



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL APPEAL NO. 26 OF 2016**

**JOSHUA KYALO KALOKI ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(Appeal against the conviction and sentence of Hon. M. M. Nafula (SRM) delivered in Tawa Senior Resident Magistrate's Court Criminal Case No. 24 of 2014 on 10<sup>th</sup> November, 2015)*

**JUDGEMENT**

1. The Appellant was charged with the offence of robbery with violence contrary to section 296 of the Penal Code. The particulars being that the Appellant on 15<sup>th</sup> January, 2014 at Nzaini Market, Mbooni location in Mbooni West District within Makueni County jointly with another not before court robbed Muthini Kilonzo Mavuthi of cash Kshs. 3,028/= and immediately before the time of such robbery wounded the said Muthini Kilonzo Mavuthi. He pleaded not guilty to the offence and was put to trial.

2. Facts as they are on record were as follows. Muthini Kilonzo Mavuthi (PW1) was on the material day at 12.05 am on his way home when the appellant appeared from a maize plantation. Using a metal rod, the appellant cut him on the head, mouth and ribs including his leg. He fell and the appellant took Kshs. 1,000/= from his shirt pocket, Kshs. 2,000/= from his left back trouser pocket and Kshs. 28/= from his other trouser pocket. He identified him using the moonlight. There soon appeared light from a motor vehicle and the appellant took off. PW1 screamed and a watchman from Nzeini market by the name David Kimanthi came and called the police. He was then taken to hospital by the police. He was issued with a treatment card at Mbooni District Hospital and later with a p3 form. On cross examination, PW1 stated that he had known the appellant for the last six years. That he informed the police that it was him who had robbed him.

3. David Kimanthi Munyua (PW2) who is a watchman and a farmer found PW1 on the way bleeding on the head and mouth. PW1 informed him that he had been attacked by Kyalo. He then called the OCS who came and ferried PW1 to hospital. On cross examination he stated that PW1 informed him that he had been attacked by the appellant.

4. Chief Inspector Abraham Borburei (PW3) was on 16<sup>th</sup> January, 2014 at 7.00 pm stopped by a watchman who informed him that he had seen a suspect who had robbed a teacher. The watchman led him to his father's pub and showed him the appellant whom he arrested. Cross examined, he stated that he was the OCS Mbooni Police Station.

5. Police Constable Collins Aoko (PW4) was on duty on 15<sup>th</sup> January, 2014 when at 11.00 am he received a report of the incident. The following day, he recorded statements of the witnesses and PW1. He issued PW1 with a p3 form and the appellant was subsequently arrested by PW3. He received blood stained clothes from PW1 which he produced as follows; a grey coat (P. Exhibit 3) and a T-shirt (P. Exhibit 4).

6. William Kamwea (PW5) a Clinical Officer Hospital examined PW1 on 25<sup>th</sup> January, 2014. He stated that PW1 had a wound on the left side of his face, a swelling on his upper lip and pain in the chest. He filled his p3 form which he produced as P. Exhibit 2 and a treatment card as P. Exhibit 1.

7. The appellant was put on his defence. He gave a sworn statement that he was on 16<sup>th</sup> January, 2014 in Kwa Malo club with a lady by the name Irene Ndinda Mutinda. PW3 later went to the club and inquired what he was doing with his girlfriend. When he told PW3 that he had gone to claim his money, he was arrested and informed that he would give an explanation at the police station and was charged. He stated that the charges he faced were different from what was in the Occurrence Book which he produced as D. Exhibit 1.

8. Aggrieved by the conviction, the appellant filed this appeal on grounds that:

a) *He was convicted on uncorroborated circumstantial evidence.*

b) *He was convicted on contradictory evidence.*

c) He was convicted on a defective charge sheet contrary to section 214 (1) (b) of the Criminal Procedure Code.

d) No identification parade was conducted.

