.m. the appellant approached him and offered him a goat for sale. The agreed on a price of Kshs. 1,600/=. Initially **PW2** was reluctant to pay the appellant as he did not know him. However the appellant took **PW2** to one **RODAH MUTISO PW3** who assured **PW2** that it was safe to pay appellant the money as she knew him well. **PW2** paid for the goat and took it to his home. The black goat was later identified by **PW1** as his goat which had been stolen from his compound during a robbery incident in which his 8 year old daughter was killed and the other daughter badly injured. Police arrested the appellant and recovered the goat. The appellant was later charged.

At the close of the prosecution case the appellant was found to have a case to answer and was placed on his defence. He gave an unsworn defence in which he denied having been involved in the robbery in which the goat was stolen. On 14th December, 2012 the learned trial magistrate delivered her judgment in which she convicted the appellant on the first count of Robbery with Violence. Since it was established that the appellant was aged 17 years and therefore was a minor at the time of the incident the court ordered that he be detained at the President's pleasure. Being aggrieved by both his conviction and sentence the appellant filed this appeal.

During the hearing of the appeal the appellant who was unrepresented chose to rely entirely upon his written submissions. **MR. AYODO** learned state counsel made oral submissions in which he opposed the appeal. As a court of first appeal we are obliged to re-consider and re-examine the prosecution case and to draw out own conclusions on the same. [See **AJODE VS. REPUBLIC 2005 KLR**]. We have carefully perused the written submissions filed by the appellant and note that he raises the following main grounds for his appeal.

- Failure to comply with section 207(1) of the Criminal Procedure Code
- Insufficiency of Evidence
- Illegal sentence

In his written submissions the appellant alleges that he was not called upon to plead to the charges in accordance with section 207(1) of the Criminal Procedure Code. We have carefully and anxiously examined the record of the trial. We note that on 14th January, 2010 when he was first arraigned in court the charges were read out to the appellant and he pleaded *'Not Guilty'* to both counts. Thereafter on 29th July, 2010 the prosecutor **CHIEF INSPECTOR GITONGA** applied to substitute the charge sheet. This was allowed by the court and the new charges were read out to the appellant on that day. Again he entered a plea of *'Not Guilty'* to both counts. What we feel appellant is referring to in this ground is the fact that a new magistrate **Hon. Usui** took over the trial from **Hon. Ogembo**. Such a situation is covered by section 200(3) of the Criminal Procedure Code which provides

"(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right."

In this case the record clearly indicates that when Hon. Usui took over the trial on 25th October, 2010 the appellant made the following application on page 18 line 4

"Accused – I ask that court start my matter afresh".

The prosecutor objected as follows on page 18 line 5

"Prosecutor – It may be difficult to get the witnesses".

The trial magistrate indicated that she would give directions on 2nd November, 2010. On that date the prosecutor indicated that he would be able to get the witnesses after all and the court directed that the matter begin *de novo* i.e. afresh. This therefore meant that all the witnesses would be re-called. The appellant argues that at this point the charges ought to have been read out to him afresh. We do not agree whilst it may have been proper form to read out the charge afresh, the fact is that the charge sheet was the very same one to which the appellant had been called upon to plead earlier on 29th July, 2010. There was no amendment to the charge at this point – all that was happening was that a different judicial officer was taking over the trial. Whilst it may have been prudent to read out the charges afresh for purposes of completeness – failure to do so was not illegal or unprocedural. Section 200(3) does not provide that the charges be read out afresh. No prejudice was suffered by the appellant by failure to read out the charges when the new magistrate took over the trial. The charges were the very same, the ones to which he had already pleaded. We find no merit in this ground of the appeal and the same is hereby dismissed.

The appellant submits that the evidence on record was not sufficient to warrant his being convicted of the offence of Robbery with Violence. The robbery incident occurred on the night of 20th/21st February, 2009. **PW1** told the court that he and his wife were both away from the homestead and had left only their two minor daughters aged 8 years and 12 years in the home. He states that he later received information that robbers had broken into his house. They killed one child, maimed the other and made away with his goats. In the first trial before Hon. Ogembo the surviving daughter **UMAZI KUTO** testified as **PW3**. However in the succeeding trial i.e. the *de novo* trial before Hon. Usui the girl was not called to testify. However there does exist ample evidence to support the fact that a robbery occurred as alleged. There would have been no reason for **PW1** to report a robbery at his home to the police if infact no such incident had actually occurred. During the robbery incident **PW1** told the court one of his daughters was killed and the other was seriously injured. **PW5 DR. SAID MOHAMED** a medical officer at Kwale District Hospital confirms that he conducted an autopsy examination on the body of Mbodze Ndegwa a 9 year old girl. He noted a depression fracture on her right scalp and a cervical spine fracture. His opinion was that death was caused due to blunt trauma. **PW5** filled and signed the post mortem report which is produced in court as an exhibit **Pexb3**. Likewise **PW6 SAMWEL GITHUI** a clinical officer attached to Msambweni District Hospital confirms that he did conduct a medical examination on Umazi Kuto a 13 year old girl on 18th June, 2010. She had been in a coma for two weeks and had a swollen face, swollen skull, anterior neck and deviated left eye. The doctor assessed her degree of injury as grievous harm. He filled and singed the P3 form which has been produced in court as an exhibit **Pexb1**. We are therefore satisfied that a robbery did infact occur in the homestead of **PW1** as alleged.

PW1 told the court that upon receiving news of the robbery he rushed back to his home. He found one of his daughters called Mboze was dead and the other called Umazi was admitted at Msambweni District Hospital in a critical condition. He also noted that two of his goats had been stolen. **PW1** describes the stolen goats thus

"I found my two goats black in colour and one with a white patch on head both female had been stolen……."

Meanwhile **PW2** tells the court that on 21st December, 2009 the very morning after the robbery he met the appellant at Mwangulu market with a goat to sell. **PW2** liked the goat and agreed to purchase it. He says that the goat which the appellant had *"was black in colour"*. **PW2** paid the appellant Kshs. 1,600/= and took the goat home. Two (2) weeks later **PW1** spotted the goat in the homestead of **PW2** and identified it as his stolen goat. **PW2** states at page 20 line 20

"I identified the goat. It had my mark. It was black and pregnant."

PW2 called police who arrested **PW2** on suspicion of having sold the goat. **PW2** led police to the appellant whom he identified as the one who sold him the goat. The goat was recovered and photographs of a black goat were produced in court as exhibit **Pexb2**. **PW2** was able to positively identify the appellant as the one who sold him the goat. They spent sufficient time in each other's company negotiating the price. The two met at 7.00 a.m. in broad daylight. Further they went together to **PW3** Mama Rodah whom the appellant said would vouch for him. The evidence of **PW2** is duly corroborated by **PW3**. This witness told the court on the material date she was at the market selling porridge. At about 7.00 a.m. she saw the appellant whom she knew as *'Mutinda'*. Appellant told her that he was selling a goat to **PW2**. **PW3** confirmed to **PW2** that she knew the appellant and that it was okay to pay him. **PW3** who knew the appellant well identifies him as the one who sold the goat to **PW2**. There is therefore sufficient evidence to show that on the day following the robbery the appellant sold a black goat to **PW2**.

This is a case where the doctrine of recent possession would squarely apply. In the case of **ARUM VS. REPUBLIC [2006] 2E.A**. the Court of Appeal held as follows

> **"Before a court can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved, that is there must be positive proof, first, that the property was found with the suspect, secondly that the property is positively identified as the property of the complainant, thirdly, that the property was stolen from the complainant, and lastly, the property was recently stolen from the complainant."**

In this case the possession by the appellant of the black goat is proven through the evidence of **PW2** and **PW3**. There is proof that the goat belonged to **PW1** who has positively identified it by its colour and indeed the appellant makes no claim that the said goat actually belonged to him. This goat was stolen from the complainant's home in the course of a robbery which robbery occurred barely 24 hours prior to the time when the appellant was seen with the goat. There can be no doubt that the appellant was an active participant in that robbery else how would he have come to have been in possession of the goat on the very morning after it had been stolen. In his defence the appellant states that he was arrested due to a dispute with 2 neighbours. He does not name the neighbours. More pertinently he makes no mention of a dispute with either **PW1** or **PW2**. No reason exists whey the two prosecution witnesses who did not know the appellant before would seek to implicate him. We reject this defence in its totality. We are therefore satisfied that the evidence on record was sufficient to prove the charge of Robbery with Violence as against the appellant. His conviction on this count was sound and we do confirm the same.

The learned trial magistrate did also convict the appellant on the charge of Assault causing Grievous Bodily Harm. However we find that this conviction had no basis given that the complainant being the child '*Umazi Kuto'* did not testify in the *de novo* trial before Hon. Usui. The trial magistrate had no liberty to consider evidence in the first trial conducted by her colleague which evidence had not tendered before her. Due to the fact that no evidence was taken from the complainant the conviction on the charge of Grevious Harm cannot stand. We therefore quash this conviction.

The appellant has also appealed as against his sentence on the basis that he ought to have been sentenced as a minor. We note that the learned trial magistrate did request an age-assessment report for the appellant. The report indicated that at the time of judgment in February, 2012 the appellant was 20 years old. Therefore in December, 2009 when the offence was committed the appellant was about 17½ years old and a minor. We are mindful of the provisions of the Children Act with respect to the sentencing of minors. The death sentence is certainly not an option to be considered. However in view of the fact that the appellant was assessed to be 20 years most of the other sentences recommended for minors are also no longer available e.g. Borstal Institutions due to his age. In the circumstances the decision of the trial magistrate to have the appellant detained at the President's pleasure was the most appropriate. We are not inclined to disturb this sentence and uphold the same. As such this appeal fails.

Dated and delivered in Mombasa this 28th day of July, 2014.

M. ODERO **M. MUYA**

JUDGE **JUDGE**

In the presence of:

Mr. Ayodo for State

Appellant in person

Court Clerk Mutisya