REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL CASE NO. 392 OF 2007

(CONSOLIDATED WITH CR. APPEAL NO. 390/07 & CRIMINAL APPEAL NO. 395/07)

1. **WILSON WILLIAM WAMBUGU...1ST APPELLANT**

2. **THOMAS NICHOLAS NDUNGU..2ND APPELLANT**

3. **BILLY WAWERU WACHIRA..3RD APPELLANT**

VERSUS

REPUBLIC..RESPONDENT

(From the original conviction and sentence in Criminal Case No. 6771 of 2005 of the Chief Magistrate's Court

at Kibera by Ms. Muchira – Senior Resident Magistrate)

JUDGMENT

The appellants, **WILSON WILLIAM WAMBUGU, THOMAS NICHOLAS NDUNGU,** and **BILLY WAWERU WACHIRA** were convicted for the offences of **robbery with violence contrary to section 296 (2) of the Penal Code.** The first and the third appellants (Wilson and Billy) were convicted on two counts, while the 2nd appellant (Thomas) was convicted on one count. All the said counts were of robbery with violence.

After their convictions, the appellants were sentenced to suffer death, as by law prescribed.

They have now lodged an appeal against both their convictions and the sentences. In their appellants, the appellants have raised the following issues;

(a) They were not identified positively, because the circumstances prevailing were harsh.

(b) The trial court did not comply with **section 198 of the Criminal Procedure Code,** when it failed to record the language in which the witnesses testified.

(c) The trial court violated the provisions of **section 26 (1) of the Constitution and section 329 of the Penal Code,** when it failed to give to the appellants an opportunity for mitigation.

(d) The trial court failed to give due consideration to the defences advanced.

(e) The evidence adduced by the prosecution was insufficient to prove the offences.

(f) In any event, the prosecution witnesses gave inconsistent evidence.

(g) Essential witnesses did not give evidence in court.

(h) As the complainants had reported cases of assault, the police erred when they charged the appellants with robbery with violence.

(i) **PW 5** did not testify on oath; that constituted a violation of section 151 of the **Criminal Procedure Code**.

In determining this appeal, we will take into account the very comprehensive submissions made by the appellants. We shall also re-evaluate all the evidence on record, and draw there from our own conclusions. Similarly, the submissions made by the respondent will also be given due consideration.

First, it is important to note that the two counts arose from incidents that took place on separate days, and in respect to which the complainants were different persons. The only two things that were common to the incidents were that they took place at Kibera Soweto, and that the appellants were alleged to have perpetrated the offences.

In Count 1, the appellants are said to have robbed **JOHN SAILI MUSYOKA (PW 1)** of his mobile phone, a wallet, his National Identity Card and KShs.4,000/- cash. The assailants were armed with a dangerous weapon, and they used actual violence on the complainant.

That incident took place on 10th September 2005.

Meanwhile, in Count 2, the appellants are said to have been acting jointly with others who were not before the court, when they robbed PETER WANJORA NDUNGU **(PW 3).** On that occasion, they robbed the complainant of his mobile phone and KShs.5,000/- cash. They also used violence on the said complainant.

That incident took place on 4th September 2005.

When the case started, on 23rd September 2005, there were only two accused persons, and both of them pleaded “Not Guilty”. On 17th November, the case was consolidated with another one, in which one of the appellants had been charged separately. After the said consolidation, the plea was taken anew. However, the record does not show the language in which the charges were read and explained to the appellants.

PW 1, JOHN SAILI MUSYOKA, testified that he was an employee of NBA Hotel, at Nyayo Estate.

He left his place of work at 6.00p.m., to go to Kibera, where he was taking his employer’s chips machine for repairs. As he was heading towards Kibera, **PW 1** meet the 1st and 3rd Appellants.

