REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

HIGH COURT CRIMINAL APPEAL NO. 63 OF 2015

HENRY ABWOBA BUKAYA .... APPELLANT

VERSUS

REPUBLIC .... RESPONDENT

(From original conviction and sentence in Criminal Case No.514 of 2014, Senior Resident Magistrate Court at Butali, (Hon Nabibya, SRM) dated 10th, June, 2015)

JUDGMENT

1. This is an appeal from conviction and sentence of the appellant by Senior Resident Magistrate, **Hon. M. L. Nabibya**, dated 15th May 2015 in Butali Senior Resident Magistrate's Court Criminal Case Number 514 of 2014.

2. **Henry Abwaka Bukaya**; (the appellant), was charged with one count of robbery with violence, contrary to **section 296(2)** of the Penal Code. Particulars of the offence were, that on the 11th day of August 2014, at **Kuvasali Area, Chemuche Sub-location**, Kakamega North District, Kakamega County, being armed with a dangerous weapon, namely, a panga, robbed **Sussy Andeso** Kshs.26,400/-, one Nokia and one former phone (sic) valued at Kshs4,000/-, and at, immediately before, or immediately after the time of such robbery, used actual violence to the said **Sussy Andeso**.

3. The appellant pleaded not guilty to the charge and after trial in which 5 prosecution witnesses testified and the defence, the trial magistrate found the appellant guilty, convicted him and sentenced him to suffer death, the only known sentence for that offence.

4. dissatisfied,, the appellant lodged an appeal to this court and proffered six grounds of appeal, namely – that he did not plead guilty to the charge, the learned magistrate erred both in law and fact by basing conviction on speculative, fabricated, inconsistent and discredited evidence; that the learned magistrate erred both in law and fact by overruling and dismissing the absence of a scene of crime expert; that the learned magistrate erred both in law and fact by failing to realize the discredited mode of light for positive watertight identification, that the learned magistrate erred in both law and fact by failing to point out to the appellant all relevant issues as stipulated by the Constitution in **Article 50(a)(c)(j)** and that the learned trial magistrate erred both in law and fact by failing to consider the absence of scenes of crime witness where (sic) relying on a single witness testimony in conviction.

5. When the appeal came up for hearing, the appellant who was in person, relied on his written submission which he had filed, while the State was represented by **Mr Oroni** who argued the appeal orally.

6. In his written submissions, the appellant faulted the prosecution for failing to call the owner of the stolen goods namely cash, and phone, who though not called as a witness, had made a report to the police. For that reason, the appellant submitted that the charge he faced was fabricated and meant to settle a matrimonial dispute through a criminal charge. The appellant further faulted the trial court for relying on the evidence of a single identifying witness which was not credible. The appellant submitted that he had been at loggerheads with PW1, his wife, who had run away from the matrimonial home and used the robbery incident, which might have been committed by someone else, to implicate him (appellant). The appellant further submitted that he was not found with any of the alleged stolen property and wondered why he was charged with robbery with violence. He also faulted the trial court for rejecting his **alibi,** and submitted that the case was not properly investigated.

8. **Mr Oroni**, on the other hand, supported the conviction and sentence. Learned counsel submitted that the complainant, PW1, positively identified the appellant on the material day when he took Kshs.26,000/-, two phones, and used violence against her. According to counsel, PW2 met the appellant as he left the shop and saw the injuries inflicted on the complainant. He submitted that the injuries suffered by the complainant were confirmed by PW4, the clinical officer, who produced a P3 form to corroborate PW1's evidence. Counsel submitted that the appellant's defence was rightly rejected by the trial court. He urged the court to uphold the conviction and affirm the sentence.

9. I have considered this appeal, submissions by both the appellant, those on behalf of the respondent, and also perused the record. This being a first appeal, it is the duty of this court to re-evaluate the evidence afresh, analyse it itself and make its own independent conclusion on whether or not the findings of the trial court should stand. However, the court should bear in mind that it never saw nor heard the witness's testimony and give due allowance for that; (see **Okeno v Republic** [1972] EA 32).

