IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, KOOME & KIAGE, JJ.A.)

CRIMINAL APPEAL NO 94 OF 2014

BETWEEN

EVANS WAMAI KARUKU ……..……APPELLANT

AND

REPUBLIC ……RESPONDENT

(Being an appeal from the judgment of the High Court at Nyeri

(Wakiaga, & Ngaah, JJ.) dated 4th July, 2014

in

H.C.CR.A No 134 of 2012)

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JUDGMENT OF THE COURT

[1] Evans Wamai Karuku, (the appellant), brings this second appeal against the judgment of the High Court **(Wakiaga, & Ngaah, JJ.)** dated 4th July, 2014 wherein his conviction and sentence for the offence of robbery with violence contrary to **Section 296 (2)** of the Penal Code was affirmed. The particulars of the charge were that on the 14th day of May, 2011, at Gathaithi village in Mathira East District within Nyeri County jointly with another not before court being armed with (sic) offensive weapon namely stones robbed Peter Mbui Wanja of Kenya shillings one thousand eight hundred (Kshs.1,800), mobile phone make Nokia 1208, one pair of sport shoes, one jacket, one long trouser and one T-shirt all valued at Kenya shillings six thousand three hundred and forty nine (Kshs.6,349/=) and immediately before or immediately after the said robbery used actual violence to the said Peter Mbui Wanja.

[2] The prosecution relied on the evidence of six witnesses to prove their case against the appellant. PW 1, Peter Mbui Wanja, (Peter), a casual labourer in Gathaithi, testified that on the night of 14th May, 2011 as he was on his way to Kariki from Gathaithi he saw two men walking ahead of him. When the two men noticed Peter coming from behind, they turned and demanded to know why he was following them. Peter told them he was on his own mission, and was not following them. As Peter was passing them, he noticed the men were carrying stones. After walking for about a meter, Peter was hit on the head with a stone. The assailants grabbed him and dragged him to a homestead in the vicinity.

[3] Peter tried to scream for help as the assailants were robbing him; this drew the ire of his assailants, with one robber strangling him, as the second one struck him and instructed his colleague to bite Peter's tongue. By this time Peter was bleeding profusely. Thus, when one of his assailants attempted to put his hand in his mouth, he bit it. He kicked the second assailant causing him to fall. Undeterred, the said assailant undressed Peter making him to tighten the grip on finger of the robber who was strangling him. One of the attackers bit off a chunk of flesh from Peter's leg. Peter fled from the scene toward Chehe screaming for help and sought help at Gathugu. PW 3, Joseph Wanjohi (Wanjohi), another casual worker known to him in the neghbourhood, opened his door and ushered him into his house. Wanjohi gave Peter clothes to wear as he was naked. Peter told him he was attacked as Wanjohi tried to administer some first aid on the injuries he sustained during the attack. Wanjohi requested Peter to retire for the night, but he was reluctant to do so, due to the nature of the injuries; he pleaded to be taken to hospital but efforts to procure a vehicle that night were unsuccessful.

[4] Early the following morning, Wanjohi left his house to buy milk, he met the appellant on the road, and the appellant was bleeding from the hand. They had a conversation and the appellant informed Wanjohi that he was involved in a fight the previous night, whereupon Wanjohi requested him to follow him to his house with a view to confirming whether Peter was the person he had fought with. When the appellant entered Wanjohi's house, he noticed that Peter seemed to know the appellant. Wanjohi's told the trial court that he was the one who advised Peter and the appellant to report the matter to police.

[5] Shortly thereafter, the area Assistant Chief – PW 2, Milka Njeri Kamau, (Milka), accompanied by PW 5, Sergeant Taara (Sgt Taara) of the Administration Police came to Wanjohi's home. They started interrogating the appellant and he admitted he fought with Peter. Thereafter, the appellant led Milka and Sgt Taara to the location where Peter's clothes were kept. The clothes were recovered, and that is how the appellant was arrested and taken to Karatina Police Station, and Peter was referred to hospital. PW 4, Dr Ndirangu, (Dr. Ndirangu), completed the P3 form which showed the injuries he sustained during the attack.

[6] The foregoing is the evidence, albeit in summary, that formed the basis of the trial court's finding that the appellant had a case to answer. Put on his defence, he gave a sworn statement whose tenor was a denial of the events of the material date, and an admission that he met Milka and Sgt Taara on 15th May, 2015 who requested him to accompany them to Karatina Police Station where he was shown a bag containing clothes which he knew nothing about. He was also a casual worker in the neighbourhood.

[7] Convinced that the prosecution had proved its case to the required standard, the trial court convicted the appellant for the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**, and sentenced him to suffer death as provided by the statute. An appeal to the High Court by the appellant against the said conviction and sentence did not bear fruit, hence this appeal. The appellant relied on the following grounds contained in his supplementary memorandum of appeal:-

- ***That both courts erred in law to find that the appellant had (sic) malice aforethought in the commission of the offence he was charged with.***

- ***Whether 'stones' were offensive weapon according to Section 296 (2) of the Penal Code.***

- ***That the defence of the appellant that he had fought with someone ought to have been considered as it would lead to the conclusion that the appellant had no mens rea to commit the offence of robbery with violence.***

- ***That if that was the case, the court failed to consider if the appellant could be responsible for a minor cognate offence.***

[8] At the hearing of the appeal Mr. Mahan, learned counsel for the appellant began by submitting that neither malice aforethought nor *mens rea* was proved, basing his submission on the testimony of Wanjohi, who was informed by the appellant that he had been attacked by somebody the previous night. Secondly, learned counsel submitted that the appellant was not mentally sound, for if he was, it defeats

logic that he could have been found at the scene of the attack. It is highly unlikely also that he could have offered to take Milka and Sgt Taara to a house or place, where the appellant's clothes were found. Thirdly, the two courts below were faulted for failing to subject the appellant to mental examination. It was submitted that upon the appellant's admission that he had fought with somebody, the court had a duty to find out whether the appellant was mentally sound and whether he had the requisite *mens rea* to injure the appellant and rob him of his clothes.

[9] On the part of the State, Mr Kaigai, learned Assistant Director of Public Prosecutions, opposed the appeal. He supported the appellant's conviction and sentence by the two courts below and went on to submit that Peter was attacked by two people who beat him up and robbed him of his clothes; that the essential ingredients of the offence of robbery with violence were proved; and that the intention was to rob. Moreover, although the appellant was not obliged to say anything in his defence, he did not state that he fought somebody; or he knew Peter. Nonetheless, Mr. Kaigai conceded that he found it odd that the appellant was found at the scene of the crime, where he admitted that he beat up Peter or they fought because he too had an injury on his hand. Counsel for the state, however urged us to find the appellant participated in the crime, and during the trial, he cross examined the witnesses and save for the strange behavior when he was arrested, there was nothing to suggest that he was of unsound mind.

[10] This being a second appeal as we have already stated, our jurisdiction is limited to matters of law only. In ***David Njoroge v Republic, [2011] eKLR***, this court stated that under **Section 361** of the **Criminal Procedure Code**:

> ***"Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (See also Chemagong v Republic (1984) KLR 213".***

[11]. The ingredients for the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code** were set out in ***Johanna Ndung'u vs Republic- Criminal Appeal No 116 of 2005 (unreported)*** as follows:-

- ***if the offender is armed with any dangerous or offensive weapon or instrument, or;***
- ***if he is in the company with one or more other person or persons, or;***
- ***if at or immediately after the time of the robbery he wounds, beats, strikes or uses any other violence to any person.***

Proof of any one of the ingredients of robbery with violence is enough to sustain a conviction. See ***Oluoch Vs Republic (1985) KLR 549***. Evidential facts tendered for proof of the ingredients of the offence must however be cogent and consistent save for such minor flaws as are curable under **Section 382** of the **Criminal Procedure Code.**

[12]. There are concurrent findings by the two courts below that the appellant was positively identified to have been at the scene of the crime and we have no reason to fault such finding as it was based on sound evidence. Both the appellant and Peter were casual labourers in the same neighbourhood and despite Peter's denial when he first testified on 21st November 2011that he knew the appellant, he changed his evidence on 8th March 2012 to concede that he had known the appellant before. Wanjohi (PW3), another casual worker was also known to both of them. The confounding feature of the case before us, and the main issue that lies for our determination, is whether in all the circumstances of the case, and on the evidence on record, the offence committed by the appellant was robbery with violence, properly so defined, or the lesser offence of assault causing actual bodily harm. To determine this we have to re-examine the evidence on record.

