Mundia v Republic (Criminal Appeal E006 of 2022)
[2024] KEHC 10580 (KLR) (29 July 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E006 OF 2022

CJ KENDAGOR, J

JULY 29, 2024

BETWEEN

ELIJAH WAITHAKA MUNDIA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against conviction and sentence arising in Othaya Law Courts Criminal case number E001 of 2021 delivered on 15th February, 2021 by Hon. M.N. Munyendo, P.M.)

JUDGMENT

1. Elijah Waithaka Mundia, hereinafter referred to as the Appellant, was convicted and sentenced to death for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. He was sentenced to ten (10) years imprisonment in respect of the 2nd count of sexual assault contrary to Section 5(1)(a)(i) of the *Sexual Offences Act* No.3 of 2006. The particulars in regards to the 1st count are that, on the 27th day of October, 2020 at Mumbuini village, jointly with others not before the court while armed with a dangerous weapon, namely a pistol, robbed AWG. KShs.150,000/- and at, or immediately before and immediately after the time of such robbery threatened to use actual violence on the complainant. The particulars in the second count are that, on the 27th day of October, 2020, at Mumbuini village, the Appellant unlawfully used his fingers to penetrate the vagina of AWG.

2. Being dissatisfied with both the conviction and sentence, the Appellant lodged this appeal with nine grounds. The grounds are summarized below:

    a. That the learned trial magistrate erred in law and fact on a defective charge sheet that was based on duplicity.

    b. That the learned trial magistrate erred in both law and fact by relying on uncorroborated evidence.

c. That the learned trial magistrate erred in law and fact by finding that the Appellant was in possession of a phone and phone number not linked to the Appellant but to other persons.

d. The learned trial magistrate erred in both law and fact in failing to recognize that the evidence adduced was materially contradictory to the root of the matter.

e. That the learned trial magistrate erred in both law and fact in failing to recognize that no information was availed in court to prove sexual assault on the complainant.

f. That the learned trial magistrate erred in both law and fact in failing to appreciate that the instant matter was not proved to the required standard of proof.

3. It is the duty of the first appellate court to re-evaluate and reconsider fresh evidence on record to arrive at its own conclusion while bearing in mind that it did not have the opportunity to observe the demeanor of the witnesses. This guiding principle is outlined in the case of Kiilu & another V Republic [2005] 1 KLR 174.

4. The appeal proceeded by way of written submissions.

Background

5. PW1, a clinical officer from Othaya sub-county hospital, testified that he filled the P3 form and told the court the medical history contained therein. He stated that the history given by the complainant was that a man entered her house and ordered her to lie on her bed, and inserted his finger in her vagina before stealing from her. He stated that there were no injuries on the head, thorax, abdomen, and upper and lower limbs. He assessed the age of the injury to the vagina as approximately six days old, and the degree sustained was harm. He stated that the complainant had normal external genitalia with negative return tests save for puss cells in the vagina, demonstrative of interruption of the vaginal lining. On cross-examination, he stated that the complainant was seen on the same day she was allegedly assaulted, and the P3 form was filled out six days later.

6. PW2, AWG, was the complainant. Her evidence was that on the night of 26th October 2020, she was alone in her house asleep when, at around 4.00 a.m, someone broke into her house and brandished a pistol in front of her while uttering the words, "Ni sisi tumekuja". She stated that her assailant held the pistol with his right hand, a torch in his left hand, and had worn a cap and covered his mouth with a mask.

She testified that she sat on her bed when she woke up and was pushed to lie down by her assailant, who then covered her with a Maasai shuka. She stated that the assailant asked for her Airtel pin and Safaricom Mpesa pin numbers, which she obliged; Equitel pin for her cell phone number, 0778 xxx 658, and the Pin for her Mpesa for cell phone line 0721 xxx 658. PW2 told the court that she was the church treasurer and had KShs.36,000/- for the church in a drawer and about Kshs.150,000/- on her Equitel line.

She further testified that the assailant asked her to sit up, pulled her skirt up, and inserted his fingers in her vagina on three occasions. According to Pw2, she got up at around 6.00 a.m. and went to her brother-in-law, who came and together they inspected the house and found that the kitchen window

glass was broken and the assailant had gained access by cutting the wire mesh and opening the door latches which had not been fastened with a padlock.

She stated that when she reported the matter to the police and applied to freeze the accounts, KShs.35000/= had been withdrawn three times from her account, and a loan of KShs.6000/= had been borrowed from Eazzy Banking. She testified that she was examined at Othaya sub-county hospital and narrated about additional items that she noticed were missing, including an umbrella, vest, and small bag three days later.

On cross-examination, she stated that the incident happened around 4 am and further that she had CCTV footage of the material date. She identified the Appellant at the dock as her assailant and stated that she recognized his voice and identified him through his eyes, nose, and height

7. PW3 was the arresting officer; his evidence was that he was contacted on 31st December, 2020 by an informant, who told him that a suspect they had been looking for a while had been seen in Othaya town. The suspect referred to the Appellant herein. He stated that he proceeded to Othaya town, where he was joined by two other officers and went to a barbershop where they found the Appellant having a haircut with two other patrons; he informed him of his right as they arrested him and found him with 53 Sim cards of different service providers; 12 memory cards, 6 Safaricom Sim cards, 2 Safaricom sim card plates, 26 Airtel lines, three Airtel plates, 9 Telkom lines, eight Equitel lines, one Nokia phone with two IMei/3569/35696809xxxxxxx EI no. 35696809xxxxxxx/35696809xxxxxxx; One ITEL phone IMEI no. 35653582xxxxxxx/39; Cash 3400/-; ID card no.2452xxxx and a brown wallet. This inventory PEx2 was signed by the appellant, the two other officers, and PW3.

   PW3 told the court that he escorted the Appellant and the other two barbershop patrons to Othaya police station and that in the Appellant's company, they went to the residence he stated as his home in Warazo Jet within the Kieni-West sub-county. According to PW3, the residents said that the Appellant did not live in the area.

   PW3 also informed the court that on January 2, 2021, he was asked by DCI officers to help conduct an identification parade. Eight people with similar physical features to the appellant were lined up, but the appellant refused to participate. PW3 stated that the appellant's allegation that his picture was taken was false. He also stated that the complainant's phones were recovered from the Accused. In cross-examination, he reiterated that at Warazo jet, the appellant's ex-wife and area chief confirmed that she had remarried and that the accused did not live at the home.

   He reiterated that following the appellant's refusal to participate in the parade, he indicated it in the form produced in court. He stated that only one phone was on during the arrest. In re-examination, he stated that the service providers confirm serial numbers and that the Appellant signed the inventory.

8. PW4 was an officer from the National Bureau Sub-County Registrar of Persons. She stated that she received a request from DCI to give details of certain ID card numbers, 2452xxxx and 293xxxx, wherein the former is for Elijah Waithaka Mundia (the Appellant) and the latter is for Peter Mburu Muchangi and produced them as Exhibit 5. In cross-examination, she stated that, as per the reports, the Appellant applied for a second ID card after losing it, which was issued on 8/6/2020.

9. PW5 stated that he works with the Safaricom Security Department law enforcement office. He stated that the process requests decrypt information concerning transactions of Mpesa for consumption by the people who request it. He stated that he received a request for processing from Othaya law courts vide MISC case no. E001 of 2020, as regards account no. 9792xxxxx for the period between 26/10/2020 to 30/10/2020.

He stated that he extracted the information for 0792xxx961, registered under the name of Peter Mburu Muchangi of ID number 29314776. He stated that the information captured gave details of the transactions done on the account from 26/10/2020 to 30/10/2020. He stated that on 27/10/2020 at 6:22 am, KShs. 35,000/ conversation ID number 386826xxxxxxx(indicating the original bank account where the money came from and deposited to 0792xxx961 from an Equity bank account, meaning that the transaction was done from the phone. Secondly, the second transaction was done on the same day at 6:25 am - a business payment was made from Equity Bank via the App for KShs 35,000/-and thirdly, on the same day, a transaction was made at 6:28 am for KShs 35,000/-. He stated that the three transactions took less than three minutes and that they could not tell the account holder from the records.

PW5 then testified that a call data record was generated from 0792xxx961, where he stated that the IMEI number 35653582xxxxxxxx was in use on 27/12/2020 and IMEI number 35635820xxxxxxxxwas in use as well on the same date until evening, with three different transactions up to 27/10/2020 at 15:07HRS. He stated that on 31/12/2020, a different number was used at 1726HRS and that a different handset, IMEI number 356968097xxxxxxxx, captured two transactions on 31/10/2020.

He went on to state that the phone in use on 31/10/2020 was a NOKIA handset, serial number 35696809xxxxxxxx, with a variance on the 15th digit as the report identified a O, whereas the phone is 3 as regards the service line 0792xxx961 that transacted twice 5:00 pm and 5:45 pm. He stated that the second device was an ITEL phone with 3 slots meaning it had three IMEIs:3565358xxxxxxxx, 35653582xxxxxxxx, and 3565358xxxxxxxx. He stated that the devices were in use on 27/12/2020. He clarified that for the two of the IMEI numbers ending with 239 in their report, the 15 digit is zero, though the report is a nine.

He stated that the first IMEI number ending with 247 was in use on 27/12 /2020 and is a direct correlation to the physical evidence and report regarding phone number 0792xxx961 for Peter Mburu. He stated that the said line was used in more handsets, but what he presented was critical to the case.

He stated that a certain handset of IMEI number 354120117xxxxxxxx yielded that other telephone lines had been used by that particular device, and they were 0723xxx007 on 24/10/2020 and 07929xxx621 on 27/10/2020.

PW5 stated that for line 0723 xxx 007, the details were registered as Elijah Waithaka Mundia of ID no 245xxxxx; he produced a history target of IMEI number 354120117907940 as exhibit 21 and subscriber details as Exhibit no. 22.

He stated that where a registering agent is not known, chances are that an ID can be used to register another line by a different person. He stated that an IMEI number is unique and two numbers never exist at any given time. He stated that the history of the IMEI number led to subsequent handsets being found in their report. He stated that Exhibit 19 contains the relationship between the recovered phone and Exhibit 21, given that the details of the other different numbers are in the appellant's name and cannot be separated. He stated that exhibit 19 was used in different handsets as IMEI numbers vary (510,520.050,740). In cross-examination, he stated that exhibits 18 and 19 were from Safaricom. He also stated that in reference to exhibit 18, 27/10/2020 reflects exhibit 19 and shows an SMSHe stated that the MPESA statement does not detail when the phone was used. He confirmed that the IMEI number ending in 940 was used on 27/10/2020. He stated that the gadget used was not in court. He mentioned that it is possible for someone to use another person's ID to register a line.

He also stated that the target line is currently registered under Judith Aoko, ID number 244xxxxx, from 17/12/2020 to 31/12/2020. He stated that it is not possible for a line to be registered under two names and confirmed that it had two different names as there had been a delay in updating.

He stated that the IMEI number is unique and used the phone number and that he did not investigate the physical device but he did investigate the phone number. He stated that the ITEL had 3 IMEI numbers, that the Nokia has 2 IMEI numbers and that each IMEI number is unique. In re-examination, he stated that he certified DFI-1 and Exhibit 19, and due to the system update, if there is a delay, it can give different details. In reference to exhibit 18, he stated that the money was transferred to Airtel 0108xx080 on the same date at 6:34 am KShs 70,000/- and another KShs 34,500 was sent to 0101xxx272 around the same time. He reiterated that it is impossible for a line to be registered in the name of two different people simultaneously, and Judith Aoko could have been the initial user before Mburu. He stated that data stays on the system for 60 days and gets deleted. He stated that he did not have the call date from 27/10/2020 to 11/11/2020 but had managed to get the data from the system to reveal information, such as the handset used on 27/10/2020(Exhibit 20).

10. PW6 was the investigating officer. He testified that on 27/10/2020 at 10:30 a.m., he accompanied the OCPD and DCIO to the scene at Mumbuini village in Chinga area. He narrated the history as shared by the complainant and produced the bank statement from Equity Bank. He stated that the statement showed how the money was transferred to 0792xxx961, totaling KShs 105,000/-. In three transactions, each of KSh. 35000/-. He further received documents showing an MPESA transaction concerning 0792xxx961 and showed that the money was transferred on 27/10/2020 in three tranches of KShs 35,000/- each and went to a certain Peter Mburu Muchangi.

He then stated that upon requesting details for ID numbers 293xxxx and 245xxxxx from the Registrar of Persons, he established that 245xxxxx belonged to one Elijah Waithaka Mundia, the Appellant herein, and 29314776 to one Peter Mburu Muchangi. He stated that he had not been able to trace Peter Mburu.

