REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 477 & 478 of 2004

(From original conviction(s) and Sentence(s) in Criminal Case No. 27029 of 2003 of the Chief Magistrate's Court at Makadara (Mrs. J. Gandani–SRM)

ALEX MUKARIA MUGAMBI...……....……..…..APPELLANT

VERSUS

REPUBLIC…….....…..……....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 478 OF 2004

(From original conviction(s) and Sentence(s) in Criminal Case No. 27029 of 2003 of the Chief Magistrate's Court at Makadara (Mrs. J. Gandani–SRM)

SILAS MUKARIA MUTINDA.....……..…..APPELLANT

VERSUS

REPUBLIC……..….....…….....RESPONDENT

J U D G M E N T

ALEX MUKARIA MUGAMBI and **SILAS MUKARIA MUTINDA** the 1st and 2nd Appellants respectively, were jointly charged with one count of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code.** They were convicted for the offence after a full trial and sentenced to death as by law required. It is against both the conviction and sentence that they now appeal, to this court.

Both Appellants have raised similar grounds of appeal which are;-

One, the learned trail magistrate erred in law and fact in finding the charge of robbery with violence proved;

Two, that the learned trial magistrate erred in law and fact in relying on exhibits produced in court to support the conviction;

Three, the learned trial magistrate erred in law and fact in failing to find the evidence of the prosecution full of contradictions and;

Four, the Appellants' defences were not dully considered.

We shall consider these grounds together.

The brief facts of the case are that the Complainant was going home at 11.00 a.m. on the 19th December 2003 when two strangers blocked his pathway. The Complainant stated that one of the two men, whom he identified in court as the 2nd Appellant, was armed with an iron bar which was exhibit 2 in the case. That he was hit on the leg while the other assailant held him by the neck and frisked his pockets. They stole Kshs.500/- from his pocket. That he screamed and members of public went to the scene, held both assailants and took them to the police station.

The defence case was that the Complainant owed the 1st Appellant money over 'miraa' (khat) supplied to him earlier. That the 1st Appellant requested the 2nd Appellant to escort him to the Complainant to claim the payment of the debt owed. That instead of the Complainant paying back the debt, he started screaming and claiming the two were thieves. That due to a large crowd which was attracted to the scene, both Appellants ran into Soweto Police Station where they were locked up and later charged.

The Appellants were unrepresented in this appeal. The State was represented by **Miss Gateru,** Learned State Counsel, who also opposed both appeals.

As is required of a first appellate court, we have analyzed and evaluated afresh the evidence adduced before the lower court in this case to draw our own conclusions while bearing in mind our limitations occasioned by the fact that we neither saw nor heard any of the witnesses and giving due allowance. See **OKENO vs. REPUBLIC [1972] EA 32**.

The Appellants' first issue with their conviction is their belief that the prosecution case had material contradictions which ought to have raised doubt in the trial court's mind as to the credibility of the Complainant, and which should have been resolved in their favour. One of these contradictions was found in the Complainant's evidence. Initially the Complainant stated that he did not know his attackers and said that they were total strangers to him. Later still in examination-in-chief the Complainant changed his evidence and said he knew both Appellants before. The other contradiction complained of is the Complainant's evidence that he was hit by the 2nd Appellant on his leg with an iron bar. Yet PW5 a Police Officer on duty at the Police Station where the report was made said he saw the Complainant bleeding on his fore head. The other contradiction was the Complainant's evidence that he was robbed of Kshs.500/- while his wife, who claims to have witnessed the entire incident categorically stated that she did not witness any robbery being committed on the Complainant. Finally, they raised issue with the alleged recovery of Complainant's identity card from the 1st Appellant while in his evidence the Complainant never said he lost it and neither was it included in the particulars of the charge.

Miss Gateru, Learned State Counsel submitted that even though PW3, the Complainant's wife, contradicted him on the issue of robbery, the evidence of identification by both was strong and should sustain the conviction.

The Appellant's conviction turned on two findings in the learned trial magistrate's judgment at page 2 of the Judgment thus:-

"***From the above, it appears that the Complainant was assaulted and indeed robbed by the accused persons here. PW3 the Complainant's wife saw the accused persons rob her husband. According to PW5 PC Were, the Complainant was robbed Kshs.500 and an identity card and he recovered the identity card from the 1st accused."***

The learned trial magistrate found that the Complainant was robbed of his cash Kshs.500/- and identity card, basing this finding on the evidence of PW3, the Complainant's wife and PW5 the Police Officer. The Judgment that PW3 stated that she witnessed the robbery was a serious misdirection not only due to the fact that PW3 clearly stated that all she saw and witnessed was the two Appellants struggling with the

Complainant but her clear evidence denying that she saw the two Appellants commit any robbery at all against the Complainant. The learned trial magistrate misdirected herself as to the import of the evidence adduced by PW3. The learned trial magistrate's finding that the Complainant was robbed of Kshs.500/- and an identity card according to the evidence of PW5 was also a serious misdirection of fact. PW5 was not a witness of the incident and what he knew of the incident is what was reported to him by witnesses to the incident. PW5's evidence was therefore of no material importance except to disclose the nature of the report made to him at the station for purposes of proving consistency of the Complainant's complaint or lack of it. In the instant case, the evidence of PW5 who was one of the Police Officer who received the Complainant's complaint, established that the Complainant was not consistent in his complaint. Nowhere did the Complainant say he lost any identity card during the incident in question and neither did he say it was recovered. Yet PW4, the first Police Officer to receive the report said that the complaint was that an identity card and money was stolen from the Complainant and that the identity card was recovered from the 1st Appellant. The other inconsistency established in the report made to the Police officers is the evidence of PW4 and PW5 saying that the Complainant was bleeding on the head without being specific and PW3 saying it was on the back of the head. That contradicted the evidence of the Complainant, who, on the other hand said he was hit on the leg and injured. The Doctor, PW1 said that the Complainant had a healed scar on the back of his head.

We find that the evidence of the prosecution case was full of contradictions. The contradictions were material and went to the core of the prosecution case. The injury suffered by the Complainant was material especially because the Appellants in their written submission raised issue with the evidence not supporting the charge on that point. It was their submission that the particulars of the charge merely indicated that violence was threatened while the evidence stated that actual violence was used. The Appellants also raised issue with the court's finding that the Complainant's identity card was stolen and later recovered from one of them yet neither the charge nor the Complainant in his evidence made such an allegation. All these complaints touch on the very core of the prosecution case and on the ingredients of the offence of robbery with violence, which the prosecution needed to establish in order to prove the charge. We find the inconsistencies and contradictions of material importance to the prosecution case. See **JOSEPH MAINA MWANGI vs. REPUBLIC, CA No. 73 of 1992 (NAIROBI).** In **OLUOCH vs. REPUBLIC [1985] KLR 549 Chesoni, Nyarangi & Platt Ag. JJA** while discussing in *obiter dictum* what constitutes robbery with violence observed: -

"***6. (Obiter) It is not the degree of actual violence that differentiates the offence of robbery and robbery with violence. 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 other 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. The ingredients of the offence of robbery under section 296(1) of the Penal Code are:-

(i) stealing anything, and

(ii) at or immediately before or immediately after the time of stealing,

(iii) using or threatening to use actual violence to any person or properly in order to obtain or retain the thing stolen or to prevent or to overcome resistance to its being stolen or retained."

We also find that the Complainant's first report was not consistent with his evidence in court and yet it was this report that should prove a good test by which the truth and accuracy of his subsequent statement may be ganged. See **TEREKALIA & ANOR VS. REPUBLIC 1952 EA**. We find that the inconsistency in the Complainant's evidence touched on his credibility and in the circumstances, we believe that it was unsafe to accept and rely on his evidence to found a conviction. On this point, we are guided by the case of **NDUNGU KIMANYI vs. REPUBLIC [1979] KLR 282** where it was held: -

"…***The witness upon whose evidence is proposed to rely upon should not create an impression in the mind of the Court that he is not a straight forward person or do or say something which indicates that he is a person of doubtful integrity and therefore unreliable witness which makes it unsafe to accept his evidence….***"

The Appellants also complained that their defences were never considered. The defence by the 1st Appellant was that he invited the 2nd Appellant to join him demand his debt from the Complainant and that when the attempt was made, the Complainant turned hostile, started screaming drawing a crowd of members of public. The two said that they decided to run into the police station for safety.

The Complainant and PW3's evidence was that both Appellants were arrested and dragged to the police station by the members of public. The Complainant and PW2's evidence was directly contradicted by the evidence of PW5**, PC WERE**. **PC WERE** stated that he saw each of the Appellants ran into the police station in intervals. Behind them were members of public in hot pursuit. PW5's evidence corroborated the defence of both Appellants that they had run for safety into the Police Station discounting the Complainant's and PW3's evidence that the two were dragged there. It was quite significant what report PW5 said he received from PW3. He said that PW3 reported an assault case against both Appellants stating that they had used an iron bar to hit her husband. The iron bar was given to PW5 and it was an exhibit in court. Taking the evdience of PW5 into consideration while bearing in mind another important fact that after a search, none of the allegedly stolen money was recovered from the Appellants, the Appellants' defence that they did not rob the Complainant ought to have created a doubt in their favour, in the learned trial magistrate's mind. We agree with the Appellants that their defences were not given due consideration and find that had the court given due weight to the defence she could have arrived at a different conclusion of this case.

In our own evaluation of the entire case, we find that the Appellants had no intention of robbing the Complainant but were demanding payment of their debt and in the process they used force. The force used inflicted an injury assessed by PW1, **Dr. Kamau,** as harm. Since no theft was proved, the learned trial magistrate should have found the offence charge unproved and at the very most, should have substituted the charge under **Section 179** of the **Criminal Procedure Code** to the minor but cognate offence of **ASSAULT CAUSING ACTUAL BODILY HARM** contrary to **Section 251** of the **Penal Code**. We exercise our powers under **Section 354** of the **Criminal Procedure Code** and set aside the conviction for the offence of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code** and in substitution thereof enter a conviction for **ASSAULT** contrary to **Section 251** of the **Penal Code**. We also set aside the sentence of death.

We have considered that the Appellants have been in continued prison custody since their arrest on 19th December 2003, a period of 3 years and 3 months. That is a substantive period of incarceration, which militates against any further withholding of the Appellants in prison custody and from enjoyment of their liberty. Accordingly, we find that the Appellants have served sufficient punishment for the offence committed and we order their immediate release unless otherwise lawfully held.

Dated at Nairobi this 8th day of March 2007.

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LESIIT, J.

JUDGE

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MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

Appellants in person

Miss Gateru for the Respondent

CC: Tabitha/Erick

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LESIIT, J.

JUDGE

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MAKHANDIA

JUDGE