10. The reasoning is that it is the trial court which had the singular advantage of seeing and hearing the live witnesses testify and being subjected to cross-examination which is the only devise for testing the truth or correctness of the evidence. In the case of **Eric Onyango Odeng' v** Republic [2014] eKLR, the Court of Appeal stated **that the first appellate court has the bounden duty to reconsider, re-evaluate and analyse the evidence that was before the trial court to determine whether on the basis of those facts, the decision of the trial court is justified.**

11. In **Bakari Rashid v Republic** [2016], the same court stated:-

> **"On a first appeal from a conviction, an appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its decision thereon. As the first appellate court, the High Court has a duty to re-hear and re-consider the material evidence before the trial court. It must then make up its own mind not disregarding the judgment appealed from, but carefully weighing and considering it."**

12. PW1, **Sussy Andeso**, who was the complainant in that court testified that she was at an M-Pesa shop at Kuvasali area on 11th August, 2014 at noon, when the appellant, whom she described as her former husband, went to the shop and picked a quarrel with her accusing her of running away from their matrimonial home. The witness asked him to use a proper channel to resolve the issue preferably through the chief's office. Later that day after closing the shop while she was on her way home, the appellant suddenly appeared and attacked her cutting her with a panga several times. She sustained injuries on the left side of the forehead and the left hand. The appellant took Kshs.26,000/- which was in a wallet, two phones and a hand bag. The witness was taken to hospital where she was treated. She made a report to the police, recorded her statement and was issued with P3. She produced a receipt for the phone dated 3th February 2014 No.PEx2.

13. PW2, **Alfred Busolo**, told the court that on 11th August, 2014, he was heading home at about 5 pm when he met PW1, the complainant who had been cut on the hand by a person she said was her husband. He took the complainant to hospital for treatment, but never met the assailant.

14. PW3, **Daniel Umba Mukhwana**, told the court that on 11th August, 2014, he was on duty, (as a

Boda boda), when at about 3 pm the appellant went to the M-Pesa shop next to where he was and picked a quarrel with the complainant, alleging that his household goods had been stolen. The witness intervened and asked the appellant to report the matter to the authorities. Later in the evening between 5pm and 6 pm, he saw the complainant on a motor cycle with injuries on her body.

15. PW4, **Pauline Marango**, a clinical officer at Malava County Hospital told the court that on 11th August, 2014 at about 9.00 pm the complainant went to hospital with a history of assault by one **Henry Bukeya**. She had blood stained pink blouse, white petticoat and black skirt. On examination, she had injuries on the left temporal area (lateral to the left eye) 5 cm long, which was stitched, swollen left eye, swollen left hand on the dorsum (opposite the palm), diagonal cut wound about 9 cm extending from the 1st joint of the finger to the joint of the small finger which was also stitched. The left small finger could not move. The joint of the ring finger was immovable, there was a cut wound on the hand near the wrist about 6 cm long which had also been stitched. The injuries were caused by a sharp object. The degree of injury was assessed as grevious harm. She filled and signed the P3 which was produced as PEx1(a).

16. PW5, **No.70716 PC Eric Kemboi**, the investigating officer, told the court that on 12th August, 2014 he was in the station when one Geoffrey **Mukhwana** , said to be employer to PW1, reported a case of assault and as a result, the victim had been admitted at Malava District Hospital. After recording the report in the OB, PW5 and **PC Yalor**, proceeded to the Hospital where they found PW1 being attended to. PW1 later went to the station and her statement together with those of other witnesses were recorded. According to the witness, a phone, Nokia Form M1 (sic) and Kshs.26,000/- were reported to have been taken by the attacker. The complainant had visible injuries on the left side of the head and a cut on the left hand. He issued the complainant with a P3. The appellant was arrested and charged in court. In cross examination, the witness told the court that the appellant was arrested by members of the public and handed over to the police. He also admitted that the complainant and the appellant were husband and wife, who had had a domestic disagreement. He further admitted that the complainant's employer, though he was the one who made the report to the police, was not a witness in the case.

17. At the close of the prosecution's case, the appellant was put on his defence and gave an unsworn statement. The appellant told the court that on 2nd August 2014 he went home and found the house locked. The complainant and children were not around. His children came from his parents and told him that the complainant had left on a motor cycle. He called her parents but she was not at her parents place. He reported the matter to the village elder and the Assistant Chief who referred him to police. The appellant told the court that he reported the matter at Kabras Police station on 5th August, 2014 under O.B. No.15 of 15th August, 2014 and left for his place of work. On 12th August, 2014 while at Malava town stage, he was arrested by members of the public on allegation that he had sent robbers to attack his wife. He was taken to the police station where he was locked in and later charged in court. He denied committing the offence to his wife of 20 years.

18. After considering the evidence on record, the learned trial magistrate stated in her judgment:-

> **"I am therefore satisfied beyond doubt that the prosecution has proved that the offender herein was armed with a dangerous weapon, namely a panga, PW1 categorically stated that the person who attacked her used a panga, the incident occurred at about 5.00 pm in broad daylight and the complainant was therefore able to see the weapon, PW5 the investigating officer in his investigations, he revealed that the assailant was armed with a panga, PW4 the clinical officer confirmed that the complainant was injured by a sharp object which evidence is synonymous with a panga, which is a sharp object."**

The learned magistrate therefore found as a fact that actual violence was used against the complainant. She continued:-

> **"I also find no doubt the complainant lost a phone which receipt (sic) she produced as PEx1. The phones were not recovered and so was the money, but the accused person in his defence chose not to talk about this issue, the prosecution case on this is unchallenged."**

19. The trial magistrate accepted the prosecution's evidence that this was robbery with violence and convicted the appellant accordingly. The appellant has taken issue with the learned magistrate's judgment saying that he was convicted on speculative, fabricated, inconsistent and discredited evidence. The appellant took issue with the fact that the alleged owner of the business was not called even though he is the one who reported the matter to the police. The appellant further submitted that there was no evidence that the complainant had the money and phones allegedly taken from her.

20. There is no doubt that the complainant was attacked and injured. The evidence of the complainant, PW2, PW3, PW4 and PW5 as well as PEx1, confirms this. As to whether the complainant had the money and phones allegedly taken away from her, the evidence is scanty. Admittedly, PW1 was working in an M-Pesa shop that belonged to someone else. The money in that shop did not belong to her. She did not explain to the court whether it was usual for her to carry money from the business with her when going home. The complainant further stated that she lost two phones. The receipt produced as PEx2 was for a Nokia 105, in the name of **Godfrey Mukhwana**, who was not called on as witness to confirm that indeed the complainant had the phone whose receipt was produced. That phone was not purchased by PW1 but by Godfrey Mukhwana. He was a crucial witness in this case who nonetheless was not called. As to whether the complainant had that phone, was not satisfactorily proved,.

21. The appellant denied that he is the one who attacked the complainant and has taken issue with the learned trial magistrate's findings. He has submitted that he was framed up by his wife because of marital differences. However the learned magistrate after considering the evidence on the issue of identification stated:-

> **"Having proved that the offender was armed, immediately before the said robbery he attacked the victim by cutting her, it is important to determine the identity of the offender."**

The learned magistrate then continued:-

> **"PW1 said she was on her way home when the accused suddenly attacked her. The accused was identified as her husband. The incident took place at about 5.00 pm and when she sought treatment, she mentioned the name of the assailant as Henry Bukaya. She is the only person who identified the accused although investigations by the investigating officer (PW5) confirmed her testimony. The accused was a person well known to her and a spouse, chances of mistaken identity were nil. The incident took place in broad daylight..."**

The learned magistrate then concluded:-

> **"I have considered all aspects like time of the day and fact that complainant and accused are husband and wife. I find the accused was properly identified. In conclusion I find that the accused in his defence did not say anything to do with the 11th August, 2014 when the offence was allegedly committed. He only explained the event of 5th August, 2014 and 12th August, 2014. He did not deny or contradict the evidence that he was armed with a dangerous weapon (panga) ... used actual violence against her ... His defence does not create doubt on the prosecution case which I now find to have been proved on the required standard of beyond reasonable doubt."**

22. The learned magistrate found that the appellant did not explain where he was on 11th August, 2014, the date the offence was committed, and therefore concluded, that the appellant committed the offence.

23. I have perused the record myself but could not found any **alibi** relating to the 11th August, 2014. PW1 told the court that the appellant went to her place of work on that material day, 11th August, 2014 at about 12 noon. PW3 on his part, told the court that he was at work near the M-Pesa shop at about 3 pm when the appellant went to the shop and picked a quarrel with PW1 over some domestic issue. PW3 saw the complainant later that day, between 5 and 6 pm injured, and PW1 told him that she had been attacked by the appellant.

24. The incident took place during the day and according to the account by both PW1 and PW3, the appellant went to the complainant's place of work and had a quarrel with her. He was within the vicinity on the material day and as correctly pointed out by the trial magistrate, he did not ably challenged the fact that he was within that area on that day.

25. It is true from the record that the two had domestic differences as husband and wife, and although the appellant has argued that he was framed up, I do not think someone else would attack the complainant to that extent, only for her to frame up the appellant. The appellant must have been involved given their domestic differences and the fact that he was seen in the vicinity.

