No. 381/14

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 19 OF 2013

BENSON MUIA SELYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Mavoko Principal Magistrate's

Court Case No. 395 of 2012 by Hon. T.A. Odera, PM on 27/2/13)

JUDGMENT

1. The appellant **Benson Muia Selya** 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 **6th September, 2011** at **Lukenya** in **Athi River District** within the **Eastern Province,** jointly with another not before court while armed with dangerous weapons namely, a knife and a rungu robbed **Musyoki Nzioki** alias **Malungu** of **Kshs. 8000/=** and at the time of such robbery used actual violence against the said **Musyoki Nzioki alias Malungu.**

2. He was tried, convicted and sentenced to serve life imprisonment.

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

i. The learned trial magistrate erred in law and fact when she failed to observe that the provisions of **Section 214 (1) (i) (ii)** were not a nullity.

ii. Vital witnesses were not called to testify.

iii. Evidence adduced was contradictory.

iv. Dismissal of the defence put up was contrary to **Section 169(1)** of the **Criminal Procedure Code.**

4. According to the prosecution, on the **6th September, 2012** at about **8.00pm,** the appellant a person well known to PW1, **Benjamin Musyoki Nzioki,** the complainant requested to be taken to **Mwalimu area,** two (2) kilometers away to purchase fuel for his motor-cycle. He instructed PW1 to stop along a murram

road where there was a thicket. Two (2) people emerged from the thicket and joined the appellant who had embarked upon assaulting the complainant. He sustained serious injuries and lost consciousness. He regained it to find his **Kshs. 8,000/=** and a mobile phone missing. He was taken to hospital as the matter was reported to the police. He was admitted in hospital for three (3) weeks.

5. On the **7th September, 2011** PW2, **No. 220807 Senior Sergeant Odhiambo Edward** found people who intended to lynch the appellant on allegations that he was the complainant's assailant. He re-arrested him. He led him to where other people believed to be suspects, sand harvesters were. They were arrested. He investigated the case and caused them to be charged. The rest were acquitted due to lack of evidence.

6. When put on his defence the appellant stated that on the material date he was doing his business as usual. His colleagues were unhappy with him as he had carried so many customers. They threatened to lynch him. He was rescued by PW2.

7. The learned trial magistrate evaluated evidence adduced and found that PW1 recognized the appellant. Although the incident happened at night circumstances that prevailed favoured correct identification/recognition. This was the basis of the conviction.

8. At the hearing of the appeal the learned State Counsel put the appellant on notice of their intention to seek enhancement of sentence, the sentence imposed having been an illegal one. The appellant did consider the notification, disregarded it and elected to proceed with the appeal against the conviction and sentence. He relied upon his written submissions. He stated that the learned trial magistrate flouted the provisions of **Section 214 (1) (i) (ii)** of the **Criminal Procedure Code** which was prejudicial to him. Failure to call crucial witnesses was detrimental to the prosecution's case. Contradictions in evidence adduced were apparent.

9. In a response thereto, **Mr. Gikonyo,** submitted orally that evidence adduced was of recognition. PW1 had known the complainant for one (1) year before the incident. Ingredients of the offence were proved. On sentence, he called upon the court to interfere with the sentence and impose a proper one provided by the law.

10. As the first appellate court, we have reconsidered the evidence, re-evaluated it to come up with our own conclusions bearing in mind that we neither saw nor heard witnesses testify. (***see Okeno versus Republic [1972] E.A. 32).***

11. It is admitted by the appellant that the complainant was indeed attacked and robbed. His only contention was that he was not involved in the commission of the crime. Further, it is argued that the charge sheet was amended but **Section 214(1) (i)** of the **Criminal Procedure Code** was not complied with. **Section 214** of the **Criminal procedure Code** provides thus ;-

> ***"(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:***
>
> ***Provided that –***
>
> ***i. where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;***
>
> ***ii. Where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination".***

12. A perusal of the court record shows that an application was made by the Court Prosecutor to have the charge sheet amended pursuant to the provisions of **Section 214 (1)** of the **Criminal Procedure Code.** The objection raised by the appellant was overruled by the court. The amendment sought was in respect of the date when the offence was committed. Proceedings show the court recorded as follows:-

> "***Court - Accused pleads a fresh***
>
> ***Language – English/Kiswahili***
>
> ***Accused 1 – Si ukweli***
>
> ***Accused 2 – Si ukweli***
>
> ***Accused 3 – Si ukweli***
>
> ***Order – Each says not true." Plea of guilty entered against each.***
>
> ***Prosecution- I close my case"***

13. It is apparent that after such an amendment the accused may demand for recall of witnesses for purposes of testifying afresh or cross-examination. In the case of ***Yongo versus Republic- Criminal Appeal No. 1 of 1993*** the Court of Appeal held thus|:-