Later, whilst coming from Kibera, at about 7.00p.m., **PW 1** met the 1st appellant, who was now walking in a staggering manner. The 1st appellant grabbed **PW 1** by his shirt, and when **PW 1** tried to break loose, all the buttons of his shirt fell-off.

The 1st appellant punched **PW 1** in his mouth. He then hit **PW 1** with an iron bar. Soon, the 1st appellant was joined by the 3rd appellant, who stole **PW 1’s** purse, mobile phone and KShs.4,000/-. The 3rd appellant also took **PW 1’s** Identity Card.

PW 1 screamed, and **PW 2** went to his rescue. Meanwhile, **PW 1** held onto the 1st appellant until **PW 2** arrived. Thereafter, **PW 1** and **PW 2** escorted the 1st appellant to the police station.

During cross-examination, **PW 1** said that he was robbed by the 1st and the 3rd appellants. He denied the assertion that there was either a grudge between him and the 1st appellant, or that the two of them fought.

PW 1 also denied the assertion that there was a friendship between him and a lady known as Ndunge.

Finally, the witness said that he did not see the 1st appellant at a birthday party which **PW 1's** sister had organized for her child.

Meanwhile, as appertains to the 2nd appellant, **PW 1** said that he was not in the group which robbed him.

PW 2, FRANCIS KUHUMBA MUTUNGI, was at his shop in Kibera Soweto on 19th September 2005. He was attending to customers when he heard people screaming outside the shop.

When **PW 2** went outside the shop, he found **PW 1** having been injured by the 1st appellant. **PW 2** helped **PW 1** arrest the said appellant, and they took him to the police station.

PW 2 also said that the 3rd appellant was at the scene, but he escaped after **PW 2** arrived.

PW 2 had known the 1st appellant for sometime, as the two of them were neighbours.

When **PW 2** was cross-examined by the 2nd appellant, he said that that appellant was one of the persons who robbed **PW 3**.

And **PW 2** denied the suggestion by the 3rd appellant, that he (**PW 2)** had differed with that appellant, over a woman.

PW 3, PETER WANJORA NDUNGU, runs a club at Kibera Soweto. On 4th September 2005, **PW 3** was inside his club when a customer complained to him that there were some people who were blocking patrons from entering the club.

When **PW 3** went outside the club, to ascertain what was happening he met the 3 appellants. He asked them to move away from the entrance. However, he was told that if he kept on being proud with his property, the appellants could burn-down his houses.

The 1st Appellant then dared him to try and touch any one of them. At that point, **PW 3** concluded that the appellants intended to steal from him. He therefore went back into his club.

However, the appellants followed him inside. The 2nd appellant took a glass and dropped it on the floor. That action caused the customers to become worried.

The 1st appellant then held **PW 3** by his neck, whilst the 3rd appellant held some glasses with which he beat up any person who tried to enter the club. The 2nd appellant then punched **PW 3** on his face, causing him to lose 2 teeth.

PW 3 lost his mobile phone and KShs.5,000/- to the robbers.

Six days later, **PW 3** learnt that one of the thugs had been arrested whilst he was robbing somebody else. The said thug was the 1st appellant. **PW 3** was one of the people who escorted the 1st appellant to the police.

During cross-examination, **PW 3** denied the assertion, by the 1st appellant, that he had fought with a brother to the said 1st appellant.

Meanwhile, **PW 3** told the 2nd appellant that he **(PW 3)** had kept his two teeth safely, until he produced the same in court. **PW 3** had been asked by the police, to keep safely, the 2 teeth that were knocked out by the 2nd appellant during the robbery.

PW 4, DOUGLAS MULAMBELA MUSUGE, works as a conductor of a matatu. He is a resident of Kibera Soweto.

On 4th September 2005. He was ay Madagascar Bar, at about 8.30p.m. That is the bar belonging to **PW 3**.

Whilst at the bar, **PW 4** saw the 3 appellants arriving; By then, **PW 4** had not yet ordered for his beer. He saw the 2nd appellant throw glasses onto the walls. He also saw the 1st appellant hold **PW 3**, whilst the 2nd appellant beat him. Thirdly, **PW 4** saw the 3rd appellant steal from **PW 3's** pockets.

By the time the 3 appellants ran away, **PW 3** was bleeding from his mouth. However, it was only on the next day that **PW 4** leant that **PW 3** had lost teeth when he was being robbed.

PW 4 testified that prior to that date, he had known the appellants, and that he believed that they were good people.

PW 5, PC GILBERT CHEROP, was on duty at Kilimani police Station on 10th September 2005. On that date, at about 9.30p.m., **PW 3** arrived at the station, together with other members of the public. They were escorting a suspect who had stolen a mobile phone and KShs.5,000/-.

As far as **PW 5** was concerned, the suspects were to have been charged with assault and theft from the person. Therefore, as far as he is aware, it was only the Investigating Officer who could explain why the appellants were charged with the offence of robbery with violence.

PW 6, PC NELSON OSOI, was the Investigating Officer. When he reported on duty, on the morning of 11th September 2005, he found that there were two suspects in custody. The said suspects had been booked into the O.B. for assault/stealing from the person.

After interrogating **PW 1, PW 3** and the suspects, **PW 6** concluded that the available evidence disclosed the offence of robbery with violence. His reasons for that decision were that **PW 1** and **PW 3** had been physically assaulted, resulting in their suffering injuries.

PW 6 also recovered an iron bar, which was used to attack **PW 1**

Thirdly, **PW 6** verified that the complainants were robbed.

PW 6, DR. ZEPHANIA KAMAU, examined the complainants on 9th and 10th September 2005. He found that both **PW 1** and **PW 3** had injuries which they had sustained about 5 days before that date. But he also ascertained that the two complainants had been treated at Kenyatta National Hospital and Mbagathi District Hospital, respectively.

After the testimony of **PW 7,** the prosecution closed its case. Thereafter, all the 3 appellants gave unsworn testimonies, in their defences.

The 1st appellant said that on 10th September 2005, he fought with **PW 1**. As they were fighting, **PW 1** is said to have been joined by **PW 2**, who helped **PW 1** to beat the 1st appellant.

In any event, the 1st appellant does not understand why he was not only charged with assault.

On his part, the 2nd appellant said that on 10th September 2005, when he was going to his place of work, in the evening, he heard someone saying that his (the 2nd appellant's) brother was being beaten.

Although he did not immediately go to help his said brother, he later heard that the brother had been taken to Kilimani Police Station.

Later that night, at about 11.00p.m, the 2nd appellant was ordered to wake up from his sleep. He was then taken to Kilimani Police Station. However, he denied having stolen from either of the complainants.

The 3rd appellant was at Casablanca, with his friend, on the night of 28th September 2005. When he was walking home, at about 3.00a.m., he was arrested by Maasai guards, who escorted him to Kilimani Police Station.

Having re-evaluated the evidence on record, we note that through their cross-examination of the prosecution witnesses, all the three appellants indicated that they were not strangers to the complainants. Each of them suggested that the complainants had only framed them because of some alleged grudges.

The evidence shows that the 1st appellant was held firmly by **PW 1**, after the complainant had been assaulted and robbed. He was arrested, with the help of **PW 2**, and was then escorted to the police station.

Therefore, the issue as to whether or not the 1st appellant was identified positively, does not arise. He was arrested in the act, and taken to the police station.

Meanwhile, the 2nd and 3rd appellants engaged **PW 3** in an argument, when he asked them to stop blocking the entrance to his club. The appellants accused him of being proud, and threatened to burn down his houses.

During the arguments and the subsequent assault upon **PW 3**, which took place inside the club, the complainant had sufficient time and opportunity to recognize the assailants.

He was even able to specifically state what each of the assailants did.

