Case Number:	Criminal Appeals 128 & 138 of 2013 (Consolidated)
Date Delivered:	27 Nov 2015
Case Class:	Criminal
Court:	High Court at Murang'a
Case Action:	Judgment
Judge:	Hatari Peter George Waweru
Citation:	Joseph Obwire Hussein & another v Republic [2015] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	Accused acquitted
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEALS NOS 128 AND 138 OF 2013 (CONSOLIDATED)

(Appeals from Conviction and Sentence in Kangema SRM Criminal Case No 180 of 2010 – D Orimba, , SRM)

JOSEPH OBWIRE HUSSEIN

ISAAC IRUNGU NJERI…………….......………....……APPELLANTS

VERSUS

REPUBLIC..RESPONDENT

J U D G M E N T

1. The Appellants, **Joseph Obwire Hussein** (who was 2nd accused in trial court) and **Isaac Irungu Njeri** (1st accused), were charged with, tried for and convicted of **simple robbery** contrary to **section 296(1)** of the ***Penal Code***. It was alleged in the particulars of the offence that on 28th April 2010 at Kirimahiga Village in Murang'a District within Central Province, jointly with others not before court, they robbed one **Samuel Kahiga Mucheru** of cash KShs 500/00, a ***Motorola*** mobile phone make C113, a wrist watch and one long trouser, all of an estimated value of KShs 4,500/00. They were each sentenced to serve fourteen (14) years imprisonment. They appealed against both conviction and sentence. Learned Prosecution Counsel for the Respondent does not support the conviction of either Appellant.

2. I have looked at the particulars of the offence in the charge sheet as it appears in the record of appeal. Those particulars pause a major problem to the charge. Robbery is defined as follows in **section 295** of the ***Penal Code*** –**"295. Any person who steals anything, and, at or immediately before of immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen, or to prevent or overcome resistance to its being stolen or retained, is guilty of the offence termed robbery."**

This means therefore that whether the offence is simple robbery or capital robbery, there must be, **at or immediately before or immediately after the time of the theft, use of, or threat to use, actual violence to any person or property in order to obtain or retain the thing stolen, or to prevent or overcome resistance to its being stolen or retained**. Any of these elements, as may be appropriate, must be alleged in the particulars of the offence. It is not sufficient to simply state that the accused ***robbed*** the complainant, as was the case here!

3. Simple robbery escalates to capital robbery under **section 296(2) if the offender is armed with any dangerous 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**. In the case of capital robbery therefore, any of these elements as may be appropriate must be alleged in the particulars of the offence.

4. The charge as framed against the Appellants did not in the particulars allege any necessary

elements to disclose the felony termed robbery, whether simple or aggravated. The charge was thus incurably defective, and the trial court should have rejected it.

5. As for the evidence placed before the trial court, the alleged offence was committed in the wee hours of the morning, at about 4.00 a.m. The complainant (PW1) and other eye-witnesses did not identify their attackers. The only evidence that tended to connect the 2nd Appellant (1st accused) to the offence was recovery from him of a black trouser one or two hours after the robbery which the complainant identified as his and as one of the items robbed off of him. His testimony was that he knew the trouser because he had had it for a long time and matched a coat he had. Police testimony was that he also tried the trouser at the police station and that it fitted him.

6. The 2nd Appellant did not deny that the trouser was recovered from him. But he claimed it as his. There was no evidence that he was accorded the same opportunity as the complainant was to try it to see if it would fit him! Bearing in mind the serious offence that he faced, this would have been the fair thing to do, and perhaps it would have belied the 2nd Appellant's claim to the trouser and remove any doubts that it might not belong to the complainant.

7. As it was, I am not satisfied that the tenuous identification of the trouser by the complainant was sufficient to found the conviction against the 2nd Appellant.

8. As for the 1st Appellant (2nd accused) there was really no evidence against him beyond the suspicion aroused by the fact that he was a "foreigner" in the area where he was arrested and the circumstances of his arrest.

9. The convictions of both Appellants would be entirely unsafe if the charge were not defective. But I have held that charge to be incurably defective.

10. I will in the event allow the Appellant's appeals in their entirety. The convictions entered against them are hereby quashed and the sentences imposed upon them set aside. They shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 18TH DAY OF NOVEMBER 2015

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 27TH DAY OF NOVEMBER 2015

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