> ***"(1)…***
>
> ***(2) Where the charge is defective either by description or at variance with the evidence at the trial, the court has the power to order an amendment or alteration of the charge provided.***
>
> ***a. the court shall call upon the accused to plead to the altered charge, and***
>
> ***b. The court shall permit the accused, if he so requests to re-examine and recall witnesses.***
>
> ***It is mandatory requirement that the court must not only comply with the above conditions, but it shall record that it has complied. The trial magistrate failed in not recording whether there had been compliance with the proviso to Section 214 of the Criminal Procedure Code Cap 75.***
>
> ***(3) The appellant should have been given the opportunity to further question the prosecution witness and it could be said whether the failure to give him the opportunity occasioned no prejudice to him as such further questioning might have caused the trial magistrate to form a different view of the witness evidence."***

14. In the instant case it is clear that the court exercised its discretion by allowing the amendment. It did call upon the appellant to plead to the altered charge. However, it failed to explain to the appellant his right to recall witnesses for purposes of cross-examination and re-examination. It also failed to comply with the mandatory requirement of recording compliance with the conditions set out in the proviso. The offence having been alleged to have been committed on a totally different date as to the one that was read to him per the information in the charge sheet, it would have been important for him to be notified of his rights just in case he had a different kind of defence to allude to. In the premises, the procedure adopted by the court was prejudicial to the appellant.

15. An error was made by the court which would call upon this court to order a re-trial. The principle upon which an order for re-trial may be granted was stated in the case of ***Fatehalli Manji versus Republic [1966] E.A. 343*** as follows:-

> ***"in general a re-trial will be ordered only when the original trial was illegal or defective… even where a conviction is initiated by a mistake of a trial court of which the prosecution is not to***

blame, it does not necessarily follow that a re-trial should be ordered, each case must depend on its own facts and circumstances and an order for a retrial should only be made where the interest of justice require it".

16. Such an order would also be considered if the court opines that there is admissible evidence that would secure a conviction.

17. This is a case whence the complainant described the appellant as the person who approached him and asked him to take him to **Kwa Mwalimu** area to buy fuel. When eventually he stopped the motor-cycle he turned against him and assaulted him. He was joined by two (2) persons. They wanted his motor-cycle. They injured him. He lost consciousness. When he regained the same he had been cut on the neck. He managed to go to a bar at **Nzoiani Market.** He notified the barman and he was taken to **Machakos District Hospital,** he was later transferred to **Kenyatta National Hospital.**

18. On cross-examination, he gave the name of the bar attendant as **Muthama.** He also said that some people saw them leave together. He however, denied the existence of a grudge/difference between them.

19. PW2 rescued the appellant from members of public who wanted to lynch him. In his defence the appellant stated that he argued with his colleagues over customers. They did not want him to carry any other customers for the day. When he resisted they removed him from his motor-cycle and threatened to douse him in petrol. Many people gathered, PW2 inclusive who arrested him.

20. No witness was called to explain the circumstances that prevailed prior to the attempt to douse the appellant in petrol. PW2 told the court that he was told the appellant had picked a motor-cycle driver to buy fuel who was beaten thoroughly. He did not divulge his source of information therefore this was hearsay evidence that was inadmissible. He took the appellant to **Kenyatta National Hospital** so that the complainant could identify him.

21. It was stated further by PW2 that on **27/9/2011** a motorcycle operator had been killed which prompted his colleagues to go to the police station. On cross-examination he said no report had been made to the police prior to the arrest. He denied an allegation that he took the appellant to hospital and went into the room to tell the complainant to allege that he was his assailant.

22. PW3, the Investigation Officer stated that he gathered that the appellant and his co-accuseds had assaulted the complainant. He did not tell the court what kind of investigation he carried out that enabled him to form an opinion that the appellant indeed assaulted the complainant and robbed him off the properties mentioned in the charge sheet.

23. Evidence of people who saw the complainant leave with the appellant as alleged was vital in the circumstances.

24. Further, evidence of **Muthama** who purportedly saw the complainant soon after he sustained injuries was also very important. It would have informed the court if indeed the complainant was able to tell who his attackers were.

25. What has not been explained by the prosecution was why a suspect had to be taken to hospital where the victim of an attack was, instead of the identification being done later on at the police station.

26. From the foregoing, it is apparent that investigations carried one in the case were wanting. It could not be stated with certainty that the appellant herein is one of the persons who robbed the complainant on the fateful date.

27. In the premises the appeal succeeds. It is allowed. The conviction is quashed and sentence imposed set aside. The appellant shall be released forthwith unless otherwise lawfully held.

28. 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