9. I have given due consideration to this appeal and in so doing, I am minded of this court's duty as a first appellate court. Addressing the first and second ground together, the appellant contended that there was a contradiction on PW1 and PW2's evidence as to the events of the material day. That while PW1 alleged that PW2 came to his rescue after the attack while PW1 was still at the scene, PW2 recounted that he went back to his work place and found PW1 bleeding on his head, mouth and nose and that during examination, PW2 denied being at the scene of the alleged attack. That PW2 later when the matter commenced afresh, stated that he rushed to the scene where he found PW1 bleeding. He contended that PW2's evidence is suspicious having initially stated that he found PW1 bleeding then later stated that he rushed to the scene. He further took issue with PW1's evidence that the monies were taken from different pockets and later when the matter commenced afresh he stated that money was taken from one pocket. He relied on **Twehangane Alfred v. Uganda Criminal Appeal No. 139 of 2001 [2003] UGCA,6** and **Ndungu Kimanyi v. Republic [1979] KLR 283** and urged that the conviction was not safe due to the contradictions. The respondent on the other hand contended that nowhere in PW2's evidence did he state that he found PW1 at his work place but that he stated that he found PW1 on his way back to work. From my reading of the record, it is clear that PW2's evidence was that he had gone to escort a lady, on his way back he heard a scream, he rushed to the scene where he found PW1 bleeding. It follows therefore that the contradiction on PW1 and PW2's evidence as stated is non-existent. On the issue that PW1 had initially stated that monies were taken from various pockets but changed when the matter commenced afresh, I am of the view that due to lapse of time, PW1 may have forgotten some details. Even if I am to be found wrong on that disposition, I am of the opinion that not every contradiction warrants rejection of evidence. On this point I borrow from **Uganda Court of Appeal in Twehangane Alfred v. Uganda Criminal Appeal No. 139 of 2001, [2003] UGCA 6** cited with approval by the Kenyan Court of Appeal in **Erick Onyango Ondeng' v. Republic [2014] e KLR** where it held as follows:

***“With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.”***

10. Applying the test herein, I find that the said contradictions did not affect the material facts on record to warrant a rejection. In the circumstances, grounds 1 and 2 must fail.

11. On the ground of defective charge sheet, the appellant took issue with the fact that the particulars of the charge sheet was that PW1 was robbed by two people yet his evidence was that the appellant was alone. Citing the holding in **Yongo v. Republic [1983] KLR 319**, he submitted that the conviction was unsafe. The respondent on the other hand cited **Sigilani v. Republic (2004) 2 KLR, 480** and contended that the appellant knew the charge he was facing. That he participated in the trial in a manner that suggested that he understood the charge and did not raise any objection. It was further submitted that the defect was curable under Section 382 of the Criminal Procedure Code and that the appellant was not prejudiced in any way.

12. Section 382 is the substantive law on the issue whether even with such defect justice could still be met or whether the defect is curable. The said section provides:

***“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings. It follows therefore that the court in determining whether a defect caused injustice has to have regard whether the objection should have been raised at an earlier stage in the proceedings.”*** (Emphasis mine)

13. To answer the question whether or not the appellant was prejudiced by the said defect, this court has to assess if the appellant understood the charges he was faced with. The appellant herein participated in his trial in a manner to suggest he well understood the charge. He understood the particulars of the charge to which he respondent and was able to cross examine the witnesses quite well. I further note that he never raised the objection well in advance. In the circumstances, the appellant cannot be said to have been prejudiced by the defect and it is hereby considered not fatal. That ground therefore fails.

14. On the issue that identification parade was not conducted, it is to be noted that the mode of identification was recognition thereby an identification parade was not necessary. PW1 was clear in his evidence that he had recognized the appellant using security light and stated that he had known the appellant for a period of six years. He gave the appellant's name to PW2 and it is in view of that disclosure that the appellant was arrested. The appellant on the other hand gave evidence that did not in any way water-down the prosecution evidence. He gave an account of his whereabouts on the material day, gave a narration of 16<sup>th</sup> January, 2014 while the incident took place on 15<sup>th</sup> January, 2014. Having emerged from the evidence that PW1 was robbed and injury inflicted on him using a weapon, it was clear that the ingredients of robbery with violence were established.

15. In the end, I find no merit in this appeal and it is hereby dismissed. The trial court's conviction and sentence is affirmed.

Orders accordingly.

**Dated at Machakos this 4<sup>th</sup> day of APRIL 2018.**

**D.K. KEMEI**

**JUDGE**

**In the presence of:-**

Mutia for Muthama – for the Appellant

Machogu - for the Respondent

Kituva - Court Assistant