According to PW6, the Appellant was involved in the transactions as the ID was used to register the line. PW6 additionally told the court about the Appellant's arrest by PW3 and the inventory and recovered items.

Regarding the identification parade, he stated that the Appellant declined to attend the ID parade claiming he was photographed during the time of his arrest. The investigating officer produced the ITEL and Nokia Phones, 8 Equitel lines, six Safaricom lines, two Safaricom plates, 25Airtel lines, three Airtel plates,9 Telkom lines, assorted memory cards and the appellant's ID card as exhibits in the case.

He stated that the value of the stolen items was KShs. 150,000/-, and the lost money was KShs 148,000/-. He testified that he established from the crime scene that entry was made from the rear door and that the complainant had stated that she saw only one person, but from the commotion, other people were in the house from 4 a.m. to 6 a.m. He stated that the money was never recovered and that Peter Mburu may not exist as one may use a fake ID to register a number.

In cross-examination, he stated that the house had a CCTV camera but was covered in mud. He acknowledged that there was a marginal error of KShs 2,000 as the amount claimed to be stolen was 150,000, and the one reported was 148,000/-. He stated that exhibit 22, no. 0723xxx007, was registered on 20/6/2016, and the Appellant's card was issued on 6/8/2020 and could have been a replacement. He testified that he could not tell if the Appellant was in Naivasha prison in 2016. According to PW6, the other two people arrested with the appellant were not criminals nor persons of interest.

11. In his defence, the appellant testified that he had been selling avocadoes for many years. He stated that on 26/10/2020, he was in Karatina picking avocadoes from a lady's farm at around 5 p.m. when he and the driver of the vehicle they used, decided to spend the night in Karatina town/TumuTumu as there was a curfew in force and proceeded to Nairobi the following day at 11 a.m. He stated that he gathered avocados from various parts of the country until the day he was arrested at a barber shop in Othaya. He mentioned that he often visited Othaya while pursuing his grandmother's inheritance case.

    The appellant stated that he faced multiple charges when he was arrested and told the court that he refused to participate in the identification parade as a photo was taken against his will. He stated that there was a family dispute over land and that he was framed. He stated that as to the SIM cards presented in court, he served a sentence from 2013 to 2019. In cross-examination, he said he slept on a chair at his driver's place in TumuTumu. He stated that he was arrested on 31/12/2020 and gave his ID number as 245xxxxx and his phone number as 07221xxxx. He acknowledged that he had signed an inventory form but stated that the police had been used by his aunt, Lucy Muthoni, to frame him.

    He stated that he has been married for over 10 years with three children and is still with his wife. He stated that he had never known the complainant nor had a dispute with her. He gave his wife's name as Judy Wanjiku and maintained that he sells avocados for a living.

    DW2 stated that the Appellant was her son. She informed the court that after an accident on April 9, 2020, the Appellant had been taking care of her while she was incapacitated. She mentioned that she instructed the appellant to sell livestock and use the proceeds to invest in both her business and the Appellant's business. She also said that on 20th October, 2020, the Appellant called her to celebrate the court's verdict and that on 26th October, 2020, he went to pick up avocados. She stated that on 31/12/2020, the police came to her house and conducted a search. She told the court that upon learning of the Appellant's arrest, she went to the police station in Othaya and further stated that she was to witness the parade, which was aborted.

    In cross-examination, she stated that the Appellant refused to take part in the parade and that he claimed he had been photographed. She stated that she did not see the appellant being photographed and that theAappellant did not have a phone. She testified in court that when she was injured on 4/09/2020, she called her daughter to contact the Appellant. She mentioned that he had a phone number starting with 0722. She also stated that the Appellant resided in Nairobi before the arrest and lived with her after she got injured.

    DW2 told the court that the Appellant came to her house on the 26th and that on the 27th of October 2020, she was not with the accused at 4.00 a.m. She stated that her son's driver is Mwai and that she saw him for the first time on the night of the 26th. On re-examination, she stated that she got hurt on 4/9/2020 and that she knew her daughter's number off her head. She clarified that the land dispute involved the Appellant's aunt.

12. DW3 Francis Mwai stated that he lives in TumuTumu in Karatina and stated that the Appellant gave him work to transport avocadoes. He stated that on 26/10/2020, they harvested avocadoes at Waguta, then at Waruru, and then back at Waguta. He stated that since it was late, they spent the night at his house as it was past curfew time and that on the 27th, the next day, they travelled to Nairobi, sold the avocados, and returned home.

    In cross-examination, he stated that he had worked with the Appellant for a while and gave the Appellant's number as 0722xxxxx and that his number (DW3) was 07138xxxxxx. He stated that on the 26th, they slept at his place after harvesting avocados and that the Appellant slept in his son's room which is outside his house. He stated that the next day, they met at around 6:30 am.

He maintained that the Appellant did not sleep in his house's sitting room. He stated that it takes about two hours to travel from Chinga to Karatina. On re-examination, he stated that it is a distance of 5 kilometers to travel from TumuTumu to Karatina.

Analysis and determination

13. The Appellant was charged with the offence of robbery with violence contrary to Section 295, as read with Section 296 (2) of the Penal Code, together with the second count of sexual assault contrary to Section 5 (1) (a) (i) to the *Sexual Offences Act*. The Appellant has submitted that the charge was fatally defective in duplicity of the robbery with violence charges preferred under Section 295 and Section 296 (2) of the Penal Code.

14. Section 134 of the Criminal Procedure Code provides that a charge sheet should be drafted in such a way that; -

    i. it discloses an offence known in law;

    ii. offence is disclosed and stated in a clear and unambiguous manner such that the accused person pleads to a specific charge which is easily under stable so as to also enable the accused person prepare the defence; and

    iii. the charge should contain all the essential ingredients of the offence.

15. The ambiguity of the framing of the charges of robbery with violence has been dealt with by the courts. The Court of Appeal in Johana Ndungu v Republic [1996] eKLR set down the ingredients of robbery with violence and, in doing so, dealt with the thorny issue of Section 295 of the Penal Code as it relates to Section 296 (2). The Court stated:

    > " 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 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any 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 s.296 (2) which we give below, and any one of which if proved will constitute the offence under the sub-section:
    >
    > i. If the offender is armed with any dangerous or offensive weapon or instrument, or
    >
    > ii. If he is in company with one or more other person or persons,
    >
    > iii. Or if, at or immediately before or immediately after the time of the had a robbery, he wounds, beats, strikes or uses any other violence to any person."

16. The Court of Appeal in Paul Katana Njuguna vs. Republic [2016] eKLR held that:

    > " Although the side note describes section 295 as definition of robbery, it is evident that the section goes beyond mere definition and creates a felony termed robbery by setting out clearly the elements of that felony. We are alive to the fact that the First Schedule to the Criminal Procedure Code lists the offence of robbery under section 296(1) of the Penal Code; the offence of robbery with violence, under Section 296(2) of the Penal Code.

It is illustrative, however, that at the commencement of that First Schedule, the following caution is given: - ‘The entries in the second and fourth columns of this Schedule headed respectively 'offence' and 'punishment under the Penal Code', are not intended as definitions of the offences and punishments described in the several corresponding sections of the Penal Code, or even as abstracts of those sections, but merely as references to the subject of the section, the number of which is given in the first column.

This Court has on several occasions had to deal with difficulties presented in considering the true purport and intendment of Sections 295, 296(1) and 296(2) of the Penal Code.

In *Joseph Onyango Owuor & Another vs. Republic [Criminal Appeal No. 353 of 2008*] (UR), the appellants complained that Section 296(2) under which he was charged did not create an offence. He argued that Section 296(2) cannot, therefore, stand on its own. In his view, a charge under Section 296(2) could only be sustained if read with Section 295 of the Penal Code.

We rejected that argument in the following words: "Likewise, the submission that the violence envisaged under 296(2) is different from that envisaged under Section 295 of the Penal Code is untenable. Section 295, does not deal with the decree of violence being merely a definition section. It is analogous to Section 268 of the Penal Code which deals with definition of "stealing" and subsequent sections which deal with different categories of offence of stealing. Section 296(1) and Section 296(2) of the Penal Code deal with the specific degrees of the offence of robbery and have been framed as such".

The particulars as stated are clear and do support the offence of aggravated robbery. The defect is alleged to be in the statement of the charge in the count in which the appellants was charged with robbery with violence contrary to Section 295 as read with Section 296 (2). Is that fatal" We think not. In Joseph Onyango Owuor & Another -v- R (supra) this Court found that when dealing with the offence under Section 296(2) of the Penal Code the statement of the offence has to be read as referring to the aggravated circumstances of the offence of robbery provided for under Section 296(1) of the same code. The Court further concluded that "the submission that the violence envisaged under Section 296(2) is different from that envisaged under Section 295 of the Penal Code is untenable. Section 295, does not deal with the degree of violence being merely a definition section. We have considered the law on duplicity in charges as expounded in case law and academic treatises and find an interesting trend which seems to have emerged. In Laban Koti vs. R. [1962] 1 EA 439 (SCK) ... The test still remains as to whether or not a failure of justice has occurred. In our opinion, the result of the application of this test must depend to some extent upon the circumstances of the case and the nature of the duplicity". “In that case, the court held that the appellants were left in no doubt from the time when the first prosecution witness testified, as to the case which he had to meet and he could not, therefore, be said to have been prejudiced in any way. ...in Amos vs. DPP [1988] RTR 198 DC, the Court held that uncertainty in the mind of the accused person is the "vice at which the rule against duplicity is aimed and to counter a true risk that there may be confusion in the presenting and meeting of charges which are mixed up and uncertain. Back home, in Mwaniki vs. Republic [2001], EA 158 (CAK), this Court held as follows: "Where two or more offences were charged in the alternative in one count, the charge was bad for duplicity and a substantial defect was created that must be assumed to be embarrassing or prejudicial to an accused as he would not know what he was charged for and if convicted, of what he had been convicted" On appeal, this Court found that it was not possible to determine which offence the appellants had committed as several

offences had been charged in the alternative, the Court stated: "These clearly were separate offences charged alternatively in one count and in our view, we would respectively follow the decision of the Court of Appeal for Eastern Africa in Cherere's case which correctly set out the law when the court held that to charge two or more offences in the alternative in one count is not merely a formal but substantial defect and that in such a situation, an accused person must be taken to have been embarrassed or prejudiced as he does not know what he is charged with, and if convicted, of what he has been convicted". The issue of duplicity of a charge also came up in Dickson Muchiro Mahero vs. Republic [2002] eKLR... The Court found that, indeed, causing death is a distinct offence from dangerous or careless driving or obstruction and that particulars of any charge under Section 46 are offences in themselves. With regard to the appellants' argument that the charge as framed alleged two offences in one count namely, first, causing death by driving a motor vehicle at a speed and second, by driving a motor vehicle in a manner which was dangerous, the Court held that the particulars were merely intended to give the appellants reasonable information as to the nature of the offence he faced. After considering the record before it, the Court was satisfied that the appellants understood the charge he faced and was in no way prejudiced. The Court in that case cited with approval the English case of Ministry of Agriculture & Fisheries and Food vs. Nunn [1978] Ltd [1990], Cr. LR 268 DC, where the court emphasized that the question of duplicity is one of fact and degree; and that the purpose of the duplex rule is to enable the accused to know the case he has to meet. In the matter before us, we are unable to detect any prejudice which the appellants suffered. The record shows that the appellants suffered no confusion when the charge, as framed, was read to him and when the witnesses testified, he fully cross-examined them. He raised no complaint before both the trial court and before the High Court. So, while it would be undesirable to charge an accused person under both sections in the alternative, it would not be prejudicial to that accused person if the offences are not framed in the alternative. As we have already noted the rule against duplicity is to enable an accused know the case has to meet. We accept as the correct position in law that uncertainty in the mind of the accused is the vice at which the rule against duplicity is aimed. If there is no risk of confusion in the mind of the accused as to the charge framed and evidence presented, a charge which may be duplex will not be found to be fatally defective."

17. Applying the test in the present case, the Appellant was afforded a fair trial, the case proceeded in a language that he understood and the amended charge was read to the Appellant, to which he pleaded not guilty. The accuracy and correctness of the evidence were tested during the trial. From the cross-examination, he understood the charge that he faced to be robbery with violence. The issue of the duplicity of charges was never raised at the lower court, and there is no possibility that there was any other reference to different charges save for what was presented and read to the Appellant in court. There was no miscarriage of justice occasioned, and the defect in the charge was curable under Section 382 of the Criminal Procedure Code.

18. The Appellant faced a charge of robbery with violence in count 1. The elements of the offence of robbery with violence were set out by the Court of Appeal in the case of Oluoch-Vs-Republic [1985] KLR thus:

" Robbery with violence is committed in any of the following circumstances:

a. The offender is armed with any dangerous and offensive weapon or instrument; or

b. The offender is in company with one or more person or persons; or

c. At or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or uses other personal violence to any person ....".

19. The case of *Dima Denge Dima & Others vs Republic, Criminal Appeal Noal Appeal No. 300 of 2007* further held as follows;

> " ...The elements of the offence under Section 296 (2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence."

20. The trial court, in observing the complainant's demeanour, stated as follows;

> " I must also state that the complainant was candid and clear in her testimony. She did not embellish her encounter with exaggerations. She remained steadfast even in her testimony and the veracity of her testimony is not in doubt. I believed her."

21. In her testimony, PW2 stated that the assailant had a pistol, which she described as black in color, and stated that she could recognize it as such. The trial court assessed the conduct of the complainant beyond the witness' testimony and made a finding that her conduct was a clear sign that fear had been instilled in her and that she had legitimate apprehension that her safety was compromised. This conduct supports the testimony that the assailant was armed with a dangerous weapon.

22. In dealing with Count 1 and grounds 2 and 6 of the Appeal, I duly note that PW2, the complainant, is the only witness who saw the assailant that night.

In Kariuki Njiru & 7 others vs Republic, the court held inter alia that;

> " Law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error."

23. The court in Wamunga v Republic (1989) KLR 424 had this to say about identification:-

> " Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from possibility of error before it can safely make it the basis of a conviction."

24. This court is duty-bound to interrogate whether or not the circumstances in the case at hand were favourable for positive identification. The complainant said the ordeal lasted about two hours. She mentioned that the assailant wore a mask and a cap, covering most of his face except for his eyes and nose. Her observation of the assailant was brief as he quickly ordered her to lie down and covered her with a Maasai shuka.

25. The assailant allegedly brandished a torch, potentially hindering the victim's ability to identify him clearly. Additionally, the complainant, in her evidence before the court, stated that the torch shone very brightly and that the assailant approached and pushed her to go back to sleep facing down. She

remained in this position until the assailant asked her to turn. Even then, she remained lying down and could not, in the circumstances, be said to provide identification free from the possibility of error.

26. With the above finding on non-reliance on identification, I proceeded to re-examine and analyze the rest of the proven facts in the case. The courts have held that in considering circumstantial evidence, a combination of facts must create a network through which an accused cannot escape because the facts taken as a whole do not admit any inference but of his guilt.

27. The way to deal with circumstantial evidence was stated in TOPER V. R. (1952)A.C. as follows:-

> " Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the influence."

28. The evidence before the court is that money was transferred from the complainant's mobile lines during the robbery. The appellant is in the picture upon arrest in Othaya town shortly over two months after the date the matter was reported to the police. He was found with an assortment of sim cards from Airtel, Safaricom, and Telkom, memory cards, and two phones. The two phones are of makes ITEL and NOKIA. The ITEL has three SIM card slots, meaning it houses and operates three SIM cards, and the Nokia has one slot. Each SIM slot, when housing any given sim card from any service provider, has a unique, unchangeable IMEI number. This means that though different SIM cards may be slotted. The housing is still the same.

29. If a slotted sim card with a specific IMEI is inserted and used, then any transaction will bear that digital fingerprint, be it a call, SMS, or any communication that sees the device communicate with another party.

30. The question and the crux of this circumstantial evidence are: When the money was transferred by the Assailant on the morning of 27/10/2020, was it transferred to any of the four IMEI numbers unique to the phones found on the Appellant's person?

31. PW5 and PW6 gave crucial evidence on digital prints left behind due to the money transfers. PW5 stated that on 27th October 2020, 0792xxxxx was linked to IMEI no. 35653582xxxxxxxx The same phone number, 0792 940 961, on 27/10/2020, was then slotted into a device that had the IMEI number 356535820xxxxxxxx. On a later date to wit: 31/12/202, the same phone number, 0792 xxx xxx, was operated on a device with IMEI number 35696809xxxxxxxx. The Nokia phone, which the appellant had at the time of arrest, has the IMEI number 35696809xxxxxxxx. Further, PW 5 thereafter produced exhibit 19, which indicated that the phone number 0792 940 961 was used from an IMEI phone that was also found on the person of the Appellant.

32. The target number, though registered in the name of Peter Mburu, was found to have operated on a phone found on the Appellant's when he was arrested on 31/12/2020. Though registered in the name of Peter Mburu, the line was used on the morning of 27/10/2020 and the day of arrest on 31/12/2020. Thus, linking the appellant as the operator of the target line. The Appellant did not deny that the handsets were found on him. The prosecution tendered evidence that clarified the registration of mobile lines and displaced the defence as stated by the appellant. The inventory was properly taken, and the appellant signed the same; I have re-evaluated the evidence by the arresting officer and the investigating officer and I am persuaded that the items were in the appellant's possession.

33. Conclusively, the two handsets recovered from the Appellant had the exact IMEI numbers as captured in Exhibit 19, and the two handsets interacted with the target number. On 27/10/2020, 0792 xxx

xxx was paired with 35412011xxxxxxxx, and the same IMEI number was paired with 0723 xxx xxx on 24/10/2020 and 27/10/2020. 0723 xxx xxx is registered in the name of the appellant, and the 0792 xxx xxx, though registered in another name, was paired with the same IMEI number 354120117xxxxxxxx found in a phone that the appellant had at the time of arrest. The limbs of robbery with violence disjunctively proved are enough to prove the offence.

34. The evidence regarding the appellant's participation is so strong that there are no other co-existing circumstances that would displace his participation. The alibi defence presented lacks credibility, and no doubt has been cast on the prosecution's case.

35. On Count 2 on Sexual Assault contrary to Section 5 (1) (a) (i) of the *Sexual Offences Act* No.3 of 2006, given the evidence above that places the appellant at the scene, Pw2's testimony that the appellant inserted his fingers into her vagina is believable. She gave a detailed testimony that the appellant instructed her to sit up so as to have his finger in her vagina on three occasions. The medical evidence that the vaginal wall had puss cells is consistent with assault or forceful entry/penetration and corroborates the complainant's testimony.

36. In the decision of John Irungu Vs Republic (2016), EKLR, the Court of Appeal stated that penetration can be occasioned by any body part or object. The penetration by the appellant using his fingers amounts to sexual assault.

Conclusion

37. The upshot is that the prosecution has discharged the burden of proof to the required standard that the appellant broke into the complaint's house while armed with a dangerous weapon, making away with mobile money and hard currency. And that during the robbery, sexually assaulted the complainant.

38. I concur fully with the conclusions of the learned trial magistrate in convicting the Appellant in Count 1 of the offence of robbery with violence contrary to Section 296(2) of the penal code and Count 2 of Sexual Assault contrary to Section 5 (1) (a) (i) of the *Sexual Offences Act*, No.3 of 2006. The appellant was afforded a fair trial, and the conviction was safe. The appeal against conviction is accordingly dismissed.

On Sentence

39. The appellant was sentenced to death as per Section 296 (2) of the Penal Code in Count 1. A 10-year sentence was meted in count 2 but held in abeyance because of the death sentence. The death sentence is still valid in law and applicable as a sentence. The trial court considered the Appellant's mitigation, the criminal record presented by the prosecutor, and the aggravating factors in the victim assessment when determining the sentence. The trial court was cognizant of the seriousness of the offences.

40. The Appellant was convicted on 15th February 2022. On 19th July 2023, vide a gazette notice number 9566, the President, in the exercise of the powers conferred by Article 133 of *the Constitution* of Kenya and Section 23 (1) of the *Power of Mercy Act*, 2011, commuted the death sentence imposed on every capital offender as of 21st November, 2022, to a life sentence.

41. Indeterminate imprisonment has been held to be unconstitutional and in *Manyeso v Republic (Criminal Appeal 12 of 2021)* [2023] KECA 827 (KLR) (7 July 2023), the Court of Appeal substituted life imprisonment with 40 years.

42. Given the circumstances of this case and the commuted sentence, I hereby substitute the sentence in count 1 to forty (40) years. The sentence in count 2 is upheld. The sentences shall run concurrently as the offences arise from the same incident. The appellant remained in custody upon arrest on 31st

December, 2020 and during trial, the prison authorities shall take into account this period from arrest in the computation of the sentence.

43. It is so ordered.

DELIVERED, DATED, AND SIGNED AT NAIROBI THROUGH TEAMS ONLINE PLATFORM ON THIS 29TH DAY OF JULY, 2024.

....

C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Hellen

ODPP: Mr. Mwakio

Appellant: Elijah Waithaka Mundia