26. The complainant was the only eye witness and the appellant has argued that he was not properly identified. I agree with the trial magistrate that the incident took place during the day, and the two had had an altercation after which the complainant was attacked. She may be the only eye witness but it is strite law that it is not the number of witnesses that matter but the quality of the evidence. **Section 143** of the evidence Act, Cap 80 laws of Kenya, is clear that the prosecution can call any number of witnesses to prove its case. The prosecution evidence proved that the appellant attacked PW1. The appellant has also argued that important witnesses were not called especially the employer to PW1 and who made the report to police. Addressing the issue of witnesses and failure to call important witnesses, in the case of **<u>Milton Kabulit & 4 others r Republic</u>** [2015] eKLR, the Court of Appeal stated:-

> **"Section 143 of the Evidence Act Cap 80 laws of Kenya stipulates that 'no particular number of witnesses shall in the absence of any provision of law to the contrary be required in the proof of any fact.' The role of the court when confronted such a complaint is as was set down in <u>Bukenya & others v Uganda</u> <u>[1972] EA 549,</u> wherein the predecessor of this court, the Court of Appeal for Eastern Africa laid down the following cardinal principles, first that 'the prosecutions must make available all witnesses to establish the truth even if their evidence may be inconsistent and second 'that the court also has the right and the duty to call witnesses whose evidence appears essential to the just decision of the court; third that where the evidence called is barely adequate the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."**

27. The question then that has to be asked here is, was this a robbery with violence case? As I have said earlier, the prosecution did not call, **<u>Godfrey Mukhwana</u>**, the owner of the money and the Nokia phone allegedly robbed from the complainant. He would also have shed light on whether the complainant possibly had the money allegedly taken away from her being that day's collection. Without his evidence, it was difficult to conclude with certainty, that indeed the complainant had the money and the phone and that they were robbed from her. The phone belonged to Godfrey and there was no credible evidence that the complainant had that phone at the material time when she was attacked.

28. Secondly, according to the complainant, her employer was the first to make a report to the police. This is also clear from the evidence of PW5 , the investigating officer, who testified that "**on 12th August, 2014 <u>Godfrey Mukhwana</u>, employer to the complainant reported a case of assault**." The report that was made was about assault and not robbery. No report of loss of money was also made. PW5 did not explain to the court how it turned out that the appellant was charged with robbery with violence, yet the report made was that of assault. The first report to police is usually important. Furthermore, the P3 form produced as PEx1 at the **Brief details of the offence** section; the P3 states that **<u>"she (complainant) alleged to have been assaulted by a person well known to her</u>**." This supports the evidence of PW5 that the report made at the police station was on assault and robbery.

Failure by the prosecution to call Godfrey Mukhwana to testify and be subjected to cross examination should be taken that it would have been adverse to the prosecution's case as far as robbery with violence was concerned.

29. The appellant and the complainant are husband and wife and the record is clear on this. They even tried to resolve the issues before the case finally proceeded to hearing, I do not think there was sufficient evidence to prove the offence of robbery with violence, and from my own assessment of the evidence, the

offence of robbery with violence was not proved beyond reasonable doubt.

30. In my view, the evidence established an offence other than robbery with violence, and had the learned trial magistrate properly addressed her mind on the evidence as a whole, she probably would have come to that conclusion and find that the evidence established the offence of causing grevious harm.

31. On a finding that the evidence adduced established an offence other than, the one the appellant was charged with, the trial magistrate would then have considered whether **section 179** of the Criminal Procedure Code applied. **Section 179** provides that an accused person can be convicted for an offence other than the one he was charged with if the evidence proved that other offence. The section provides:-

> **"(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.**
>
> **(2)When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted on the minor offence although he was not charged with it."**

32. The issue of substituting an offence, on accused was charged with, for an offence which the evidence proved/established is not an open/obvious case. The offence to be substituted with must be cognate and minor to the offence that the accused was initially charged with. That is, they must relate to one another. The Court of Appeal considered the application of section 179 of the Criminal Procedure Code in the case of **Robert Muhungi Mumbi v Republic** [2015] eKLR and observed:-

> **"An accused person charged with a major offence may be convicted of a minor offence if the minor offence and the major offence are cognate, that is to say, both are offences that are related or alike, of the same genus or species. To sustain such a conviction, the court must be satisfied on two things; first, that the circumstances embodied in the major charge necessarily and according to definition of the offence imputed by the charge, constitute the minor offence secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted."**

33. A cognate offence is defined in the Blank's Law Dictionary 8th Edition at page 1111 thus:-

> **"A lesser offence that is related to the greater offence because it shares several of the elements of the greater offence and is of the same class or category."**

34. Is causing grevious harm a minor and cognate offence to robbery with violence in terms of **section 179** of the Criminal Procedure Code; and should the court convict the appellant for that offence though he was not charged with it? The Court of Appeal considered this aspect in the case of **Evans Wamai Karuku v Republic** [2016] eKLR. In that case the appellant had been charged tried and convicted by the subordinate court for the offence of robbery with violence. His appeal to the High Court was dismissed. On further appeal to the Court of Appeal, the Court of Appeal held:-

> **"With respect, we think the main issue in this matter was not the mere identification of the appellant, but whether upon full and true evaluation of the evidence on record, the elements of the offence of robbery with violence was proved as charged beyond reasonable doubt. In our assessment, the findings of the two courts below did not fully accord with the evidence and there was an error in principle in approach to evaluation of evidence. There can be no doubt that the appellant and Peter were involved in a fight on the date and time stated in the charge sheet ... the combatants were casual labourers in the same neighbourhood who knew each other and the prosecution evidence itself confirmed this. The injuries suffered were also not in doubt but were not grevious as they were mainly bruises amounting to harm. In all the circumstances it was open to two courts below to consider whether a cognate but lesser offence was committed. It is our considered view that the offence of assault causing bodily**

<u>harm is cognate in nature and since the two courts below did not address this aspect, we would adopt the words</u> of Spray J. (as he then was) in <u>Ali Mohammed Hassan Mpanda v Republic</u> [1963] EA 294 where he interpreted the Tanzania equivalent of section 179 of the Criminal Procedure Code as follows:-

'Subsection (1) envisages a process of subtraction; the court considers all the essential ingredients of the offence charged, finds one or more not to have been proved, finds that the remaining ingredients include all the essential ingredients of a minor, cognate offence (proved) and may then, in its discretion, convict of that offence. Accordingly we hold and find that the offence which commends itself to us for purposes of sentencing the appellant is that of assault causing actual bodily harm contrary to section 251 of the Penal code as opposed to that of robbery with violence.' (emphasis)

The Court of Appeal addressed the same issue another case that was on all fours with the present appeal in the case of **<u>Lawrence Omondi Otieno v Republic</u>** [2007] eKLR. The appellant in that case had been charged before the subordinate case with the offence of robbery with violence. After trial, he was found guilty, convicted and sentenced to suffer death. His appeal to the High Court was dismissed forcing him to appeal to the Court of Appeal. His appeal was allowed and conviction for robbery with violence substituted with one for causing grevious harm. The Court of Appeal observed:-

"Did the first appellate court reconsider the evidence, re-evaluate the same and draw its own conclusions? In <u>Achira v Republic</u> [2003] KLR 707 at page 710, this court stated:-

"This is a first appeal. This court as the first appellate court is required to reconsider the evidence re-evaluate the same and draw its own conclusions and in doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses (see <u>Okeno v Republic</u> [1972] EA 32 and <u>Ngui v Republic [1984] KLR 729"</u>

It is our view that had the superior court proceeded as stated in the foregoing passage, <u>it would certainly have detected the fact that this was a case of aggravated assault and not robbery with violence. Only the complainant talked about being robbed of Kshs.17,000/- but she does not appear to have reported that matter even to her husband who was the actual owner of the money</u>.

<u>In view of the foregoing, we are satisfied that the appellant ought to have been convicted for the minor and cognate offence of causing grevious harm contrary to section 234 of the Penal Code and not robbery with violence contrary to section 296(2) of the Penal Code</u>."

35. Guided by the above holding, I find that the offence established and proved by the evidence in the case before the trial magistrate was minor and cognate to the offence of robbery with violence, the appellant had been charged with in the subordinate court namely, causing grevious harm. The appellant could have been convicted for causing grevious harm although he had not been charged with it and not robbery with violence

36. Having come to that conclusion, I invoke the provisions of **section 179** of the Criminal Code, allow the appeal, quash the conviction for robbery with violence, and set aside the death sentence imposed against the appellant. In place therefor I convict the appellant for the offence of causing grevious harm under section 234 of the Penal Code. I sentence the appellant to five years imprisonment. The sentence of imprisonment is to run from the date the appellant was convicted before the trial court, that is 10th June, 2015.

Orders accordingly.

Dated and delivered at Kakamega this 14th July, 2016.

E.C. MWITA

JUDGE