IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OKWENGU, MAKHANDIA & SICHALE, JJ.A.)

CRIMINAL APPEAL NO. 56 OF 2014

BETWEEN

1. FESTUS KAHINDI CHARO

2. KINGI FONDO SHUTU

3. AMANI SHUTU SHUTU

4. BIRIA CHARO SHUTU ……APPELLANTS

AND

REPUBLIC ……..……RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Malindi (Meoli & Tuiyot, JJ.) dated 14th March, 2010

in

H.C.Cr.A. Nos. 134, 135, 136 & 138 of 2010)

****

JUDGMENT OF THE COURT

The appellants, ***Festus Kahindi Charo, Kingi Fondo Shutu, Amani Charo Shutu*** and ***Biria Charo Shutu*** were charged with two counts. In the count I they were charged with the offence of robbery with violence contrary to ***section 296(2)*** of the Penal Code. The particulars were that:

"On the 28th day of September, 2006 at Mbuzi Wengi area in Malindi Location within Malindi District of the Coast Province jointly with others not before court while armed with offensive weapons namely pangas, knives, stone and rungus, robbed JAPHET NOTI CHARO of one radio make, SONY, VCD machine and five mobile phones all valued at Kshs.40,500/= and at or immediately before or immediately after the time of such robbery used actual violence to the said JAPHET NOTI CHARO."

In Count II the appellants were charged with the offence of malicious damage to property contrary to

section 339(1) of the Penal Code. The particulars were that:

"On the 28th day of September, 2006 at Mbuzi Wengi area in Malindi District of the Coast Province, jointly with others not before court, wilfully and unlawfully damaged six (6) jugs two (2) mugs all valued at Kshs380/= the property of JAPHET NOTI CHARO."

The case was initially heard by ***Joshua Kiarie*** the then Senior Principal Magistrate Malindi Law Courts who recorded the evidence of PW1. However, on 17th December, 2009 the trial commenced *de novo* before ***L. W. Gitari***, the then Chief Magistrate Malindi Law Courts who on 2nd December, 2010 found the appellants guilty of the offence of robbery with violence and accordingly sentenced them to death as by law prescribed. They were however acquitted of Count II.

The appellants were dissatisfied with the conviction and sentence and filed an appeal to the High Court. On 14th May, 2012 ***Meoli & Tuiyot, JJ***. dismissed the appellants appeals hence precipitating the appeals before us. Each of the appellants filed his grounds of appeal. The 1st appellant raised the following grounds:

"1. ***That the learned judges ered*** (sic) ***in law for re-instating the death sentence without seeing that the same was/is unjustified as the charge sheet used at the trial was fatally and incurably defective.***

2. That the learned appellate judges erred in law for upholding the trial Courts decision without seeing that the evidence adduced at the trial was marred by contradictions, fabrications and inconsistencies.

3. That the honourable judges erred in law when they failed to see that the trial Magistrate was unjust to me as some essential witnesses were left out of the prosecution case, contravention (sic) ***of sections 150 and 125 of C.P.C. and evidence act respectively.***

4. That the learned judges erred in law for retaining a death sentence without seeing that the charge in question was cooked as it was not even reported to police.

5. That the honourable judges erred in law for failing to see that the trial Magistrates decision to dismiss my defense statement was unjustified as the same was sworn, watertight and truthful."

The 2nd appellant raised the following grounds:

"1. ***That the honourable judges erred in for maintaining that I continue serving a death sentence yet the charge sheet was used*** (sic) ***as the trial was drafted contrary to the law hence defective.***

2. That the learned judges erred when they supported the original conviction and sentence without seeing that the robbery charge is a framed one as it was not even reported to police.

3. That the honorable judges erred in law for upholding the trial Courts decision yet the evidence used at the trial was full of contradictions, fabrications and inconsistencies hence in-admissible.

4. That the honorable judges erred for meting (sic) ***on me the original conviction and sentence without seeing that it was prejudicial when the prosecution case was closed yet some essential witnesses had not been called to testify.***

5. That the learned judges erred in law for seeing my defense statement useless yet the same was not watered down any (sic) ***at the trial."***

The third appellant raised the following grounds:

"1. ***That the honourable judges erred in law and fact for upholding the decision of the trial Magistrate***

yet the charge sheet used at the trial was inadmissible as it was drafted contrary the law hence rendered fatally defective.

2. That the honourable judges erred in law for reaching their decision without seeing that the evidence of prosecution was dominated by glaring contradictions, fabrications and inconsistences.

3. That the learned appellate judges erred in law for supporting the trial Magistrate decision, without detecting that (sic) ***robbery charge is*** (sic) ***framed as the same was not reported to police hence the same was an afterthought.***

4. That the learned honorable erred in law when they failed to see that the case was not proved beyond reasonable doubt as some essential witnesses were left out of the prosecution case.

5. That the honorable judge erred in law for yet again dismissing my defense statement yet the same was sworn watertight and contained the whole truth."

Whilst the 4th appellant listed the following as his grounds of appeal:

"1. ***That the honourable judges erred in law foe*** (sic) ***upholding the trial Courts decision that I continue with the death sentence without seeing that the charge sheet used at the trial was fatally and incurably defective something which is contrary to section 134-137 of the C.P.C.***

2. That the honorable learned judges erred in law for failing to interfere with the unjust (sic) ***trial magistrate decision yet testimonies of some witnesses were marred by glaring contradictions, fabrications and inconsistencies a contravention of section 163(1) of the evidence act.***

3. That the learned appellate judge erred in law for supporting the original conviction and sentence without detecting (sic) ***the charges were framed as the same was not reported to police.***

4. That the honorable judges erred in law for supporting the original conviction and sentence yet it was evident in the records that essential witnesses were left out of the prosecution case hence a violation of section 150 of C.P.C.

5. That the honorable judges erred in law for finding the original decision justified yet the truth of the matter was narrated at my defense evidence."

On 16th July, 2014 ***Mr. Ngumbau*** learned counsel for the appellants filed a supplementary ground of appeal to wit:

"That the learned first appellate court Judges erred in law by failing to find that section 215 of the Criminal Code was not complied with."

However, when the appeal came up for hearing before us, ***Mr. Ngumbau*** withdrew the supplementary ground of appeal filed by himself and adopted all the grounds of appeal filed by the appellants. He condensed them into two grounds to wit failure by the two courts below to analyze and re-evaluate the evidence and secondly failure to reconsider the appellants' defences. Mr. Ngumbau contended that the evidence on record did not disclose the offence of robbery with violence contrary to ***section 296(2)*** of the Penal Code. He further faulted the conviction on the basis that the evidence was full of contradictions.

In his response ***Mr. Wohoro*** the learned Assistant Director of Public Prosecutions opposed the appeal. He maintained that the inconsistencies in the prosecution case were not material. He countered the proposition that the evidence did not disclose the offence of robbery with violence by submitting that there were items that were stolen from PW1's premises.

We have had the benefit of looking at the evidence adduced in the trial court and the judgment made thereafter as well as the judgment of the first appellate court, the grounds of appeal as well as submissions

by the rival parties.

It is not in dispute that on 28th September, 2006 at about 3 p.m. PW1 ***Japheth Noti Charo*** was at his bar premises at Mbuzi Wengi in Malindi. While there, he was descended upon by six people who were very well-known to him. Out of the six (6) the four (4) appellants were subsequently arrested. According to PW1, the 2nd appellant ***Kingi Fondo Shutu,*** the 3rd appellant ***Amani Charo Shutu*** and the 4th appellant ***Biria Charo Shutu*** are his step-brothers while the 1st appellant ***Festus Kahindi Charo*** is his nephew. Of the four, the 1st, 2nd and 4th appellant each was armed with a rungu whilst the 3rd appellant was armed with a panga. The six viciously attacked him and left him for dead. His brother and daughter came to his rescue and took him to the Malindi District Hospital. They took away his phone, a Sony radio, a DVD deck as well as other mobile phones belonging to his customers which were being charged. The six also destroyed jugs and beer glasses in the bar premises.

On 29th September, 2006 PW3 ***Ebrahim Abdullahi*** a Clinical Officer of Malindi District Hospital filled PW1's P3 form. He classified the degree of injury sustained by PW1 as grievous harm.

PW2 ***Juliet Nyule Roselyn*** worked in PW1's bar as a waiter. On the material day she saw the four appellants and two others who were not in court attack PW1. The attack was also witnessed by PW4 ***Stephen Bahati Karisa*** as well as PW5 ***Kahindi Kazungu*** who were also in the bar. There was also PW6 ***Gabriel Katana*** who is PW1's son and was playing pool in the bar when his father was attacked.

At the close of the prosecution case, all the appellants chose to make sworn statements of defence and denied the charges levelled against them. They admitted however, that they were relatives. In their defences the 4th appellant and the 1st appellant alluded to the existence of a land dispute as a result of which they were charged with the offence of trespass in Court No. 3 in Malindi. The 3rd appellant and the 2nd appellant too denied having committed the offences.

This being a second appeal, our mandate is as stipulated in ***section 361*** of the Criminal Procedure Code which provides that:

"361(1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section:-

a. ***On a matter of fact, and severity of sentence is a matter of fact: or***

b. ***Against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence.***

The above provision of the law was amplified in the case of ***Hamisi Mbela & Another v. Republic*** Mombasa Court of Appeal ***Criminal Appeal No. 319 of 2009 (UR)*** wherein this Court held:-

"8. This being a second appeal, this court is mandated under section 361(1) of the Criminal Procedure Code to consider only issues of law. As was held in *M'Riungu vs Republic [1983] KLR 445.*

Where a right of appeal is confined to questions of law, an 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 decision 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 Ltd (t/a MBS Fastenings****)."***

This position was further reiterated by this Court in ***John Sadera v R. Nakuru Criminal Appeal No. 242 of 2008 (UR)*** where it was held *inter alia* that only issues of law may be raised and considered in a

second appeal to this Court.

The ingredients of the offence of robbery are well defined in ***section 296(2)*** of the Penal Code. In ***Johana Ndungu v R. (Criminal Appeal No. 116 of 1995 (UR),*** this Court said:

"In order to appreciate properly as to what acts constitute an offence under section 296(2) one must consider the sub-section in conjunction with section 295 of the Penal Code. The essential ingredient of robbery under section 295 <u>is use</u> of or threat to use actual violence against any person or property at or immediately before or immediately after to further <u>in any</u> manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in section 296(2) which we give below and any one of which if proved will constitute the offence under the sub-section.

1. ***If the offender is armed with any dangerous or offensive weapon or instrument, or***

2. ***If he is in company with one or more other person or persons, or***

3. ***If, at or immediately before or immediately after the time of the robbery, he wounds, beat, strikes or uses any other violence to any person."***

It follows that the threat or use of actual violence must be in furtherance of an act of stealing.

In the instant case, the particulars of the charge against the appellants is that they robbed PW1 of one radio make Sony, VCD machine and five mobile phones. It is instructive to note that there was a second charge of malicious damage to property contrary to ***section 339(1)*** of the Penal Code. The particulars of the charge in Count II were that the appellants jointly with others not before the court wilfully and unlawfully damaged six jugs and two mugs being the property of PW1. The question that we must address is whether there was robbery (*or theft*) at the time PW1 was attacked. There is uncontroverted evidence that PW1 and the appellants were all related. It would appear that PW1's father who was also the father of the 2nd, 3rd and 4th appellants was polygamous as according to the 2nd appellant their father had 86 wives. He was said to have had over 300 children. It would also appear that although PW1's father owned a huge chunk of land (*the 2nd appellant described it as a size of a sub-location*) there were disputes in the family that related to inheritance of the land. Indeed the 1st and 4th appellants had been charged in Malindi Law Courts for the offence of trespass. Was this the motive for the vicious attack on PW1? PW7, ***Pc. Salim Omar*** the investigating officer conceded in cross-examination that the initial report as recorded in OB No. 31 of 29th September, 2006 was that of assault. He further conceded that when the 4th appellant was arrested, entry No. 101/26/10/06 was made in the Occurrence Book and this entry was to the effect that he was to be charged with an offence of grievous harm. He confirmed that no report of robbery with violence was recorded in the Occurrence Book and further that investigations had revealed that there was a land dispute.

We have also looked at the P.3 form filled by PW3 and note in particular that the section that deals with "***The brief details of the alleged offence"*** which is usually recorded by the police on receiving a complaint, it was indicated therein as follows:

"alleged to have been assaulted by six people known to him, please examine him for police action".

For the foregoing reasons, we have come to the conclusion that the vicious attack on PW1 was not in furtherance of an act of stealing, but was a result of an existing dispute over their late father's estate. The appellants ought not to have been charged with the offence of robbery with violence contrary to ***section 296(2).*** Accordingly we allow the appeal, quash the conviction and set aside the sentences of death imposed on the appellants. In lieu therefore we substitute the offence of robbery with violence with that of grievous harm contrary to ***section 231(a)*** of the Penal Code and convict them of the said offence. We shall impose a sentence of 9 years imprisonment. We further direct that the sentence of 9 years shall take effect from the date of conviction and sentence that is 2nd December, 2010. It is so ordered.

Dated and delivered at Malindi this 9th day of October, 2014

H. M. OKWENGU

……

JUDGE OF APPEAL

ASIKE-MAKHANDIA

……

JUDGE OF APPEAL

F. SICHALE

……

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR