IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ.A)

CRIMINAL APPEAL NO. 19 OF 2014

BETWEEN

CLIFF BIKERI MOKUA…..... 1ST APPELLANT

EDWIN CHWEYA….....2ND APPELLANT

AND

REPUBLIC ….....RESPONDENT

(Appeal from Judgment of the High Court of Kenya at Kisii (Maina & Okongo, JJ) dated 30th January, 2014

in

HCCRA NO. 268 & 269 OF 2012

****

JUDGEMENT OF THE COURT

The appellants herein, ***Cliff Bikeri Mokua*** *(1st appellant)* and ***Edwin Chweya Mokua*** *(2nd appellant)* were arraigned before the Nyamira Chief Magistrate's Court in *Criminal case No. 685 of 2011* with the offence of robbery with violence contrary to ***section 296 (2)*** of the Penal Code. It was alleged in the particulars that the appellants, on 4th October, 2011 at Gekomoni area in Nyamira District within Nyamira County, while armed with dangerous weapons namely;- a knife and a metal wire, robbed ***Jared Mongare Mabea*** *("the complainant")* of a motor vehicle Reg. No. KBJ 817 N valued at Kshs.800,000/=, a cash sum of Kshs.850/= all valued at Kshs.800,850/= the property of the said complainant and immediately after the time of such robbery used actual violence against the said complainant.

The appellants denied the charge. The prosecution called a total of eight ***(8)*** witnesses namely, the complainant *(PW1)*, ***Gladys Kwamboka*** *(PW2)*, ***John Ntabo Otieno*** *(PW3)*, ***Pius Moseti Maangi*** *(PW4)*, ***James Mokaya Mageto*** *(PW5)* ***Livingstone Nyangau Momanyi*** *(PW6)*, ***George Meja Omamo***

(PW7) and PC ***Peter Gatimu*** *(PW8).* The appellants also testified on their own behalf and called no witness.

The learned trial Magistrate ***(J. Wanjala SPM,)*** was satisfied that the offence of robbery with violence was proved beyond reasonable doubt against the appellants,found them guilty and convicted them as charged but sentenced each of them to life imprisonment.

The appellants appealed to the High Court but their appeals were dismissed and hence this second appeal. Being a second appeal, our mandate is as donated by the provisions of ***Section 361 (1)*** of the Criminal Procedure Code, ***Cap 75*** Laws of Kenya, namely, to consider only issues of law. We are bound by concurrent findings of fact by the two courts below unless those findings have no basis in evidence. That position has been reiterated in many decisions of this Court. See for instance, ***Njoroge -Vs – Republic [1982] KLR 388, Omboko -Vs – Republic [1983] KLR 191*** and ***M'Riungu -Vs – Republic [1983] KLR 455.***

The appellants, through their advocates M/s Mochere & Co., raised the following issues of law:

1. ***That the High Court Judges failed in their duty to re-evaluate the evidence and reach their own independent conclusion;***
2. ***That the evidence did not support the charge;***
3. ***That the appellants' fair trial rights were infringed;***
4. ***Failure to call essential witnesses;***
5. ***Failure to adequately consider the defence***

Before considering those issues and the submissions thereon, we shall set out, in summary, the concurrent findings of fact made by the two courts below. The complainant, an employee of Kisii University in its Transport Department, used to supplement his income by selling milk in Keroka and Kisii town areas using his motor vehicle Reg. No. KBJ 817 N, a Toyota Fielder *("the said vehicle")*. He was desirous of buying a photocopier. The appellants at that time had a photocopier which they offered to sell to the complainant at Kshs.40,000/=. The photocopier however, could not operate without first being repaired. The sale was reduced into writing and the complainant made part payment towards the said purchase price. The photocopier was then given to a technician for repair. The photocopier still could not function but the appellants demanded balance of purchase price with threats which prompted the complainant to report to Kisii Police Station. The complainant then paid the balance but the photocopier would still not function. The complainant paid more money for a spare part which was availed by the appellants but which part did not improve matters as the photocopier could still not function. The complainant then sought the intervention of the father of the appellants since he believed the appellants had cheated him. Their father told him the appellants would refund his money from proceeds of sale of their motor vehicle which was undergoing repair. That was the relationship status between the complainant and the appellants before the 4th of October, 2011.

On that date the complainant was delivering milk at Keroka when he was approached by the appellants who told him they would refund his money. They boarded his said motor vehicle ostensibly headed to Kisii town but it was never to be. At a place called Kegati, the appellants ordered the complainant to stop and the 1st appellant who was strategically sitting behind the complainant threw a rope over the camplainant's head intending to place a noose round his neck. Luckly the rope got into the complainant's mouth and he realized he was in danger. He attempted to open the back door without success. The 2nd appellant joined the attack and the two pulled the complainant from the driver's seat to a place between the front seats and tied his hands with wire. The 1st appellant then took over the driving with the 2nd appellant sitting on the complainant as he held on to his neck. They wanted to know how much money the appellant had and told him that they had been paid to kill him.

Luckily after driving for sometime on smooth and rough patches of the road, the vehicle got stuck at a place called Gekomoni where the 1st appellant sought assistance from by-standers on payment of Kshs.200/= per helper. As the Good Samaritans went for equipment to use in the assistance, the 1st

appellant joined the 2nd appellant in strangling the complainant using the said wire and a scarf. The complainant then feigned death. The Good Samaritans returned and the vehicle was removed from where it had been stuck. The 1st appellant reversed the vehicle and attempted to drive away without paying the Good Samaritans the sum of Kshs.200/= per person which he had promised. The Good Samaritans started shouting demanding their payment. A crowd formed. As fate would have it, the vehicle got stuck once more. The 1st appellant left the vehicle and called the Good Samaritans aside as if he wanted to pay them. A lady who had called the Good Samaritans went near the vehicle and saw the complainant who was then tied and alerted members of the public. When the appellants were asked who the person was, they said he was their father who was mad. The complainant struggled with the 2nd appellant and attempted to open the car door and was then rescued by members of the public. The appellants were then apprehended.

Gladys Kwamboka Morara was the lady who called the Good Samaritans and first noticed the complainant when the car got stuck the second time. John Ntabo Otieno and James Mokaya Mageto were the two Good Samartians who were called by Gladys and who removed the vehicle from where it was stuck the first time and who were not paid as promised and whose shouts attracted members of the public.

Among the members of the public was George Meja Omamo who was also the village elder of Gekomoni village. He testified that the vehicle got stuck near his land and he was attracted to the scene by the commotion caused by the appellant's failure to pay Kshs.200/= to the Good Samaritans as agreed. At the scene, he saw the complainant lying in the vehicle. He went for a rope to tie the appellants as he suspected foul play. When he returned he saw the 1st appellant attempting to escape and was apprehended. According to Meja, members of the public tried to administer mob justice upon the appellants prompting him to call the area Assistant Chief, Livingstone Nyangau Momanyi. The Assistant Chief in turn informed the OCS, Nyamira who dispatched police officers to the scene. The appellants were then arrested.

The complainant was treated at Nyamira District Hospital by Pius Moseti Maangi, *(clinical officer)*. He found a cut wound on the complainant's upper lip; swellings and tenderness in the right eye; bruises and swelling round the neck; anteria chest tenderness and swelling; bruises and tenderness on the left wrist. The clinical officer classified the injuries as harm.

The appellants gave unsworn statements in their defence and denied committing the offence. They alleged to be victims of attacks pre-arranged by the complainant first by people who joined them in the vehicle and by others who met them on motor bikes on a pretended journey to Kisii allegedly forced upon them by the complainant. Members of the public who included school children, according to the appellants, engaged the motor bike attackers in a fight which the former appeared to be winning until a chief appeared on the scene and chased away the attackers. According to the appellants, police officers, including the OCS of Nyamira Police Station, arrived at the scene who, despite protests from members of the public, arrested them.

In his judgment, the learned Senior Principal Magistrate first set out the evidence which was adduced before him in detail after which he analysed it. Following the analysis, he believed the evidence of the complainant. He stated:

> ***"From the evidence of the complainant, eye witnesses, clinical officer and the investigating officer I believe the complainant was indeed injured. He could not have been injured if he was the one who had kidnapped the accused persons and tied them. I believe that the two accused persons carjacked the complainant when he gave them a lift in his car and they tied him and drove him to Gekomoni where he was rescued. He had been tied and accused 2 was sitting on his (him) holding the rope and wire he was tied with. He was tied in his mouth, neck and left hand.***
> **….....**

….....

The accused persons do not deny to have been involved in the incident. Their defence that they were the victims is not true. The eye witnesses had no reason to (lie) against the accused persons."

On the ingredients of the offence of robbery with violence, the learned Senior Principal Magistrate stated:

"I believe the offence of robbery with violence was being convicted (sic) (committed)..... The complainant had already been robbed because he had been driven by the accused persons from Nyosia along Keroka – Kisii road upto Gekomoni area in Nyamira County which is a long distance from Nyosia.The ingredients required in a robbery with violence case have been proved because there was violence used on the complainant by the two accused person(s) who tied him and immobilised him and took over his vehicle registration number KBJ 817 N. The weapons used included a wire and a rope which injured him in the process. Also a knife was found in the vehicle as well as a piece of timber and a piece of wood, a scarf and other implements."

In the end the learned Senior Principal Magistrate found the appellants guilty as charged, convicted them and sentenced them as already stated.

The findings of the learned Senior Principal Magistrate became the subject of the first appeal before the High Court which considered the entire evidence and in dismissing the appeal, stated as follows:-

"We are satisfied that the conviction of the appellants was safe. The offence occurred in broad day light. In their defences both appellants conceded traveling in his car on the material day but contend that it was the complainant who planned to harm them but not vice -versa. It was their evidence that as they drove to Keroka in the complainant's car and on reaching a place called Otange another car (probox) swerved infront of their car and two men got out and as the complainant sat comfortably without doing anything the two men got into the car and begun assaulting them and calling them fools. The complainant communicated with the men as one sat on the 1st appellant. The car stopped after sometime and when they saw some women coming towards the car they raised the alarm by making a lot of noise. The two men ran off as the women went to their rescue. The compliant went to the back and tried to knock the 2nd appellant down but a villager intervened and demanded to know what was happening. Soon men on seven motor bikes arrived and they started beating the appellants. Those villagers who had rescued them tried to intervene but to no avail as he said he had been robbed of his car. They tried to say that he was trying to avenge the photo copier but they did no listen as some villagers claimed the complainant had married in that area. The men on the motor bikes overpowered the villagers and beat the appellants mercilessly. It was then that chief came and rescued them. Police officers came to the scene but despite pleas by the villagers that they were not thieves they were treated as such and taken to Nyamira Police station.

13. ***These defences which were not sworn did not shake the sworn testimonies of the prosecution witnesses, all of who corroborated the evidence of the complainant.***

14. ***Indeed PW2, PW3, & PW5 gave very consistent evidence.They were working separately in their respective farms when they saw the vehicle stall. Indeed PW2 is the one who called PW3 and his workers to go and push the vehicle and told them the driver had promised to pay. These witnesses attested to the fact that the driver attempted to leave without paying them but car got stuck again. It was when waiting for their pay after it stalled the second time that they noticed some one in distress in the car. All these witnesses identified that person as the complainant***

and the persons who were apprehended as the two appellants. It is apparent from the evidence that none of the witnesses knew the complainant or the appellants before ….....

The defence that they (appellants) were victims rather than the culprits was therefore an after thought and was not convincing at all."

In the end, the learned Judges of the High Court dismissed the appellants' appeal and hence the appeal before us.

Mr. ***Mochere,*** learned counsel for the appellants, submitted that the evidence disclosed that the complainant framed the appellants because of having lost his money on a photocopier which failed to function. Learned counsel made that submission because of what he called material conflict in evidence among the witnesses. He further submitted that the ingredients of robbery with violence were not demonstrated given that when the appellants entered the complainant's vehicle they were not armed and that some of the alleged weapons were recovered after the appellants had taken their pleas.

