REPUBLIC OF KENYA

HIGH COURT APPELLATE SIDE NAIROBI

CRIMINAL APPEALS NOS 550 AND 549 OF 1979 (CONSOLIDATED)

GREGORY MULI MASAU .....1ST APPELLANT

MICHAEL MUISA MASAU.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT OF THE COURT

These appeals have been consolidated. The two appellants were jointly charged before the Resident Magistrate at Machakos with robbery contrary to section 296(1) of the Penal Code, wrongful confinement contrary to section 263 of the Penal Code, and assault causing actual bodily harm contrary to section 251 of the Penal Code. The last two offences were allegedly committed against Nzembei Mulee and were earlier in point of time than that allegedly committed against the first complainant, Musyoki Kilonzo. After trial both appellants were convicted on all charges, the first appellant receiving a total of five and a half years' imprisonment and fifteen strokes corporal punishment, and the second appellant receiving five years' imprisonment (because all his sentences were ordered to run concurrently) and nine strokes corporal punishment. The 5-year reporting orders were (presumably) in respect of the robbery charge; but the record does not specifically state this.

The facts were briefly that, at about 7.30 pm on 27th March 1979, Nzembei Mulee was on duty with his employer at the latter's hotel in Machakos, when first the appellant, an administration policeman of some nine years' standing, accompanied by the second appellant, a local businessman, entered and without more ado proceeded to handcuff Nzembei with black handcuffs and to take him out of the hotel and away towards the river and *shambas*.

In circumstances showing that both were acting in concert, the first appellant demanded money from Nzembei as the price of his release, and assaulted him, causing injuries on his right knee and left elbow. On what was said to be the way to the police station they encountered the other complainant, Musyoki Kilonzo. The first appellant caught him by the neck, pulled him to the ground felt in his pockets and relieved him of Shs 50. Musyoki then managed to wriggle out of his shirt and escape some 20 yards away. However, according to Nzembei, the second appellant:

… asked the [first appellant] to leave [Musyoki Kilonzo] saying that he knew him. So the [first appellant] released [Musyoki] who ran away and stood at a distance.

We shall return to this in a moment.

The magistrate took some care on the issue of identification, although he overlooked the fact that while Musyoki said there was no artificial light, Nzembei said that at the place they encountered Musyoki there

were street lights and lights in the houses around. Both complainants said that it was a light night and that it was possible to recognise a face at 10 and 20 feet, respectively. Corroboration, if it were needed as against the first appellant, is to be found in the production by him of the black handcuffs from his house on 29th March, after denying to his superiors that he had any. There was evidence that handcuffs had not been officially issued to this appellant at any of the material times. What were described as a pair of white handcuffs had presumably been surrendered by him to senior Sgt Muthiani on 3rd March. This was in support of certain background evidence of similar antecedent complaints of which we doubt the relevance or, indeed, admissibility. As to the second appellant, we consider Nzembei would have been unlikely to have given evidence as to his expression of disassociation from the robbery had it not been true (and moreover, accurate) that it was supportive of that identification. Accordingly, in our judgment, it can safely be accepted that the two appellants were correctly identified, both as the two persons who initially came into the hotel and handcuffed Nzembei, and as the ones who stopped Musyoki.

Unfortunately the magistrate did not deal at all with what might appear to be the expressed disassociation from the robbery by the second appellant, but which we think is in reality evidence that he was not associated with it. He was intent on dragging Nzembei along and there is nothing to show that he was acting jointly with the first appellant.

Accordingly, we cannot sustain the conviction of the second appellant on the robbery count and must allow his appeal thereon. We are, however, satisfied that a robbery was committed on Musyoki by the first appellant and that that offence was complete before he released him at the second appellant's instigation. We are further satisfied that the magistrate correctly accepted the remaining evidence, which undoubtedly showed that each appellant was concerned in and committed the assault on Nzembei after handcuffing him. Did this, however, as is averred in the particulars of the second count, amount to a confinement within section 263 of the Penal Code?

The meanings given to the verb "to confine" in the *Oxford English Dictionary* are as follows: "to shut up, imprison, immure, put or keep in detention"; "to enclose or retain with limits"; and "to keep within bounds, limits or restrict". Such authorities as exist indicate that there is a distinction between wrongful restraint and confinement. For instance section 339 of the Indian Penal Code provides (in effect) that obstruction of a person in one direction amounts to wrongful restraint; while section 340 provides that anyone who restrains another from proceeding beyond "certain circumscribing limits" wrongfully confines him. Much of the commentary in *Gour's Penal Law of India* is based on *Bird v Jones* (1845) 115 ER 668, which was an action for false imprisonment, the plaintiff having been compelled to proceed in a particular direction, although not restrained from proceeding in any direction. There was considerable divergence of judicial opinion as to whether the plaintiff was imprisoned; Coleridge J, speaking of that which the commentary calls the "allied offence" of false imprisonment said:

> A prison may have its boundary large or narrow, visible and tangible or, though real still in the conception only; it may itself be movable or fixed, but a boundary it must have; and that boundary the party imprisoned must be prevented from passing.

A little further on Patterson J said:

> I have no doubt that in general, if one man compels another to stay in any given place against his will, he imprisons that other just as much as if he locked him up in a room …

After consideration of the proved facts in this case we are satisfied that they amount to wrongful confinement. Even though the boundaries were movable, Nzembei could not run away from the appellants in any direction because of the total restraint they were exercising upon him. We accordingly dismiss the two appeals from the convictions on count 2.

The conviction on the assault charge also depended on evidence whether Nzembei had, as a result of it, suffered bodily harm. When the clinical officer testified as to the age of the injuries, this was not, it seems, to the liking of the magistrate for, at the end of his evidence the magistrate said: "I found this witness to be utterly uncreditworthy from his demeanour in the witness box".

Whether the magistrate thought he was acting under section 199 of the Criminal Procedure Code, which appears to permit remarks as to demeanour to be made whilst a witness is under examination, we do not know; but it does not, we think, entitle a magistrate to indicate his view as to the credibility of that particular witness on the sum total of his evidence at that stage of the case. We draw attention to *Byamungu s/o Rusiliba v R* (1951) 18 EACA 233, 236, in which the Court of Appeal said that an impression as to the demeanour of a witness ought not be made without testing it against the whole of the evidence in question. In any case the clinical officer was not a qualified medical expert and might well not possess the detailed knowledge and experience enabling him to assess the age of injuries he observed. See generally on this subject *R v Bills s/o Luhoyo* (1947) 14 EACA 137.

We note also that on the same page of the record the magistrate made findings as to whether the witness Nzembei had been tampered with by the appellants prior to the trial. Although the appellants made formal denials to this allegation, the finding was made not on evidence, (tested or untested) but on the statement of a police corporal who was not sworn; and no evidence was allowed to be called to rebut the allegations. We think that these findings, made at the outset of the case, were most unfortunate. However, having considered the matter we do not feel that any prejudice was occasioned or that it cast doubt on the magistrate's findings on the evidence as a whole.

After having considered all the evidence on record we reach the conclusion that the magistrate was entitled to find (as he did) that Nzembei suffered injuries and was caused actual bodily harm by the appellants acting in concert. We therefore dismiss the appeals against the convictions on count 3.

For the reasons given we allow the second appellant's appeal on the first count and quash his conviction thereon, setting aside the sentence imposed on him. But we maintain the first appellant's conviction on that count, as we are satisfied that he committed that offence, and dismiss his appeal against the conviction.

As to the first appellant's appeal against the sentence on count 1, the offence was a grave one, particularly in view of his position. We cannot possibly say the custodial sentence passed on him was too severe. Neither can we say the custodial sentences passed on the two appellants on counts 2 and 3 were in any way excessive in all the circumstances of the case, save that we order, in the first appellant's case, that they run concurrently with that which we have upheld in relation to him on the first count.

The awards of corporal punishment on the first appellant were, we think, too severe, notwithstanding the gravity of the offence both individually and in the aggregate. On the first count we reduce the award to three strokes corporal punishment, and to three strokes on the third count, making a total of six strokes. We also maintain the reporting order on the robbery count. As to the second appellant, we cannot say that the award of three strokes corporal punishment on the third count was in any way excessive and we dismiss his appeal in that respect.

In the final result the first appellant's appeal against his conviction on all three counts is dismissed, and he will serve a total of five years' imprisonment, receive six strokes and be subject to a five year reporting order. The second appellant will serve a total of six months' imprisonment and suffer three strokes corporal punishment. Otherwise the appeals are dismissed.

Appeal of second appellant on count 1 allowed.

Otherwise appeals dismissed.

Dated and delivered at Nairobi this 31st day of October 1979,

E. TREVELYAN

JUDGE

A.R.W HANCOX

JUDGE