REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 100 OF 2013

LESIIT AND MAKAU, JJ

MUNJIA MICHUBU……....……..…APPELLANT

VERSUS

REPUBLIC ……RESPONDENT

(An appeal against the conviction and sentence in chief Magistrate's court at Meru NO. 3852 of 1999 by Hon. D. K. Gichuki, SRM)

J U D G M E N T

1. The appellant was charged with one count of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on 25th May, 2012 at Antuambui location in Igembe North District within Meru County being armed with a dangerous weapon namely a panga, robbed M'Mwirabua M'Arungu of cash Kshs.5,000/- and during the time of such robbery used personal violence to the said M'Mwirabua M'Arungu.
2. After the trial, the appellant was convicted and sentenced to suffer death.

3. Being aggrieved by the conviction and the sentence the appellant preferred this appeal. he relied on 8 grounds of appeal namely:-
    i. ***That learned Chief Magistrate erred in law and fact in that he misdirected himself in failing to find that the complainant's evidence was not at all corroborated by the prosecution witnesses.***
    ii. ***That the learned Chief Magistrate erred in law and fact in failing to find that the evidence of the prosecution was full of gaping loopholes and inconsistences to warrant a conviction.***
    iii. ***That the learned chief magistrate erred in law and fact in failing to find that the prosecution did not lay a proper foundation as required by law as he relied on a defective charge sheet, hence the charges were defective ab initio.***
    iv. ***That the learned chief Magistrate erred in law and fact by failing to take into account the evidence on record which was full of discrepancies.***
    v. ***That the learned chief Magistrate erred in law and fact by failing to take into account the appellant's mitigation thereof.***
    vi. ***That the trial Magistrate erred in law and fact in convicting the appellant on unproven charge and imposing an erroneous sentence and thus the evidence tendered does not meet the ingredients of the charge of robbery with violence.***
    vii. ***That the judgment of the trial court is against the weight of the evidence and the same is***

bad in law.

4. The appellant's appeal was argued by Mr. Omari, learned Advocate. Mr. Omari argued that the entire appeal turns on the question whether the case in the lower court was proved beyond reasonable doubt. Counsel argued that there was contradiction on the evidence of the prosecution witnesses. He urged that evidence of PW1 was that when he was attacked he lost consciousness only to find himself later being carried by one Kaberia (PW2). He urged PW1's evidence was contradicted by that of PW2 who testified that when he reached at a corner, he met Michubu the appellant seated on an old man, stepping on his head while holding a panga and asked them whether they were fighting or playing. PW1 answered PW2.

5. Mr. Omari submitted this is not possible as PW1 had testified that he had lost consciousness. He urged the evidence that the appellant stole Kshs.5,000/- from the complainant(PW1) is neither here nor there, as nothing was produced in court to prove the complainant had the money but only court's inference based on the fact that as Maua area grows miraa, it was probable complainant had the money as he had alleged.

6. He further urged the Administration Police Officers who arrested the appellant were not called to testify. He referred to the case of **BUKENYA V UGANDA (1972) EA 549** submitting that the prosecution should have availed all relevant witnesses to establish the truth of the charge and failed to do so.

7. Mr. Omari, learned Advocate argued further that no weapon was recovered and as such the ingredients of robbery with violence were not proved. He referred to evidence of PW4 who he alleged stated PW1 suffered injuries yet in his evidence at Page 18 of the proceedings he stated that there was evidence of alcohol when PW1 was being examined and as such he submitted that it cannot be ruled out that injuries he got was from fall considering his age as he was over 85 years. He urged the evidence shows that incident occurred near a primary school and a canteen yet it was only PW2, a relative of the complainant(PW1) who went to the scene. PW2 testified he heard screams, the counsel submitted it's unbelievable he is the only one who heard the screams.

8. The appellant raised a defence of alibi. The learned Advocate urged the trial court failed to consider the defence though it mentioned that alibi was a mere denial. He concluded by submitting the case was not proved beyond any reasonable doubt.

9. Mr. Makori, learned prosecution counsel, represented the State in this appeal. He opposed the appeal. Mr. Makori, learned State Counsel, urged the ingredients of the offence of robbery was proved in that the appellant was armed with a panga which is a dangerous weapon and that during the robbery he used violence against the complainant(PW1). The appellant during the incident grabbed the complainant(PW1) and hit him with backside of C-line. PW1's evidence he urged was corroborated by PW4 a Medical Practitioner who treated PW1 of the injuries he had sustained which injuries were consistent with the head butting. On evidence of PW4 Mr. Makori corrected the impression created by the appellant and pointed out PW4 had indicated in his P3 Form that there was no evidence of alcohol abuse. He urged the court not to disturb the findings.

10. Mr. Omari, Advocate in a rejoinder, urged that the evidence adduced was that the appellant had a C-Line but charge sheet reads of a panga. He added at any rate whatever weapon used was never produced in court. He pointed out the complainant(PW1) referred to the weapon used as a C-Line panga which he urged was a different and new weapon.

11. We are first appellate court and as required of us we have subjected the entire evidence adduced before the trial court to a fresh analysis and evaluation while bearing in mind we neither saw nor heard any of the witnesses. We have also given due allowance to that shortcoming. We have been guided by the case of **OKENO V REPUBLIC(1972) EA 32.**

12. The brief facts of the case were that on 25th May, 2012 at around 7.00 am the complainant an old

man aged around 85 years was walking alone to his shamba in Antuambui when he met the appellant who was well known to him. The appellant attacked the complainant by grabbing him by his collar, hit him at the back with a C-Line panga and head-butted the complainant on the face. The complainant fell down and lost consciousness and came around 11.00 a.m. When he found he was being carried by Kaberia(PW2). He found Kshs.5,000/- and his walking stick were missing. PW2 took him to the hospital whereby he was treated and then went to the police station and reported the matter. He was issued with P3 Form. The appellant was arrested after sometime and charged with this offence.

