REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 20 OF 2014

BENARD MULWA MUSYOKA ……APPELLANT

VERSUS

REPUBLIC ……RESPONDENT

(Being an appeal from the original conviction and sentence in Kilungu Principal Magistrate's Court Criminal Case No. 20 of 2013 by Hon Henry Nyakweba, PM on 6/12/13)

J U D G M E N T

1. **Bernard Mulwa Musyoka,** hereinafter "***the appellant***" was charged with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code.** Particulars of the offence being that on the **5th** day of **March, 2013** at **Mutungu village, Nduu sub-location** in **Kilungu District** within **Makueni County** robbed **Charles Mwau Ndan'ga** of **Kshs. 10,000/=** and one mobile phone make Samsung valued at Kshs. **2500/=** and immediately after the time of such robbery used actual violence to the said **Charles Mwau Ndan'ga.**

2. He was tried, convicted and sentenced to suffer death. Being dissatisfied with the conviction and sentence he now appeals on grounds that ;-

i. The charge was defective in nature for being at variance with the evidence adduced by PW1 in relation to the time when actual violence was used against him.

ii. The learned trial magistrate failed to exercise his discretion pursuant to the provisions of **Section 179** of the **Criminal Procedure Code.**

iii. **Article49 (1) (f)** of the **Constitution** was violated hence the appellant's fundamental rights being violated.

iv. Failure to summon a witness 'Tom' was detrimental to the prosecution's case and the burden of proof was not discharged.

3. According to the prosecution's case, on the **5th March, 2013, PW1, Charles Mwau Ndan'ga,** the complainant herein was at **Kilome Market** where he had gone to pay his creditors. He remained with **Kshs. 10,000/=** and used service of a '*boda boda*' to take him home. The appellant, the rider of the motorcycle on reaching his home accelerated and stopped 0.5.km away. When he eventually

stopped he seized the complainant by the neck and squeezed it rendering him unconscious. He took away his cellphone. Thereafter he reported the matter to the police. The appellant was arrested. The cellphone was found in possession of one **Francisca Mueni Mutua** alleged to be the appellant's mother.

4. The court duly complied with **Section 211** of the **Criminal Procedure Code.** The appellant having understood the requirements of the provision opted to remain silent.

5. The learned trial magistrate analyzed evidence adduced and made a finding that indeed the appellant did commit the offence.

6. At the hearing of the appeal the appellant chose to rely upon his written submissions. In addition thereto, he stated that the person who was found in possession of the cellphone was not called as a witness.

7. The appeal was opposed by the State. **Ms Kefa** the learned state counsel submitted orally that the appellant was well known to the complainant. When the complaint was made to the police, the complainant specifically provided his name and when he sighted him he notified the police who arrested him.

8. On our part we have duly re-considered the evidence, re-evaluated it and come-up with our own conclusions since this is the first appeal. (***See Okeno versus Republic [1972] E.A. 32).***

9. The appellant faced a charge of robbery with violence. The ingredients of robbery with violence were clearly set out by the Court of Appeal in the case of ***Olouch versus Republic [1985] KLR*** where it stated thus:-

> "***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 with one or more 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…"***

10. The charge is as drawn as stipulated in the ingredient '***C***' aforestated of the charge of robbery with violence.

<u>The question to be answered is therefore;- whether the charge was defective?</u>

11. It has been held that the charge can only be fatally defective if it does not disclose essential ingredients of the offence. In the case of ***Sigilai versus Republic[2004] 2KLR 480*** it was held thus:-

> "***The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence."***

12. The charge as framed was not defective because it disclosed one of the essential ingredients of the charge of robbery with violence. It was read to the appellant in clear terms which enabled him participate in trial by cross-examining the witnesses who testified. Prior to being put on his defence the learned trial magistrate gave an indepth explanation of **Section 211** of the **Criminal Procedure Code** and even recorded everything he stated which made the appellant elect not to give evidence but to leave it to the court to decide on evidence adduced. The charge was not defective.

13. It is contended that the appellant should have been accused of having contravened **Section 296(1)** of the **Penal Code** and the trial magistrate should have exercised his discretion pursuant to the provisions of **Section 179 (2)** of the **Criminal Procedure Code.**

14. **Section 296(1)** of the **Penal Code** provides:-

> "***Any person who commits the felony of robbery is liable to imprisonment for fourteen years".***

15. A felony of robbery would be committed when a person takes something of value from another person using force or having threatened to use force or violence. Where the person strikes and wounds using actual violence, it ceases to be simple robbery. This is a case where the complainant sought medical treatment following injuries sustained. He was examined by PW4, **Eric Kasiamani,** a clinical officer who found that he had sustained injuries on the neck, left shoulder and the jaw. Both hips were tender and swollen. There were scratch marks on the neck. He had suffered harm. This was evidence that violence had been visited on the person of the complainant. It was not a mere threat. The learned trial magistrate could not have exercised his discretion to reduce the charge and convict the appellant of a minor offence when there were no circumstances prevailing that required him to do so.

16. Was it necessary to call the complainant's employee called '***Tom'?*** It was indeed the evidence of PW3, **Stephen Nthuli Meyu** that he learnt of the robbery from **Tom** who called him and told him that the complainant had been robbed the previous night. In the case of ***Mwangi versus Republic [1984] KLR 595*** the Court of Appeal stated thus:-

> ***"Whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with the discretion unless it may be shown that the prosecution was influenced by some oblique motive".***

17. **Tom** did not witness the robbery. His evidence would have meant coming to tell the court that he either called PW3 and gave him information about a robbery or not. This was evidence of no value. Failure to call him was not detrimental to the prosecution's case since he was not a vital witness.

18. The appellant has argued that his fundamental rights were violated having been held in custody for **4 days.** The charge sheet indeed indicates he was arrested on **7/3/2013** and produced in court on **8/3/2013**. The record however shows he was arraigned in court on **11/3/2013.** On the said date the charge was not read to the appellant. It was explained by the prosecution that the complainant was in a critical condition. That notwithstanding, no explanation was rendered why he was not produced in court within **24 hours.** It is however settled that where an accused person is held in custody for more than the stipulated time, a relief of discharge/acquittal is incompetent. What is open to such a person is a civil claim for damages. (***see Julius Kamau Mbugua versus Republic- Criminal Appeal No. 50 of 2008 (reported in 2010)eKLR.***

19. This then brings us to the last ground – whether the burden of proof was discharged in the circumstances. PW1 was at **Kilome Market** having gone to pay PW3 what he owed him. The Appellant was well known to PW3. He is the one who called him and asked him to take PW1 home. PW1 also identified the appellant by name. He was a person known to him as a boda boda operator. Cash money and a cellphone were taken away from him without his consent.

20. PW1 said it was the complainant who took away the said items. The money was not recovered. However the cellphone was recovered. A lady said to be the mother of the appellant rang him on **13/3/2013.** Consequently, the police recovered the cellphone from her.

21. Following the directive of the trial magistrate the lady was arrested and charged in ***Criminal Case No. 119 of 2013 - Republic versus Francisca Mueni Mutua*** with the offence of handling stolen property. She pleaded guilty to the charge and the case was determined.

22. The evidence adduced by the complainant incriminating the appellant was not discredited. No explanation having been rendered the evidence adduced proved the charge. There was no misdirection on the part of the trial magistrate in reaching the finding that the appellant was identified appropriately as the person who robbed the complainant.

23. In the result, there is no basis to interfere with the decision of the Lower Court. Accordingly, we dismiss the appeal in its entirety.

24. It is so ordered.

DATED and **SIGNED** at **MACHAKOS** this **23RD** day of **OCTOBER, 2014.**

L.N. MUTENDE **B. THURANIRA JADEN**

JUDGE **JUDGE**

DELIVERED in open court at **MACHAKOS** this **23RD** day of **OCTOBER, 2014.**

L.N. MUTENDE

JUDGE