PW 3 was involved in the arrest of the 2nd appellant. And as he had recognized the said appellant at the scene of crime, we hold the view that the was no room for any error in the identification of the 2nd appellant.

The 3rd appellant was arrested by the complainants; that is what the Investigating Officer **(PW 6)** said. But **PW 1** said that he was not present when the 3rd appellant was arrested.

PW 2 said that the 3rd appellant was arrested by some Maasai men, on 29th September 2005.

As the person who arrested the 3rd appellant did not give evidence in court, we are unable to ascertain the reasons which prompted that person to effect the arrest. Therefore, although the 3rd appellant had been well-known to **PW 1, PW 2** and **PW 3** before the incident giving rise to the charges preferred against him, the court does not have any information which provides a nexus between any of those witnesses and the arrest of the 3rd appellant.

On the issue of the language used by the witnesses, it is significant that on 17th November 2005, the trial court did not indicate on the record, the language in which the plea was taken. Secondly, the court did not indicate the language in which **PW 1, PW 2, PW 3, PW 4** and **PW 5** testified.

Therefore, the appellants asserted that **section 198 (1) of the Criminal Procedure Code** had been violated. The said section stipulates as follows;

"Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands."

In this case the appellants have not told us the language in which the five witnesses gave evidence. However, as the language of the Magistrate's Courts is either English or Kiswahili, it is most probable that the witnesses testified in one of those languages, or that their evidence was interpreted into one of those languages.

But trial courts ought not to leave the issue of language to conjecture. The court should indicate the language in which the plea is taken, and the language in which each witness testified.

Although the trial court did not indicate the language spoken by the five witnesses, we note that on 5th June 2006, the appellants asked that the 5 witnesses be re-called for cross-examination.

The prosecution had no objection to that application; and the court ordered that the witnesses be re-called.

Thereafter, **PW 1** was cross-examined at length, by the 3 appellants. The said cross-examination lasted some 2 days! On the first of those days, the record did not indicate the language spoken by **PW 1**. But on 10th January 2007, the record shows that there was interpretation from English to Kiswahili and vice-versa.

Although the trial court had ordered that **PW 1, PW 2, PW 3, PW 4** and **PW 5** would only be re-called for cross-examination, **PW 2, PW 3, PW 4** and **PW 5** actually gave their full evidence afresh. And when they did so, here was interpretation from English to Kiswahili and vice-versa. Therefore, there is no merit in the criticism leveled against the trial court on the issue of the language in which the witnesses testified.

That is because **PW 5** and **PW 6** testified in Kiswahili, whilst there was appropriate interpretation when **PW 7** testified.

To our knowledge, there is no legal bar to a witness producing an exhibit which he kept in his custody. In this case, the said exhibit was 2 teeth of **PW 3**. He lost the said teeth when he was punched on his face, whilst being robbed.

The fact that he had a gap in his mouth where the two teeth ought to have been, was obvious. Therefore, even though the said teeth were not produced by the Investigating Officer, nothing turns on that.

Meanwhile, a perusal of the original hand-written record reveals that **PW 5** did give evidence on oath. Therefore, the appellants were wrong to have asserted otherwise.

The appellants' contention that the Investigating Officer did not carry out any investigations, because he did not visit the scenes of crime is not supported by the evidence on record.

PW 6 said that he did visit the scenes of crime, although not immediately. That statement must be put in perspective, as it was not until the morning of 11th of September 2005 that **PW 6** was assigned the role of the investigator.

The incidents he was required to investigate had taken place on 4th and on 10th September, 2005.

In both incidents, the complainants had been, reportedly, injured in the process of being robbed. Both complainants had gone to hospital immediately after the respective incidents.

In the circumstances, there would have been no sense of urgency in the Investigating Officer rushing to the scenes, as there was nothing which required to be preserved. The iron-bar used to attack **PW 1**, on the previous night, was already in the hands of the police.

PW 6 interrogated both the complainants and the appellants. He then charged the appellants with the offence of robbery with violence. He did so, even though the report recorded when the complainants' reported to the police was that they were victims of assault and theft.

In law, the police are mandated to receive complaints and evidence. They are then obliged to carry out their own investigations.

After concluding their investigations, they establish whether or not there was sufficient evidence to warrant charges being preferred against the suspects.

Ordinarily, victims of criminal offences are not expected to be conversant with the ingredients of any particular offence. They are simply required to provide the police with the particulars of what transpired.

Thereafter, it is the responsibility of the police to determine the nature of the offence established from the evidence they had put together.

In this case, the facts reported to the police were that the assailants had assaulted the complainants, and had also stolen from them.

By dint of the definition of robbery, as stipulated in **section 295 of the Penal Code;**

*"**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."***

Therefore, as both **PW 1** and **PW 8** were assaulted, in the process of being robbed, the offence committed was robbery.

Secondly, because the assailants were armed with an iron bar (in relation to count 1); and were more than one (in Count 2); and also because the assailants did assault the complainants in both counts, the offences committed fell squarely within the provisions of **section 296 (2) of the Penal code.**

Therefore, although the complainants may not have specified, in their report, that the offence committed against them was one of robbery with violence, we find and hold that **PW 6** was entitled to charge the appellants with that offence.

Reverting to the issues raised by the appellants, we find as follows;

(a) The 1st and 2nd appellants were positively identified.

(b) Although the trial court did not initially record the language in which the witnesses testified, the said witnesses did give evidence afresh. They did so at the request of the appellants.

And the witnesses were then cross-examined at length. That confirms that the appellants understood the evidence being given by the witnesses.

Therefore, the failure to indicate the language in which the witnesses testified, did not prejudice the appellants.

Section 198 of the Criminal Procedure Code only requires the evidence to be interpreted into the language understood by the accused person if the witnesses testified in a language which the accused did not understand.

(c) ***As regards mitigation, section 329 of the Criminal Procedure Code stipulates as follows;***

"The court may, before passing sentence, receive such evidence as it thinks fit, in order to inform itself as to the sentence proper to be passed. "

That provision is not couched in mandatory terms. However, we believe that is advisable for a court go give to an accused, the opportunity to mitigate before passing sentence.

In this case, the record shows that each of the appellants was accorded the opportunity for mitigation.

Just because the appellants chose not to mitigate, cannot be basis for finding fault with the learned trial magistrate.

(d)   The defences were duly considered by the trial court, which rejected the same for good reasons.

(e)   There was sufficient evidence to sustain the convictions of the 1st and 2nd appellant. However, there are gaps in the evidence against the 3rd appellant. Consequently, the convictions against him are quashed, and the sentences set aside.

(f)   There were no substantive inconsistencies in the evidence tendered by the prosecution, as against the 1st and 2nd appellants.

(g)   No essential witnesses failed to testify.

(h)   From the particulars of the complaints lodged by the complainants, the police had every right to determine the nature of the offence with which to charge the appellants.

It is not for complainants to determine for the police, the offence with which the suspect ought to be charged.

(i)   PW 5 was the police officer who re-arrested the 1st and 2nd appellant. He did not investigate the case.

Therefore, if his evidence was to be expunged from record, on the grounds that he was not sworn before he testified, however, that would not have any impact on the prosecution case.

If anything, that might only impact negatively on the ground of appeal which asserts that the appellants should only have been charged with assault and stealing from the person.

In conclusion, we find no merit in the appeals by the 1st and 2nd appellants. They are dismissed.

However, as already stated earlier herein, the 3rd appellant's appeal is allowed.

We order that he be set at liberty forthwith unless he is otherwise lawfully held.

Dated, Signed and Delivered at Nairobi, this 18th day of May, 2011

....	....
FRED A. OCHIENG	**MOHAMED WARSAME**
JUDGE	**JUDGE**