13. In a case of robbery with violence contrary to Section 296(2) the prosecution must satisfy that all the ingredients of this offence are proved before an accused is convicted of such an offence of Robbery with violence is defined under Section 295 of the Penal Code as follows:-

> ***"295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery."***

14. We have carefully analyzed and evaluated the prosecution case in this case to satisfy ourselves that the ingredients of the offence were met. PW1 in his evidence stated that after the attack at around 7.00 a.m. he lost consciousness and gained consciousness at around 11.00 a.m. At the time of the attack PW1 never mentioned of the appellant stealing anything from him. No evidence that the appellant demanded any money or anything from the complainant. Complainant's evidence is that when he gained consciousness he found his Kshs.5,000/- and walking stick missing.

15. Incidentally PW2 who found appellant seated on the complainant never testified witnessing anything being stolen. He talked to PW1, who according to PW2 told him the appellant beat him seriously and stole his Kshs.5,000/-. PW1 never mentioned in his evidence ever talking to PW2 and telling him what PW2 testified. PW1 in his evidence testified that he informed the police he had been assaulted. He never mentioned of appellant having stolen his money. He just testified he found his Kshs.5,000/- and walking stick missing. When the appellant was confronted by PW2 he left the complainant and aimed a blow with the panga at PW2 cutting the left finger of PW2. Anything after the appellant left the complainant might have happened as regards PW1's money and walking stick for the period he was unconscious for 4 hours. We find that the prosecution did not prove that anything was stolen by the appellant from the complainant and as such the ingredient of robbery with violence were not proved to the required standard.

16. The other issues raised in regard to the prosecution evidence is that the evidence of PW1 was contradicted by PW2. PW1 evidence is that he lost consciousness after the attack whereas PW2 testified he was able to talk to PW1 at the time the attack was going on. We do believe the evidence of PW1 as he had specifically stated that he lost consciousness and regained it at 11.00 a.m. following brutal attack by the appellant. PW5 contradicts PW1 and PW2 by stating that PW1's money was snatched from his breast pocket. PW1 never in his evidence stated so nor gave any report to the effect of any money being stolen from him by the appellant.

17. We have examined the evidence of PW1, PW2, and PW5 and are very clear in our minds that PW2 and PW5 contradicted PW1 in his own evidence. PW1 never in his evidence mentioned seeing the appellant stealing anything from him. He testified that he later found his money and walking stick missing. PW2 contradicted PW1 when he testified that he was told by the complainant that the appellant stole Kshs.5,000/- from him. PW5 contradicted PW1 when he testified that PW1 stated that Kshs.5,000/- was snatched from his breast pocket when PW1 only reported to police just of assault. We find these glaring contradictions and inconsistencies cannot be resolved with the evidence. We have come to the conclusion that the case against the appellant could have been tramped up charges. The inconsistencies in the evidence, the obvious

exaggerations and the existing grudge between the appellant and PW1 and his family members create a doubt as to whether robbery took place as alleged. The appellant's defence that the complainant and his witness had grudge with him and had framed him with an offence of murder and have threatened him with imprisonment cannot be all together be overlooked especially given the fact that the case appears to be a fabrication.

18. We note that the report PW1 testified he gave to police was of assault whereas according to PW5 the complainant complained of being hit with side of the panga and kshs.5,000/- snatched. PW5 booked an assault and theft not robbery. We note the inconsistencies in evidence of PW1, PW2 and PW3 as to the type of weapon used. PW1 talks of C-Line, panga, PW2 of panga and PW5 of panga whereas the charge sheet talks of a panga. PW1 contradicts the charge sheet by talking of C-line panga. We take the complainant testified he found Kshs.5,000/- missing and his walking stick. The charge sheet do not include walking stick as one of the items stolen. PW2 who found the appellant at the scene did not mention the complainant complaining of a walking stick in his evidence. Significantly PW2 testified he was cut with a panga by the appellant, yet no report was booked with police, no P3 form was obtained and no charge was preferred against the appellant for such an offence. The manner in which this matter was handled creates further doubt as to whether the complainant was robbed as alleged. The evidence support of the report by PW1 on an offence of assault and not robbery with violence. We find that the appellant ought to have been charged with an offence of assault but not robbery with violence.

19. As regards the appellant's defence of alibi, we have carefully considered the findings of the trial court and have no doubt the defence of alibi was considered. The evidence of PW1 and PW2 squarely placed the appellant at the scene of incident at 7.00 a.m. and the trial court correctly found the appellant was at the scene of the incident and not at the hotel. He did not call any witness to support his defence of alibi which was dislodged by the prosecution witnesses.

20. We have come to the conclusion that the prosecution case was full of contradictions and inconsistencies which could not be resolved with the evidence. We find that the prosecution had not proved the case against the appellant to the required standard. We accordingly find merit in the appeal. Accordingly we allow the appeal and quash the conviction and set aside the sentence. The appellant should be set at liberty forthwith unless he is otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MERU THIS 24TH DAY OF JULY, 2014.

J. LESIIT **J. A. MAKAU**

JUDGE **JUDGE**