REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEALS NO 53 & 54 OF 2014

VINCENT KIOKO MULI……1ST APPELLANT

JOSHUA MUNYAO MULI……2ND APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(An appeal arising out of the judgment and sentence of L. Simiyu Ag. SRM in Criminal Case No. 447 of 2013 delivered on 4th April 2014 at the Chief Magistrate's Court at Machakos)

JUDGMENT

The Appellants were charged in the trial Court with the offence of robbery with violence, contrary to section 295 as read with section 296(2) of the Penal Code. The particulars of the offence were that on the night of 23rd day of February 2013 at Kathiani sub-location in Kathiani District within Machakos County, jointly while armed with dangerous weapons namely a knife and a rungu, robbed Samuel Muli of Kshs 2,600/= and immediately before or immediately after the time of such robbery wounded the said Samuel Muli.

The 1st and 2nd Appellants pleaded not guilty to the charges on 28th May 2013 after amendment to the charge sheet. They were tried, convicted of the offence and each sentenced to death. The Appellants are aggrieved by the judgment of the trial magistrate, and preferred these appeals against the conviction and sentence.

The grounds of appeal for both the 1st and 2nd Appellants were that the trial magistrate erred by convicting the Appellants on the uncorroborated evidence of the complainant; the trial magistrate failed to evaluate the evidence of PW5 who testified that he investigated charges of assault and not robbery with violence; the trial magistrate erred in relying on the evidence of PW2 who had problem with her sight and could only see from close range; the trial magistrate failed to give weight to the evidence of PW6 who testified that the complainant seemed to have been hit by a blunt object contrary to assertions by PW1 who alleged that to have been assaulted by a knife; and also by not giving weight to the evidence of PW5 who testified that there was bad blood between the Appellants and complainant.

Further, that the trial magistrate erred in convicting the Appellants for the robbery with violence when the weapons said to have been used were not produced in court, there was no evidence that PW1 was robbed of Kshs. 2,600/=, and when PW3 and PW4 testified that they fled the scene and never saw the Appellants rob the complainant. The Appellants claimed that the trial magistrate erred in convicting them

on evidence that did not meet the required standard of beyond reasonable doubt.

The Appellants' Advocate, Andrew Makundi & Co Advocates, filed submissions dated 17th November 2015 wherein he reiterated the grounds of the appeal set out in the foregoing, and pointed the Court to the evidence by various witnesses that he relied upon in this regard. Reliance was also placed on the decision in **Maitanyi vs Republic, (1986) KLR 198** on the treatment of evidence by a single witness, and also on the decision in **Elizabeth Gitiri Gachanja & 7 Others vs The Republic,** (**2011) e KLR** that evidence relied upon to convict in capital offences must be of high quality, credible and beyond reasonable doubt.

Cliff Machogu, the learned Prosecution Counsel, conceded the appeal in a written submission dated 18th November 2015. The counsel submitted that there were inconsistencies in the testimony of PW1 who testified that when he was attacked by the Appellants there were other people present; however during cross examination by the 1st Appellant he testified that there were no other people present. As regards PW2, the learned counsel noted that she testified that she could only see at close range, contrary to her testimony that she witnessed the Appellants attack and rob PW1 while seated 100 meters away.

Further, that there were inconsistencies in the testimony of the investigating officer (PW5) as to the dates of reporting the incidence. The counsel also submitted that according to PW6, the complainant had been attacked with a blunt object and there was no evidence tendered as to the attack being made by a sharp object. Further, that the P3 form had indicated that the complainant had been treated one month after the attack, although PW6 had stated that the PW1 had informed him he had been injured 12 hours prior.

As this is a first appeal, we are required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that we never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

The key evidence given at the trial is as follows. The prosecution called six witnesses. PW1 was the complainant Samuel Muli Mutisya. He testified that on 23rd February 2013 he went home at about 9.30 am and found the two Appellants who were his sons. Further, that two women came to buy mangoes and that he had received Kshs. 370/- in payment which he proceeded to give to his mother. PW1 stated that he was grabbed suddenly on the neck by the 2nd Appellant while the 1st Appellant jumped in front of him brandishing a knife telling him he would die. He stated that he fought the two Appellants, but that they took Kshs 2,600/= from his pocket before striking him on the head and fleeing.

PW1 stated that his mother had witnessed what had transpired and had come to see whether he was alright. He also stated that the two women who had come to buy mangoes ran away, and were later forced to return the mangoes by the Appellants and came back to demand back their money. He stated that he had later reported the matter to Kathiani police station and also was issued with a P3 form. PW1 stated that the P3 form showed that the age of injury was 12 hours. He testified that he has been treated on the date of the incident but the P3 form was filled on a different date. He stated that he went to the hospital on two occasions.

PW2 was Naomi Mutisya, the complainant's mother. It was her testimony that the two Appellants had attacked PW1. She stated that the 1st Appellant had a knife and the 2nd Appellant held on to PW1's neck and had pushed him down. That at the time of the attack she was seated outside her house. She stated that her vision had been impaired by old age and could see only at close range. However, she stated that she had seen the Appellants clearly during the act.

PW 3 was Lydia Syumiti who testified that on 23rd February 2013 she has gone to buy mangoes at the complainant's home together with PW4 Kanini Mutuku. PW3 and PW4 testified that on that day they found PW1 who allowed them to pick the mangoes. They both stated that they had found the complainant and his mother.

PW3 and PW4 stated that when they finished paying for the mangoes and were leaving they heard a noise. When they checked where the noise was from they saw the 2nd Appellant holding a knife and the other Appellant was holding a stick. They stated that they were attacking PW1. They both stated that they did not witness the complainant being robbed but had seen the attack. PW4 stated that the complainant had an injury on the head. They stated that the Appellants had also threatened them.

PW5 was PC Wycliff Wangila Sikuku who stated that on 23rd February 2013 the complainant had come to the office complaining that his sons had assaulted him. It was his testimony that PW1 had said that he had been assaulted on the 22nd. He stated that the complainant had reported that he had also lost kshs. 2,600/= during the incident. PW5 testified that he found the Appellants at their home on 9/5/2013. He stated that he issued the complainant with a P3 form on 25th February 2013 after he had showed him a treatment card. He also stated that he had seen an injury on the elbow of the complainant but had not seen a cut on him.

PW6, Elijah Mureithi Nyaga, on his part confirmed filling the P3 form that was issued on 26/2/2013 for the complainant. The findings of the examination were that there was tenderness on the head and a wound on the upper elbow joint. He concluded that the injury was inflicted by a blunt object and was 12 hours old, and that the degree of injury was "harm". On cross examination he however stated that he had filled the P3 form and signed it on 26th March 2013. He stated that the disparity in dates could only be explained by the investigating officers.

After the close of the prosecution case, the 1st Appellant made submissions in which he stated that the evidence showed that robbery was not committed. The trial court found that the Appellants had a case to answer and put them on their defence. The Appellants gave sworn evidence and did not call any witnesses.

The 1st Appellant testified that on the day of the alleged robbery he had picked and sold mangoes to some customers and when he had gone to give his father the Kshs 370/= which was the proceeds from the mangoes, and that the complainant claimed that the mangoes were worth more money and asked the 1st Appellant to bring back the mangoes.. He further testified that the complainant had become agitated when he had told him he had spent the money from the sale of mangoes on 3 previous occasions on school shoes. He stated that when his father had gone to the house to bring a whip, he had fled and returned later to continue his routine duties of cleaning and feeding livestock. The 1st Appellant testified that the 2nd Appellant returned home at about 7pm that night and found him preparing dinner, and that he did not hear his father return that night. He claimed to have been falsely accused of the said crime.

The 2nd Appellant in his testimony denied the accusations and stated that on the material day 23/2/2013 he had just arrived from Mombasa at 8.00 a.m. He stated that after he reached home, he proceeded to the market to charge his phone. He stated that he saw two women come under a mango tree and had also seen his father whom he did not speak to. He stated that he returned to the market to pick his phone and called his mother who informed him that she had been chased away. The 2nd Appellant testified that he stayed at the market until 8.00pm and later returned home where he found the 1st Appellant preparing dinner.

We have considered the grounds of appeal, submissions and evidence given in the trial court, and find that the main issue raised in this appeal is whether the Appellants' conviction for the offence of robbery with violence was based on sufficient evidence. The offence of robbery with violence is provided under under section 296 (2) of the Penal Code which reads thus:

"If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death"

We are in this respect guided by the decision in **Johanna Ndungu vs Republic, Cr. App No. 116 of 2005 (unreported)** which sets out what constitutes robbery with violence under section 296(2) of the Penal Code as follows:

"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 ingredients of robbery under Section 295 are use of or threat to use actual violence against any person or property and at or immediately before or immediately after to further in any manner the act of stealing. Therefore the existence of the aforedescribed 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 the 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, beats strikes or uses any other violence to any person."**

We are also alive to the requirement that proof of any one of the above ingredients of robbery with violence is enough to base a conviction under section 296 (2) of the Penal Code as was held in **Oluoch vs Republic, (1985) KLR 549**.

The Appellant argued that there is insufficient evidence linking them to the offence of robbery with violence. In particular they submitted that the witnesses did not corroborate the evidence that the complainant was robbed, or that he was attacked by a knife. We however note that PW3 and PW4 did testify to seeing the Appellants with a knife and stick when struggling with PW1.

PW4 in particular stated that the 1st Appellant (Vincent) was holding a stick and the 2nd Appellant (Munyao) was holding a knife. PW3 during cross-examination by the 2nd Appellant also stated that she saw him holding a knife. PW1 and PW2 however testified that it is the 1st Appellant (Vincent) who had a knife and PW1 testified that it is the 2nd Appellant (Munyao) who had a stick. In addition PW2 did testify that she has a visual problem although she stated that at the time she saw the Appellants clearly.

Therefore there was conflicting evidence as to whether the Appellants were armed with offensive weapons at the time of the alleged offence. In addition PW3 stated during cross-examination that she did not see the Appellants robbing PW1. PW4 on her part testified that she saw PW1 give the 1st Appellant Kshs 100/= out of the money she paid for the mangoes and that is when he stopped struggling, and she believed that the Appellants wanted to rob their father. However, she also stated that she did not see PW1 being robbed by the Appellants. PW5 also testified that the money that was alleged to have been

stolen from PW1 of Kshs 2,600/= was not recovered from the Appellants, neither was it produced in evidence.

An important element of robbery with violence is that it must be proved beyond reasonable doubt that there was a robbery, and therefore an item that was stolen, as held in **Johanna Ndungu vs Republic, (supra)**. In the present appeal insufficient evidence was brought of such robbery. We accordingly find for the foregoing reasons that there was insufficient evidence to convict the Appellants on the charge of robbery with violence.

Notwithstanding this finding, tis Court is empowered by section 354 (3)(a)(ii) of the Criminal Procedure Code upon hearing an appeal from conviction to alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence. It is in this regard our opinion that the evidence that was tendered in the trial court disclosed that the Appellants did commit the lesser offence of common assault which is provided in section 250 of the Penal Code as follows:

“Any person who unlawfully assaults another is guilty of a misdemeanour and, if the assault is not committed in circumstances for which a greater punishment is provided in this Code, is liable to imprisonment for one year.’

See also in this regard the provisions of section 179(1) of the Criminal Procedure Code.

We are alive in this respect to the fact that PW6 did produce as evidence a P3 form wherein he classified the injuries suffered by PW1 as “harm”. The evidence by PW6 was that he saw the complainant on 23rd March 2013 which was the same date he filled the P3 form, and which was one month after the alleged assault and robbery incident. He stated upon cross-examination that he relied on the history as given by the patient (PW1).

We therefore find in the circumstances that the said P3 form and evidence of PW6 as to the harm that was suffered by PW1 does not meet the standard required of beyond reasonable doubt, as the PW6 did not examine the PW1 at the time of the alleged assault, neither did he produce any treatment notes in evidence which showed the results of the examination of PW1 at the time of the assault. The said evidence cannot therefore have support a finding of assault causing actual bodily harm contrary to section 251 of the Penal Code.

We accordingly quash the conviction of the Appellant for the charge of robbery with violence contrary to Section 296(2) of the Penal Code, and set aside the sentence imposed upon him for this conviction. We however find the Appellants guilty of the lesser offence of common assault contrary to section 250 of the Penal Code, and sentence the 1st and 2nd Appellants to one year imprisonment each which is the maximum sentence for assault under section 250 of the Penal Code. We note that the 1st and 2nd Appellants have already served a period of over one year sentence, and we accordingly order that the 1st and 2nd Appellants be and are hereby set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 23RD DAY OF DECEMBER 2015.

P. NYAMWEYA **E. MURIITHI**

JUDGE **JUDGE**