



**IN THE COURT OF APPEAL**

**AT NYERI**

**(SITTING AT MERU)**

**(CORAM: NAMBUYE, KIAGE & SICHALE, JJ.A)**

**CRIMINAL APPEAL NO. 57 OF 2013**

**BETWEEN**

**HARUN MWAMBIA NDEREBA ..... 1<sup>ST</sup> APPELLANT**

**KIMATHI MUGO BASILIO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from judgment of the High Court at Meru delivered by ( Lesiit & Makau, JJ) on 22<sup>nd</sup> November, 2012*

*in*

**H.C.CR. A. NO. 143 OF 2010)**

\*\*\*\*\*

**JUDGMENT OF THE COURT**

The two appellants **HARON MWAMBIA NDEREBA** and **KIMATHI MUGO BASILIO** (hereinafter the 1<sup>st</sup> and 2<sup>nd</sup> appellants respectively) were charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars were that on 31<sup>st</sup> day of January, 2010 at Ngumbao market Mariaini Sub-Location in Meru South district within Eastern Province jointly and with another not before court they robbed **BERNARD NJOKA** of a mobile phone make Nokia, one National Identity Card serial number 223106585, Electors Card number 01540058, Equity Bank Account card, Barclays Bank of Kenya Ltd saving card number 375383 and cash Kshs.500.00 all valued at Kshs.6,000.00 and immediately before and (sic) immediately after the time of such robbery used actual violence to the said **BERNARD MATE NJOKA**.

The trial proceeded before P. Ngare, the then Principal Magistrate, Chuka who in a ruling delivered on 15<sup>th</sup> July 2010 found the appellants had a case to answer. In their defences, each of the appellants elected to make a sworn statement. In a judgment delivered on 29<sup>th</sup> July 2010, the trial court found each of the appellants guilty and sentenced each one of them to death as by law prescribed.

The appellants were dissatisfied with the outcome of the trial and filed an appeal in the High Court. On 22<sup>nd</sup> November, 2012 Lesiit J and Makau J dismissed the appellants' appeals thus provoking the appeal before us.

When the matter came before us for hearing on 2<sup>nd</sup> November 2015, Mr. Mwanzia learned counsel for the appellants abandoned the grounds of appeal filed by the appellants. Instead, he relied on the grounds filed by him on 30<sup>th</sup> October 2015. These were:

- ”(1) THAT the learned superior court judges erred in law by upholding the conviction and sentence of the subordinate court for the offence of Robbery with violence whereas the ingredients thereof were not proved beyond reasonable doubt.***
- 2. THAT the learned superior judges erred in law by failing to sufficiently discharge their function of evaluating the evidence as the first appellate court and particularly that the appellant and the complainant knew each other and fought, therefore arrived at a wrong decision.***
- 3. THAT the learned superior court of judges erred in law by finding that the appellant was fit to stand trial though there was documentary evidence produced at the trial to the contrary.”***

In his oral submissions, it was counsel's submission that the 1<sup>st</sup> appellate court failed to re-analyze and re-evaluate the evidence tendered in the trial court; that the appellants and the complainant knew each other as they were neighbors and that after the complainant refused to part with Kshs.20/= to buy beer, a fight ensued; that the fight was preceded by a disagreement over the Kshs.20/= to buy beer; that the offence of robbery with violence was not disclosed but that there was assault that caused grievous harm; that in the scuffle, the complainant lost his wallet which was picked by PW3 who was initially arrested but later freed and treated as a prosecution witness. Counsel concluded his submissions by urging us to find that the 1<sup>st</sup> appellant was mentally insane and he had produced a letter to that effect.

Mr. Musyoka, the learned prosecuting counsel on behalf of the State opposed the appeal. Counsel submitted that the fight between the complainant and the appellants culminated in a robbery as force was used, the complainant injured and property stolen from him. The complainant's stolen items were eventually found in possession of the 2<sup>nd</sup> appellant. As to the defence of insanity, counsel submitted that the medical report showed that the appellant though insane was under medication and the trial court had rightly found that he was able to follow the proceedings.

The appeal before us is a second appeal. The law is that on a second appeal the Court of Appeal is restricted to consider only points of law. (See **section 361 of the Criminal Procedure Code**). See also ***Njoroge -vs- Republic*** (1982) KLR 388, where this Court at page 389 held;

***“... on this second appeal, we are only concerned with the points of law and consider ourselves bound by the concurrent findings of fact arrived at in the courts below, unless shown to be based on no evidence..” See *M’Riungu -vs- Republic* (1983) KLR 455.”***

This Court has also stated in many previous decisions that it will not interfere with concurrent findings of fact by the two courts below unless they were based on no evidence or there was a misapprehension of the evidence or they are shown demonstrably to have acted on wrong principles in reaching their decisions. (See ***Chemagong v. Republic*** [1984] KLR 61 and ***Kiarie v. Republic*** [1964] KLR 739).

In ***M’Riungu v. Republic*** [1983] KLR 455 the Court held:-

***“Where a right of appeal is confined to questions of law, the appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law and it should not interfere with the decisions of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which***

***would be the same as holding that the decision is bad in law (Martin v. Glyneed Distributors Limited (T/A MBS Fastenings – The Times of March 30, 1983)”.***

Most recently, this Court in **George Kamau Gatogo v Republic**- Civil Appeal No. 21 of 2011 cited with approval the holding in **Kaingo Vs. R** [1982] KLR 213 at P 219 where the Court held that;

***“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was evidence on which the trial court could find as it did (REUBEN KARARI C/o KARANJA VS. R [1956] 17 EACA 146).”***

Therefore, as the 2<sup>nd</sup> appellate court we are bound to apply the law as enunciated by the above principles.

We have anxiously considered the grounds of appeal, the rival submissions of counsel and the law. On the issue that the second appellant should have been found to be mentally insane, it is our view that this is a matter of fact. However, both the lower courts considered the issue and found that the appellant fully took part in the trial. In the assessment of the trial court, the 2<sup>nd</sup> appellant had conducted his defence ***“without any hitch.”*** This was a finding of fact that the 1<sup>st</sup> appellate court rightly refrained from disturbing. We too do not wish to disturb the said finding.

Be that as it may, the issue that we must determine is whether there was evidence on which the trial court could find as it did and whether the 1<sup>st</sup> appellate court properly re-evaluated the evidence in arriving at the same conclusion as the trial court. The evidence tendered in the trial court was that on 31<sup>st</sup> January 2010 at about 6.00 p.m. **PW1 BERNARD MATE NJOKA** (hereinafter the complainant) was on his way home together with his sons namely **GITHINJI, MORRIS** and **MUGAMBI JAMES**. On the way home, they encountered the two appellants and one other. The complainant gave the names of three persons as **BASILIO, GITHINJI** and **NJIRU**. In his narration of the events of that day the complainant told the trial court that: ***“Accused 2 demanded that I give out 20/= for their beer otherwise I will not pass there*** (Emphasis added). ***At the time accused one punched me on the mouth and removed two of my teeth. Accused 2 held and lifted me and my mobile phone fell from my pocket and it was taken by their accomplice Njiru. Accused 2 put his hand into my pocket (left) and took my wallet. They tore my pair of trouser and they even bit me. My wallet had my ATM card from equity bank, 500/= cash and an elector (sic) card.”***

**PW2 MORRIS MUGENDI MUTEGI** and his other two brothers were in company of the complainant whilst on their way home. His testimony was that when PW1 refused to give the two appellants Kshs. 20/= for beer, the 2<sup>nd</sup> appellant ***“boxed him on the mouth and the two teeth got off. Accused 1 held and pulled him to the ground and they bit (sic) him badly.”*** PW2 and others screamt and rushed to a nearby hotel to seek help. No one came to their aid but instead those who came became spectators.

The other eye witness **ASHTON MBAABU (PW4)** went to the scene of the scuffle. He found the two appellants, one sitting on top of the complainant and the other holding his legs.

On 3<sup>rd</sup> February 2010 the two appellants were arrested by **AP PETER GACHOKI (PW5)**. The 2<sup>nd</sup> appellant was found in possession of PW1’s wallet. One of the items namely, the mobile phone was picked by **NJIRU M’RITHAA (PW3)** on the day of the attack. As this was one of the items that belonged to PW1, PW3 was arrested. However, he was later released and treated as a prosecution witness. It was his evidence that the 1<sup>st</sup> appellant claimed that the phone was his.

**PW5 JOSEPH MWENDA**, a clinical officer from Meru South District found that PW1 had bruises in his mouth and the lower front tooth missing. He classified the degree of injury as maim.

In their sworn statements of defence the appellants denied the commission of the offence. It was the 1<sup>st</sup> appellant’s defence that he was not mentally sane and that he was under medication. On the other hand

the second appellant's defence was that he picked the wallet, PW1's identity card and his ATM card on 1<sup>st</sup> February 2010. He took them to the chief of Kanwa but did not hand them in as the chief was absent.

As stated above, the question that we must inevitably answer it whether from the evidence tendered in the lower court and re-evaluated by the 1<sup>st</sup> appellate court there was evidence on which the trial court found as it did, this being a question of law. It was the complainant's evidence that the appellants demanded Kshs.20 for beer so as to allow him to pass. The complainant declined to part with the 20/= . It is then that the appellants attacked him and inflicted injuries on him. PW2's evidence was that when the appellants accosted PW1 and beat him, he sought help from a nearby hotel. However, instead of the members of the public assisting, they became spectators. When PW4 got to the scene he found the two appellants, one sat on top of the complainant and the other holding his legs. It was the complainant's own evidence that in the course of the assault and as he was lifted up, his mobile phone fell off and it was picked by PW3 who was initially arrested and later released.

It would therefore appear that the two appellants herein were intent on beating PW1 as opposed to robbing him. They asked him for Kshs. 20/= so as to allow him to pass. When the complainant refused to pay the illegal "**toll charges**" they set upon him and assaulted him. PW2 rushed to a nearby hotel to seek help. However, as stated above, the persons who came did not offer any help but merely became spectators. Indeed even when PW4 came to the scene he found the two still assaulting the complainant. The mobile phone that was picked by PW3 fell from PW1's pocket in the course of the scuffle.

In **Moses Odhiambo Oduor & 2 Others v Republic Kisumu Criminal Appeal No. 348 of 2008** this court differently constituted and whilst dealing with near similar facts determined as follows:

*"On our part having carefully considered the testimony tendered before the trial court we would agree with the two counsel that had the two courts below correctly directed themselves, they would have found the appellants guilty of the lesser but cognate offences of either assault or grievous harm rather than that preferred. The evidence on record shows that the attack upon the complainant was preceded by a disagreement or an altercation of some sort, possibly arising from a business rivalry. Again, the fight was protracted and involved other youths.*

*The attack upon the complainant could only be explained on the basis of some unexplained reason and not robbery. The two courts below having failed to direct themselves on this issue, the robbery charge cannot stand. We must, accordingly, give the benefit of doubt to the appellant and quash the conviction for robbery with violence and set aside the sentences of death. In their stead we substitute therefore convictions for grievous harm contrary to Section 234 of the Penal Code since the injury sustained by the complainant was classified as maim according to the P3 form – exhibit No. 1.*

In the instant case, the attack upon the complainant was because he refused to part with Kshs. 20.00, the illegal "toll" demanded by the appellants. We are therefore of the considered view that had the two lower courts properly directed themselves, they would have found the two appellants guilty of grievous harm and not robbery with violence contrary to section 296(2) of the Penal Code as the facts pointed to assault and not the offence of robbery with violence. Accordingly, we quash the conviction of robbery with violence and set aside the sentences of death. Instead, we find each of the appellants guilty of the offence of grievous harm contrary to section 234 of the Penal Code as the injuries sustained by the complainant were classified as "**maim.**"

Each of the appellants is sentenced to 15 years imprisonment. The sentences to run from the date of sentence, namely 29<sup>th</sup> July, 2010.

**Dated and delivered at Meru this 17<sup>th</sup> day of December, 2015.**

**R. N. NAMBUYE**

.....

**JUDGE OF APPEAL**

**P. O. KIAGE**

.....

**JUDGE OF APPEAL**

**F. SICHALE**

.....

**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original*

**DEPUTY REGISTRAR**