Learned counsel further submitted that there was breach of provisions of the Constitution when the prosecution failed to disclose their evidence and the prosecution further failed to call essential witnesses. It was learned counsels further submission that the appellant's right to legal representation was also infringed.

Mr. ***Abele,*** learned Assistant Director of Public Prosecutions, supported the appellants' conviction and the sentence imposed upon them. Learned counsel made that submission because the two courts below made concurrent findings on facts, and in his view could not be faulted. In his view, the two courts below analysed and re-evaluated the evidence respectively after which they concluded, and in his view properly, that the appellants had violently robbed the complainant of his car. It was also counsel's view that there was no breach of the appellants' fair trial rights under the Constitution and that their defences, besides being far fetched, were displaced by the overwhelming evidence the prosecution adduced. Counsel did not find any inconsistency between the charge and the evidence and prayed that the appeal be dismissed in its entirety.

We have considered the record of appeal, the grounds of appeal, the submissions of counsel and the relevant case law. On the exercise of the mandate of the first appellate court, we have revisited the judgment of the High Court, passages of which we have reproduced above. The learned Judges approached the matter this way. They set out the issues for determination in the appeal. They then outlined the facts of the case before the trial court by considering, in summary, the evidence tendered before the trial court before reminding themselves of their duty as a first appellate court. They then analysed and reviewed the evidence and reached their own independent conclusion. We find nothing wrong with the approach adopted by the learned Judges. The approach was in line with the guiding principle that it is the duty of the first appellate court to reconsider the evidence, evaluate it, and draw its own conclusion in order to satisfy itself that there is no failure of justice but not merely to scrutinize the evidence to see if there was some evidence to support the trial court's findings and conclusion. The complaint that the High Court failed in its duty to re-evaluate the evidence and draw its own independent conclusion is therefore without merit and we reject it.

On the complaint that the evidence did not support the charge, learned counsel submitted, ***inter alia,*** that whereas a knife was mentioned in the charge sheet, there was no evidence that it was used. Indeed, according to learned counsel, the complainant expressly stated that the appellants were not armed when they entered his vehicle. Counsel added that the said knife and other items, which allegedly belonged to the appellants, were recovered after the appellants had already taken their pleas. Our own consideration of the record reveals that a knife was not indeed used in the robbery. However, both courts below accepted the evidence that on the material day as the complainant drove his vehicle in the company of the appellants at a place called Kegati, the 1st appellant who was seated behind the complainant, threw a rope over his head intending to strangle him but the rope got into the complainant's mouth. The appellants then tied the complainant with electricity wire and the 1st appellant took over the driving of the vehicle as

the 2nd appellant sat on the complainant with hands firmly on his neck. The charge sheet indicated the appellants were armed with dangerous weapons among them a metal wire. In our humble view, a metal wire would include electricity cable or wire which came out clearly in the evidence. In any event, other elements of the offence of robbery with violence were proved. In the case of ***Ganzi and 2 others -Vs – Republic [2005] KLR 52,*** this Court, differently constituted, set out the elements of the offence of robbery with violence as follows:-

(a) The offender is armed with any dangerous or offensive weapon or instrument; or

(b) The offender is in the company of one or more people; or

c. ***At or immediately before or immediately after, the offender wounds, beats, strikes or uses other personal violence against any other person.***

It is not a requirement that all the above elements be proved. It is sufficient if one is demonstrated.

Applying those principles to the totality of the evidence on record, we think the appellant's complaint that the evidence did not support the charge is without substance. The appellants in the case before us were two. The complainant was also injured. The clinical officer of Nyamira District Hospital testified that he treated the complainant for injuries on the neck, upper lip, left wrist, left eye and chest. He classified the injuries as harm. Further, Gladys, Ntabo, and Mokaya testified of the weak condition of the complainant when he was rescued. Gladys thought he was dead; Ntabo also thought the complainant was not alive and appeared swollen all over, and Mokaya stated that the complainant was about to die. Clearly therefore two elements of the offence of robbery with violence were proved. In the premises, the complaint that the evidence did not support the charge as laid is without merit and we reject it.

The appellants also complained about the prosecution's failure to call essential witnesses. Learned counsel for the appellants submitted that one ***Nyandieka*** whose statement was recorded by the prosecution was not called to testify and so was the OCS of Nyamira Police station and the scenes of crime personnel. Under ***section 143*** of the Evidence Act, no specific number of witnesses are required to prove any fact unless the law says so. The duty of the prosecution is to present before the trial court such witnesses as it thinks will establish its case beyond reasonable doubt. We have considered the record of this appeal and find nothing to suggest that the prosecution failed to discharge its duty. As we have already stated, the prosecution adduced evidence before the trial court which demonstrated, beyond reasonable doubt, that the complainant was robbed by the appellants. In our considered view, the failure to call Nyandieka did not prejudice the appellants. His statement was in any case produced by the appellants and as the learned trial magistrate found, the same was in tandem with the evidence of Glays, Ntabo and Mokaya. In our view, if Nyandieka had been called to testify, his evidence would only have fortified the case for the prosecution. The same is true of the ***OCS*** and the scenes of crime personnel. The prosecution availed eye witnesses to the robbery against the complainant. Those witnesses left no doubt in the minds of the two court's below that the complainant was robbed by the appellants in the manner described by the witnesses. The OCS and the scenes of crime personnel would not, in our view, have adduced better evidence than that of the eye witnesses. Further, the case presented by the prosecution was not a doubtful one. It was in our view, water-tight and the evidence of the OCS and the scenes of crime personnel would have added no value to it. In the premises, the appellants' complaint with respect to alleged failure to call essential witnesses is without merit and cannot stand.

We turn now to the complaint that the appellants' defences were not adequately considered. With due respect, we find this complaint without substance. We make that finding because the evidence of the complainant, Gladys, Ntabo, Moseti and Mokaya completely dislodged the appellants' defences that they were the victims rather than perpetrators of the offence of robbery with violence. Our consideration of the record, shows that the appellants' said defences were considered in some detail by the two courts below and were thereafter properly rejected.

Lastly we turn to the appellants' complaint that they were not accorded a fair hearing. In this regard the appellants contended that the prosecution failed to disclose their evidence prior to the hearing; that the

appellants' right to legal representation was infringed and that the appellants were ordered to wear different clothes to facilitate their identification which action infringed Article ***50 (1)*** of the Constitution, 2010. Our perusal of the record shows that after the testimony of the complainant, the learned Senior Principal Magistrate recorded as follows:-

"COURT: Both accused are identical twins, Issue of identification."

And in his judgment, the learned trial magistrate stated:-

> ***"It must be noted that the two accused persons are identical twins. It is not easy to differentiate them. I even in court the (sic) it was decided that they do not wear the same clothes so that when they are seated in court we would know where dress (sic) Accused 1 or Accused 2 is wearing or the witnesses would identify by the positions in the dock."***

We note that the difficulty of differentiating the appellants was expressed by the Court. However, no witness expressed such difficulty. The complainant on his part, was familiar with the appellants since they had a business transaction before and no issue of their identification arose. In the premises in our view no case has been made out with regard to breach of Article *50 (1)* of the Constitution, 2010.

With regard to alleged breach of the appellants' right to legal representation, we think nothing turns on the same. We say so, because the appellants had the onus to organize their representation as correctly submitted by Mr Abele. They initially engaged counsel who withdrew from acting and it was upto them to engage services of another counsel if they saw wished. They did not. As at the obtaining period when the matter was heard, the state had no duty to hire an advocate for an accused person in Criminal cases. In the premises allegations of breach of Constitutional provisions have no merit and we reject them.

The upshot of the totality of above assessment is that we find no merit in this appeal. The same is dismissed in its entirety.

DATED AND DELIVERED AT KISUMU THIS 19TH DAY OF SEPTEMBER 2014.

J.W. ONYANGO OTIENO

….....

JUDGE OF APPEAL

F. AZANGALALA

….....

JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR