REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 159 OF 2013

(CONSOLIDATED WITH)

CRIMINAL APPEAL NO.161 OF 2013

NZAU KAKUNU ALIAS **OMONDI……...1ST APPELLANT**

UKUMU CHARLES ALIAS **MBISI……..2ND APPELLANT**

VERSUS

REPUBLIC …….RESPONDENT

(Being an appeal from the original conviction and sentence in Mutomo Senior Resident Magistrate's Court Criminal Case No. 93 of 2013 by Hon. S.K. Mutai, SRM on 18/7/13)

JUDGMENT

1. **Nzau Kakumu** Alias **Omondi** (*1st Appellant*) and **Ukumu Charles** Alias **Mbisi** (*2nd Appellant*) were charged with Robbery with violence contrary to **Section 296(2)** of the **Penal Code.** Particulars of the offence being that on **26th** day of **May, 2013** at about 10.00pm at **Mutomo Township, Mutomo Location, Mutomo District** within **Kitui County,** jointly with others not before court being armed with dangerous weapons namely, hammers, pangas and piece of wood robbed **Jackline Kisyung'u** Kshs. 600/= and at or immediately before or immediately after the time of such robbery beat the said **Jackline Kisyung'u.**

Count 2- Assault causing actual bodily harm contrary to **Section 251** of the **Penal Code.** Particulars thereof being that on the **26th** day of **May, 2013 at** about 10.00pm at **Mutomo Township, Mutomo Location** in **Mutomo District** within **Kitui County,** jointly with others not before court unlawfully assaulted **Catherine Kisyung'u** thereby occasioning her actual bodily harm.

2. They were tried, convicted and sentenced as follows:-

Count 1 – to serve life imprisonment

Count 2 - to serve three (3) years imprisonment.

3. Being aggrieved by the conviction and sentence they appealed on grounds that:-

i. The learned trial magistrate erred in law and fact by convicting on evidence of a sole identification witness without considering existence of a possibility of mistake.

ii. Failure to caution itself was erroneous on the part of the court.

4. The case as presented by the prosecution is that PW1 , **Jackline Kisyung'u** with her sister **Catherine Kisyung'u,** PW2, were on their way home when they were stopped by five (5) people who beat them up, tore their clothes and took away PW1's Kshs. 600/=. They reported the matter to the police and sought treatment at **Mutomo Hospital**. The appellants were arrested and subsequently charged.

5. When put on his defence the 1st appellant stated that on the material date he was working at **Kiviu** upto 5.00pm. They went to collect more bricks. Their vehicle had a puncture. They reached **Mutomo** at 1.00pm. They went to work. The following day he went for lunch at a hotel only to be arrested.

6. The 2nd appellant said he was carrying water using a motorbike. He worked until 5.30pm when he went to Kikunga's shop then later to Montona Bar. He sat opposite the two (2) complainants as they drank alcohol. On his way home he was stopped. The two complainants demanded for money for the beers. People went there and PW1 alleged that he had taken her Kshs. 600/=. He was searched. He only had Kshs. 45/=. He went home. The following day he was arrested.

7. At the hearing of the appeal, **Mrs. Gakobo** learned Senior Principal State Counsel notified the appellants of the States' intention to seek correction of the error committed by the trial court in sentencing them to life imprisonment, a sentence that was illegal.

8. The 1st appellant having considered the notification elected to proceed with the appeal on conviction and sentence. The 2nd appellant however abandoned the appeal against the sentence.

9. The 1st appellant relied upon written submissions whereby he stated that it was a case of mistaken identity a fact that the trial magistrate failed to consider. Further he submitted that identification was not proper.

10. **Mr. Kilonzo,** counsel for the 2nd appellant submitted orally. He prayed to withdraw the appeal on sentence and opted to pursue appeal on conviction. He submitted that there was no robbery with violence as there were no weapons mentioned as having been used in the course of the alleged incident. He argued that if the complainants were beaten it was a case of simple robbery or mere assault. This could have called upon the magistrate to exercise powers conferred by **Section 179** of the **Criminal Procedure Code.** He urged this court to exercise power under **Section 354** of the **Criminal Procedure Code** to correct the error occasioned.

11. Further, he urged the court to look at the evidence adduced and make a finding that the offence was not committed.

12. With regard to the charge of assault, he stated that the event occurred in the same transaction, therefore there should not have been a charge of assault.

13. In response thereto, **Mrs Saoli,** the learned State counsel stated that evidence adduced was sufficient to have the appellants convicted as injuries sustained were proved and the appellants were recognized. She prayed for enhancement of sentence in respect of the 1st appellant.

14. This being the first appellate court, our duty is to re-consider the evidence, re-evaluate it and draw our own conclusions in deciding whether the judgment of the trial court should be upheld. (See ***Okeno versus Republic [1972] E.A. 32).***

15. It is argued by the 1st appellant that this was a case of mistaken identity. As correctly submitted, in the case of ***Anjononi versus Republic [1980]KLR 52*** it was stated thus:-

> "…***recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone, the jury should be reminded that mistakes in recognition in close relatives and friends are sometimes made."***

16. PW1, **Jackline Kisyung'u** on cross-examination said she did identify their attackers. She testified that she knew the 1st appellant as **Omondi.** PW2, **Catherine Kisung'u** stated that she recognized both the appellants. In their defence the 1st appellant denied having been at the scene of the incident. The 2nd appellant on the other hand stated that on the fateful night he had been drinking at **Montana Bar.** The complainants demanded for money from him to buy beer but he declined to give them. One of them purportedly vowed to ensure she would have him fixed.

17. Evidence adduced clearly established the fact that the complainants herein were people who knew the appellants previously. It was therefore a case of recognition. The complainants were able to recognize their attackers because there was moonlight and they struggled until they reached where there were security lights. In the circumstances, the question of mistaken identity could not arise.

18. The appellants faced a charge of robbery with violence. The ingredients of robbery with violence were stated in the case of ***Oluoch versus Republic [1985]KLR,*** where it was held that:-

> "***Robbery with violence is committed in any of the following circumstances:-***
>
> ***a) The offender is armed with any dangerous and offensive weapons or instrument; or***
>
> ***b) The offender is in company with 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…"***

19. The particulars of the offence state that the appellants were armed with dangerous weapons namely;- hammers, pangas and pieces of wood. PW1 said the appellants beat them. PW2 said the 1st appellant in particular slapped her. None of the witnesses said their attackers were armed with any type of weapon or instrument.

20. PW1, stated that the attackers searched them, tore her clothes and took her cash Kshs. 600/=. No evidence was led as to where the money had been prior to being taken. She was able to recognize their attackers but she did not state who in particular took the money if indeed she had the money. A doubt is cast as to whether she lost any money in the process of the attack. In the circumstances the charge of robbery would not stand.

21. However, there is medical evidence establishing the fact that PW1 was assaulted. She sustained wounds in her inner side of the right cheek (mouth). The right temporal was swollen and tender. The degree of injury sustained was assessed as harm. This was indeed a case of assault. The learned trial magistrate should have exercised his discretion as provided by the law

to convict of a lesser cognate offence.

22. With regard to the second count, the complainant was PW2. Evidence was adduced which proved the fact that she was assaulted by the appellants herein jointly with others who were not arrested. She was subjected to medical examination by PW3, **Daniel Mulwa,** a clinical officer who found her having sustained a tender right ear, swollen and tender shoulder. He assessed the degree of injury sustained as harm. There was no misdirection on the part of the trial magistrate in reaching the finding of guilty as he did.

23. Having re-evaluated evidence as required, acting pursuant to the provision of **Section 354** of the **Criminal Procedure Code,** we have no reason to interfere with the findings of the learned trial magistrate in respect of the second count. In the premises we confirm the conviction and sentence imposed.

24. With regard to the first count, there being good reason to interfere with the findings of the Lower Court, we hereby set aside the conviction for robbery with violence and substitute it with a conviction on a lesser charge of assault causing actual bodily harm contrary to **Section 251** of the Penal Code. Accordingly we sentence the appellants to **three** (**3) years** imprisonment. The sentence will run concurrently with the one imposed on **Count 2.**

25. It is so ordered.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **30TH** day of **OCTOBER, 2014.**

L.N. Mutende **B. Thuranira Jaden**

Judge **Judge**