[13]. The very first official report to be made on the incident was to Assistant Chief Milkah (PW2) at 10 am on 15th May 2011. The report was about someone who had been beaten and injured at the home of

Wanjohi. It was a report on assault. That conclusion is evident from the first testimony given by Milkah on 25th August 2011 when matters were still fresh in her mind. We may quote her:

> ***"I was told that someone was seriously beaten and injured. I went to report to Corporal Taara at AP Post and he escorted me to the scene. The scene was at Joseph Wanjohi's residence where I found one Peter Mbui Wanja who had been beaten up. He was injured mostly on the face and head. He was bleeding. After interrogating the victim, he identified one Evan as the assailant. Evan was also at the scene and is accused on the dock. After interrogating Evan, he told us that he is the one who had beaten Peter and he agreed to take us to where beating occurred. Complainant said he was robbed of a phone and ksh. 1800/-. We visited scene of incident and Evans said he even had complainant's clothes kept at his (accused's house). So we went to accused's house and found the clothes of the complainant."***

[14]. The same story seems to have been given by Peter to officers at Karatina Police station where a P3 form was issued at 2.30 pm on the same day when the *"Brief details of alleged offence"* were recorded as:-

"He alleges to have been assaulted by two male persons known to him physically".

Dr. Ndirangu(PW4), the medical officer before whom Peter appeared the following day, recorded the medical history as ***"..having been assaulted by people he was able to identify using kicks, blows, human bites and other assorted weapons----stones etc"***. The injuries he found were ***"multiple facial bruises, forehead, cheek and neck bruises, swelling of the left eye and a human bite on the left knee"***. The doctor classified the injuries as ***"harm".***

[15]. The prosecution's own evidence through Wanjohi added to the mystery as it portrayed more of a fight which took place between two people who had previously known each other, than a robbery committed against the appellant by evil strangers. Wanjohi testified about hearing Peter calling him out at night and upon recognizing his voice, opening the door for him and seeing his nakedness and bleeding from the face. He continued:

> ***'I helped him with clothes and accommodation. He said he had been attacked. In the morning I left the house for milk and on the way I met a Wamae who was bleeding from the hand. He told me that he had fought with somebody the night before. I told him to follow me to my house to see if the person he claimed to have fought with was Peter aforesaid. Inside my house the two seemed to 'know' each other well."***

The appellant's clothes, according to Wanjohi, were also *"blood soiled"* when he met him.

[16]. As earlier noted, the first report relating to assault was made to Milkah on 15th May 2011and she testified about it. She was however recalled to testify 10 months later in March 2012 when the trial re-commenced *de novo* and that is when the story of the first report morphed into one of pure robbery, the robber having been identified by the appellant, and members of the public baying for the appellant's blood before Milkah saved him. We may quote her:

> ***"On the 15/5/11 at about 11.00 am, while home I received a call informing me about the complainant in this case. That he was at the home of a Wanjohi where he had sought help after having been robbed and seriously injured on the day before.***
>
> ***I proceeded to Wanjohi's. I saw complainant who had been injured on the face. He is Peter – PW1. He told me what had happened. I learnt that accused, identified by pointing and who was at Wanjohi's premises had robbed the complainant before attacking him. Public wanted to lynch the accused who volunteered to produce the complainant's clothings. The accused led me and complainant Peter to a home where he removed the same and which the complainant identified shortly thereafter.."***

[17]. For some reason, Milkah's story appears to have been embellished. At no time in her evidence did she mention that she was accompanied by a police officer when she arrived at Wanjohi's home and instead swore that she, accompanied by Peter, went with the appellant to his home to collect Peter's missing clothes and later recorded her statement with the police. On the other hand, Sgt Taara (PW5) and PC Miriti (PW6) said they were with Milkah at Wanjohi's residence, but only Sgt Taara said he accompanied Milkah to collect Peter's clothes. PC Miriti confessed in cross examination that he did not witness the recovery of the clothes, and as the Investigating officer, he was not given any recovery form of the exhibits. More importantly, neither of the two police officers made any mention of any members of the public gathered at Wanjohi's residence baying for the appellant's blood.

[18]. Peter himself testified twice and in his first evidence recorded on 29th November 2011, he gave the impression that he met two strangers at night who were armed with stones, and who set upon him and violently robbed him. It turned out after he was recalled to testify again, that he was known to the two assailants who were fellow casual labourers in the same neighborhood. They were not armed with stones when he first saw them, but they picked the stones when the fight started.

[19]. It seems to us that the two courts below had a skewed appreciation of the evidence of the crucial witnesses as reviewed above. The trial court concentrated on the issue of identification and believed the sole evidence of Peter that he was attacked and robbed outside a canteen lighted with electricity by people he knew before, one of whom was the appellant. The High Court on its part similarly focused on identification and was of the erroneous view that Wanjohi's house was the scene of the robbery and that is where the appellant was arrested. It found:

> ***"It is clear from the evidence tendered that the appellant was arrested from the scene of the attack and all items stolen from the complainant were recovered from him some hours after the attack. It was further the evidence of the complainant that at the home of the attack the appellant was together with another person and that the complainant was informed(sic)*** (injured) ***in the process as confirmed by the evidence of PW4. We are therefore of the considered view that all the ingredients of the charge of robbery with violence were proved by the prosecution witnesses."***

[20]. 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 were 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 the approach to evaluation of the 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. If there was any attempt to pursue the other known person who was also present and participated in the fight, we shall never know as there is no investigation or evidence on record. The combatants were casual labourers in the same neighbourhood who knew each other and the prosecution evidence itself confirmed this. The injuries suffered by Peter were also not in doubt but were not grievous as they were mainly bruises amounting to harm. The appellant, according to the prosecution evidence of Wanjohi and Milkah exhibited inexplicable and illogical behaviour for one who had committed the heinous crime of robbery with violence.

[21]. In all the circumstances, it was open for the two courts below to consider whether a cognate but lesser offence was committed. **Section 179** of the **Criminal Procedure Code** provides as follows:

> ***" 179. (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 of the minor offence although he was not charged***

with it".

[22] It is our considered view that the offence of assault causing bodily harm is cognate in nature, and since the two courts below did not address this aspect we would adopt the words of Spry, J. (as he then was) in Ali ***Mohammed Hassani Mpanda v Republic, [1963] EA 294***, wherein he interpreted the Tanzanian equivalent of **Section 179** of the **Criminal Procedure Code** as follows:

> ***"Sub-section (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".***

See also:-***Robert Ndecho& Another v Rex, (1950- 51) EA 171***, ***Wachira s/o Njenga v Regina ,(1954) EA 398*** and ***Robert Mutungi Muumbi v Republic, [2015] eKLR***.

[23]. 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. We have said enough to show that there are compelling reasons to depart from the concurrent findings of fact by the two courts below.

[24] The upshot is that this appeal partially succeeds, we quash the conviction entered against the appellant, set aside the death sentence; and in place thereof substitute the same with a conviction for the offence of assault causing actual bodily harm contrary to **Section 251** of the **Penal Code**. We take into account that the appellant has served a period of about 4 years since conviction on 29th June 2012. We therefore commute the sentence for the offence to the period already served by the appellant. Thus, the appellant is to be set at liberty forthwith in regard to the sentence unless otherwise lawfully held.

Dated and delivered at Nyeri this 6th day of April, 2016

P. N. WAKI

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR