REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. E022 OF 2020

BENARD OMONDI MUMBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against the whole judgement delivered by the Hon. J.P. Nandi on the 11.11.2020 and subsequent conviction passed on the 15.12.2020 in Bondo principal Magistrate's Court Criminal Case No. 691B of 2019)

JUDGMENT

1. The appellant Benard Omondi Mumbo was charged with two counts of the offence of robbery with violence contrary to section 295 as read with section 296 (2) of the penal code. On the first count the particulars were that on the night of 9th June 2019 at Shaq villa Estate in Bondo Township, Bondo sub-county within Siaya County, jointly with others not present before court, while armed with offensive weapons namely a rungu, they robbed Josephine Anyango Akello of; one gas cylinder of 13kgs, one television set make Samsung of 32inch, a Samsung DVD, GOTV decoder, mosquito nets, one brown bag, one solar delight, two mobile phones make Huawei and cash of the value of Kshs. 3,800 all valued at Kshs. 75,285 and at the time of such robbery used actual violence on the said Josephine Anyango Akello.

2. On the second count the particulars of the offence were that on the night of 9th June 2019 at Shaq villa Estate in Bondo Township, Bondo sub-county within Siaya County, jointly with others not present before court, while armed with offensive weapons namely a rungu, they robbed Hellen Anyango Otieno of her cash Kshs. 59,000 and two Nokia mobile phones make 1280 all valued at Kshs. 64,000 and at the time of such robbery used actual violence on the said Hellen Anyango Otieno.

3. The appellant also faced two alternative charges of handling stolen goods contrary to section 322 (2) of the Penal Code

4. The appellant pleaded not guilty to both the main charges and the alternative charges. The matter proceeded to hearing and the trial magistrate Hon. J.P. Nandi after considering the evidence of the prosecution witnesses against the evidence of the defence witnesses found that the prosecution had proved their case against the appellant and sentenced the appellant to 14 (fourteen) imprisonment.

5. The appellant filed his petition of appeal dated the 24.12.2020 on the same date setting out the following grounds:

a) That the trial magistrate erred in both law and fact by failing to consider that the evidence was meted with inconsistencies, insufficiencies and irregularities.

b) That the trial magistrate erred in both law and fact by failing to adhere by the provisions of sec. (107) of the Evidence Act.

c) That the trial court failed to adhere by provisions of Sec. 169 of the CPC and thus unsound judgement was delivered.

d) That the trial magistrate erred in both law and fact by failing to consider my defence of ALIBI that was sound and cogent.

e) That I wish to be present at the hearing of this appeal and/or be supplied with the trial records since I cannot recall all that transpired in court I pray to be supplied with certified proceedings file to enable me raise more reasonable grounds and also pray to appear before the court during the hearing.

6. In response, the prosecution filed a Notice of Enhancement of Sentence dated 19th October 2021 and filed in court on the same date in which they sought to have the appellant's sentence enhanced from 14 years to the death sentence. The appellant was given the opportunity to respond to the Notice of enhancement of sentence and he intimated that he wished the appeal to proceed on merit as he was never given a fair trial.

7. The appeal was canvassed by way of written submissions.

8. The appellant submitted that he had earlier on alerted the trial court that he was not provided with all the relevant evidence that the court intended to rely on as per the provisions of Article 50 (j) of the constitution. The appellant relied on the case of **Simon Githaka v R [2015] eKLR**.

9. It was the appellant's further submission that he was prejudiced as the court proceeded with his case despite the fact that he informed the court that he had no faith in the presiding magistrate.

10. He further submitted that he was a pauper and layman and was not legally represented considering the nature of the offence he was charged with. He further submitted that he was not aware of the dire consequences of the offence and that he was a first time offender.

11. The appellant submitted that the sentence meted out to him was harsh and excessive considering the circumstances of the offence and further that the court ought to consider ordering a retrial.

12. I have read and considered the trial court record of proceedings, and the appellants' grounds of appeal as well as the respondent's Notice of Enhancement of Sentence. I have also considered the submissions of the appellant.

13. The duty of this court as a first appellate court is to reconsider and re-evaluate the evidence on record, bearing in mind that I did not see or hear the witnesses, and reach my own conclusion -See **Okeno v R [1972] EA. 32** and **Mohamed Rama Alfani & 2 Others v Republic, Criminal Appeal No. 223 of 2002**.

14. The evidence adduced before the trial court was as follows- PW1 Josephine Anyango Akello, the first complainant testified that on 9.6.2019 at 1am she was asleep in her house when it started raining so she went out to fetch the rain water only to realise that the door was locked from outside. She therefore switched on the security lights but it was not working so she used the rear door and opened the front door and switched on the lights in the sitting room and placed the basins outside. It was her testimony that while outside, she bumped into a person and dashed back into the house and locked the door. She stated that she tried to wake her children but they were dead asleep as she was screaming.

15. PW1 testified that someone kicked the door and a tall person entered inside the house in the company of a short man and she was able to see their faces. It was her testimony that the tall person moved closer to her and slapped her on the mouth telling her to stop screaming while the short man took her handbag which was in the sitting room and removed Kshs. 3,800. She further testified that the tall man demanded

for her phones which she handed over to him, two Huawei phones. It was her testimony that they checked her M-pesa and M-shwari account and saw that she did not have money then ordered her to sit.

16. PW1 testified that the tall man retained her two phones as the short man removed her Samsung TV, GOTV decoder and DVD player. She stated that the attackers switched off the lights in the house and started using mobile spotlights which were bright. It was her testimony that they also took her hot pots, two set of tea cups, cooker with two plates and a 13kg gas cylinder.

17. It was her testimony that the attackers took her outside and ordered her to call the M-pesa lady, Hellen Anyango Otieno, who upon hearing PW1 ‘s voice turned on the lights and the assailants pushed her inside. PW1 testified that Hellen attempted to jump outside but the tall man hit her ad she fell down after which they ordered her to give them money which she did. She further testified that the assailants ordered Hellen to transfer the money to PW1’s phone after which they took PW1 back to her house where they started packing her items in boxes.

18. PW1 testified that the tall man went into her bedroom and took her big brown bag and they packed the items inside after which they ordered her to transfer the money in her mpesa to another number known to them before they left her house and locking the door from outside.

19. It was her testimony that after 30 minutes, one John Henry Ochola knocked on her door telling her to open so that they could take her to hospital. She stated that they went to Bondo Police Station where they were referred to hospital where they were treated and in the morning they recorded statements with the police.

20. PW1 testified that on the 15.9.2019 the police called her and told her that some items had been recovered so she went to the police where she was able to identify her items namely:

i. A Samsung empty TV box

ii. 13Kg Gas cylinder

iii. 32 inch Samsung TV

iv. Gas Cylinder

v. GOTV Decoder

vi. DVD

vii. Delight solar

viii. One brown bag

21. She further testified that the robbery took about 30 minutes and that on the 16.9.2019 she went for an identification parade and was able to identify the tall man as the appellant.

22. PW2 Hellen Anyango Otieno, the 2nd complainant testified that on the 9.6.2019 at 1am she was in the house sleeping when she heard PW1 calling her name so she woke up, put the lights on and opened the door. She testified that PW1 was pushed inside the house by a person and someone hit the bulb and she fell down and someone followed her and hit her on the head, face and pulled her back in the house.

23. PW2 identified the person who hit her as one with beards, small eyes and was tall. She stated that he demanded for her mpesa phone, a nokia phone, which she gave up. She further testified that the man ordered her to transfer the Kshs. 20,000 in her phone to PW1’s phone but she did not, forcing the man to do it himself. She further testified that the tall man ordered her to give him cash so she gave him the Kshs. 40,500 she had in the house.

24. PW2 testified that the tall man ordered the man who was outside to search the house for money which he did but was not successful so the tall man ordered her to sleep and not scream after which they left with PW1 and locked the house from outside. It was her testimony that after they had left, she called John Henry Ochola and informed him what had happened so he came and opened the door as well as that of PW1 and they proceeded Bondo Police Station then Bondo sub-county hospital where she was treated. She further stated that she talked to the police who blocked the m-pesa line and reversed Kshs. 18,550. She further stated that the next day she recorded her statement and went to hospital where the P3 form was duly filled.

25. It was her testimony that on the 15.9.2019 she was called by the police to go and identify some things at Bondo Police Station where she was able to identify her two Nokia phones on whose batteries she had marked "N.O." She further stated that she went for the identification parade and was able to identify the tall well-built man as the appellant herein. She further stated that the incident took about 30 minutes and that she was also able to identify the appellant due to the light from the bulb which he later hit as well as the phone light that shone on his face as he was transferring money from her phone.

26. PW3 Jane Oluoch, a minor was taken through *voire dire* examination and found to understand the nature of an oath. She testified that on the evening of 9.6.2019, while going to the market at Akala, she met the appellant who took her to his sister Hellen in Bondo and subsequently to Chavakali where he told her that they should stay as husband and wife. It was her testimony that she found MFI4, 5, 8,9,7 and 6 in the house as well as several small phones including MFI16(a) and 16(b). She testified that police arrested the appellant, brought him in the house and took the items to court and they were taken to Bondo Police Station.

27. PW4 Jackline Khasandi Imbusi from Chavakali testified that on 10.7.2019, the appellant came to ask for a house at the plot where he worked as a caretaker. He stated that the appellant paid Kshs. 2,000 on the same day and moved in on the 13.7.2019 and that on the 14.7.2019 she found him in the house with a girl he stayed with.

28. PW4 testified that the appellant told her that he had left his Identity card at home though he never availed a photocopy of the same. She further testified that on the 7.9.2019, she found out that the appellant had been arrested by police as she met them while leaving the plot and the police informed her that the appellant had stolen people's items. It was her testimony that the police recovered MFI3, 4,6,8,7 & 9 from the house occupied by the appellant. PW4 identified the appellant as a tall person who told her that he sold clothes and charcoal.

29. PW5, Neema Caren Atieno, another minor from Bondo township was taken through a voire dire examination and found to understand of nature of an oath. It was her testimony that on 8.6.2019 at 8pm she was outside lighting a jiko when two men came into the compound and greeted her. It was her testimony that one was well built. She further testified that they pointed towards the house of Mama Wendu and Mama Sisto then they went away. She stated that she was able to see the face of the well-built man.

30. PW6 No. 237283 IP Leonard Omuse testified that he carried out the appellant's identification parade which was conducted on the 16.9.2019. He stated that during the parade, the suspect was in a group of 8 men and that the appellant chose to stand between the 2nd & 3rd person. He further stated that the appellant had a problem with the parade claiming that some witnesses had met him while in custody which was found to be not true as the investigating officer confirmed that the witnesses had not stepped in the police station.

31. PW6 testified that both the 1st and 2nd complainant, PW1 & 2 identified the appellant by touching and hearing his voice and touching respectively. He produced the identification parade forms as exhibit 17 (a) and (b).

32. PW7 PC Suleiman Opondo the investigating officer testified that on the 9.6.2019 while at the station, received a c all from the DCIO to join other officers and proceed to a scene of robbery. He testified that at

the report office they found a reportee who led them to the crime scene where they found two ladies who had been robbed by two men. It was his testimony that they referred the two ladies to hospital and the following day issued them with a P3 form which was duly filled.

33. It was his testimony that they managed to reverse monies send to phone number 0780xxxxxx and tracked the airtel number which called another number in Chavakali. PW7 testified that they moved to Chavakali where they managed to arrest the appellant who took them to his rented house where they found a 16-year-old girl who confirmed that she was living with the appellant as her boyfriend.

34. PW7 further testified that they recovered a gas cylinder, a Samsung TV set, cooker, decoder, DVD player, solar delight, one brown bag, two Nokia mobile phones and a box which carried the TV. It was his testimony that the appellant did not have receipts for the items recovered in the house. PW7 testified that they went to Bondo and called the victims who came and positively identified their items. PW7 produced the recovered items as Exhibits 3,4,5,6,7,8,9,10,11 (a), 11(b), 11(c), 14,15, 16 (a) and (b).

35. PW8 John Henry Ochola testified that on 9.6.2019 at 1.54am, he was flashed by his sister PW2 and when he called her back she informed him that she had been robbed and further warned him not to go to her rescue immediately as the robbers may still be around. It was his testimony that he rushed to the scene and found the house locked from outside and after he knocked on the door and she responded, he opened the door and got inside where he noticed her bleeding from her left eye.

36. PW8 testified that he took PW2 and her neighbour PW1 to Bondo Police Station where they found that the incident had already been reported and the officers rushed to the scene after which the victims were referred to hospital for treatment. It was his statement that CID officers called Safaricom and reversed Kshs. 18,200.

37. PW9 Jared Opondo, a clinical officer coordinating clinical services at Bondo sub-county hospital testified and produced PW1's P3 form as Pexhibit 2 showing that she had injury in the right arm likely to have been caused by a blunt object which injuries were classified as harm. He produced her treatment notes as Pexhibit 1.

38. He also produced PW2's P3 form as Pexhibit 13 which showed that she suffered a stitched cut wound on the left periportal region of the head, inflamed left eye as well as inflammation on the left knee joint which injuries were also classified as harm. PW9 produced PW2's treatment notes as Pexhibit 12.

39. Placed on his defence, the appellant exercised his constitutional right and refused to give any evidence in defence saying he left it to the court to conclude the case. Upon being convicted for the offences of robbery with violence in the two main counts, the accused/appellant said that he had nothing to say in mitigation and the trial court sentenced him to serve 14 years imprisonment on each count, the two sentences to run consecutively.

40. It is the above judgment and sentence which gave rise to this appeal.

Determination

41. I have considered the appeal herein as well as the trial court record and written submissions by the appellant and the Notice of enhancement of sentence by the Prosecution. The issues for determination are:

a) ***Whether the appellant was denied a fair trial;***

b) ***Whether the case against the appellant was proved beyond reasonable doubt***

c) ***Whether the sentence was manifestly harsh and should be interfered with.***

d) ***Whether the judgement passed by the trial magistrate complied with section 169 of the Criminal Procedure Code***

e) ***Whether the court should order a retrial***

On the appellant's right to a fair trial

42. It is the appellant's case that he was denied a fair trial. The appellant raises various grounds in his submissions to buttress the fact that he was denied a fair trial. ***Firstly***, it was the appellant's submission that he was not provided with all the relevant evidence that the prosecution intended to rely on in line with the provisions of Article 50 (j) of the constitution.

43. Article 50(2) (j) of the Constitution guarantees every accused person a fair trial which includes the right:

> ***"to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence."***

44. In the instant case I note that when the matter first came up for hearing on the 12.11.2019, the appellant brought to the attention of the trial court that he had not received all the statements including the first report and further that he could not read all the handwriting. It is on this basis that the trial magistrate allowed an adjournment directing the prosecution to supply the appellant with all the relevant documents. When the matter next came up for hearing before the trial magistrate on the 26.2.2020, the appellant informed the court that he was ready to proceed with the trial but that he was going back to the cells.

45. I find that the appellant was supplied with the evidence the prosecution intended to rely on and as such he was ready to proceed but he chose not to participate in the proceedings for reasons known to himself.

46. ***Secondly***, the appellant submitted that his right to a fair trial was prejudiced on account that the court proceeded with his case despite the fact that he informed the court that he had no faith in the presiding magistrate.

47. I have perused the lower court proceedings in this particular matter and at no time did the appellant inform the trial magistrate that he had no faith in him. In fact, when the matter came up for hearing on the 26.2.2020, the appellant stated that he was ready to proceed however he went on to state that he was going back to the cells. The trial court noted that the appellant had chosen of his volition to be away from court when his case was proceeding.

48. Article 50 (2) (f) of the constitution provides thus:

> ***"(2) Every accused person has the right to a fair trial, which includes the right: -***
>
> > ***(f) to be present when being tried, <u>unless the conduct of the accused person makes it impossible for the trial to proceed</u>."***

49. A plain reading of Article 50 (2) (f) shows that every accused person has a right to a fair trial which includes right to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed.

50. However, an accused's conduct that may deny him the enjoyments of the right to be present in court during his trial include situations where for instance the accused person becomes violent or unruly during proceedings to such an extent that it becomes impossible for the court to conduct the proceedings or where he deliberately absents himself or absconds. Care must be taken to carefully consider the circumstances surrounding an accused person's failure to attend court.

51. In this case, the accused was aware of his case. He even indicated to the court that he was ready to proceed before reneging on the same and stating that he was going back to the cells.

52. In the Ugandan case of **Uganda v Gulindwa Paul and Tumusiime HCT-00-AC-CM-005-2015** that was quoted in the case of **Republic v Galma Abagaro Shano [2017] eKLR,** the court stated as follows;

> ***"In my view, a defendant of full age and sound mind, who is properly notified of his trial and chooses to absent himself, as a result violates his obligation to attend court, deprives himself of the right to be present, and when a criminal trial proceeds in his absence, he cannot come up and claim he had been denied his constitutional rights. I hold this view because I do not think that one who voluntarily chooses not to exercise a right given to him by the constitution, cannot turn around and say he has lost the benefits he might have expected to enjoy had he exercised it."***

53. I do not find any error on the part of the trial court when he proceeded with the case against the appellant despite his absence as the absence was occasioned by the appellant himself choosing not to participate in the hearing and which he stated to court and a record of the same made by the trial magistrate. It was in the interest of justice that the case against the appellant proceeds. The prosecution had already secured 3 witnesses to testify on that particular day.

54. In the circumstances it is my opinion that the appellant cannot claim violation of his constitutional right which right he chose not to exercise.

55. ***Thirdly,*** the appellant seemed to insinuate that he was denied a fair trial as he was not given legal representation being a pauper who did not understand the dire consequences of the offence he was charged with.

56. Article 50 (2) (h) of the Constitution provides for provision of legal representation by the state where substantial injustice would occur. Further, in its decision in **Republic v Karisa Chengo & 2 Others [2017] eKLR**, the Supreme Court considered the issue of legal representation at state expense and stated:

> ***"[87] Article 50(2) (h) of the Constitution provides that "[every accused person has the right to a fair trial, which includes the right…to have an advocate assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly." It does not define what "substantial injustice" means. However, in David Macharia Njoroge vs Republic, (supra), the Court of Appeal held that "substantial injustice" results to "persons accused of capital offences" with "loss of life" as the penalty if they have no counsel during their trials. We do not entirely concur with that holding, as it has the effect of limiting the right to legal representation in criminal trials only to cases where the accused person is charged with a capital offence. The operative words in Article 50 (2) (h) are "if substantial injustice would otherwise result…." While it is therefore undeniable that a person facing a death penalty and who cannot afford legal representation is likely to suffer substantial injustice during his trial; the protection embedded in Article 50 (2) (h) goes beyond capital offence trials. The Court of Appeal indeed appears to have embraced this reasoning in a recent decision in Thomas Alugha Ndegwa vs Republic; C.A. No. 2 of 2004, when it allowed an application for legal representation by the appellant who had been convicted of defilement and sentenced to life imprisonment.***
>
> ***(88] In addition to the above, we do not agree with the Court of Appeal's holding in the instant case to the effect that the right guaranteed in Article 50 (2) (h) of the Constitution is progressive and that it can only be realized when certain legislative steps have been taken, such as the enactment of the Legal Aid Act. While this is true regarding the general scheme of legal aid which the Act is set to fully implement, the same cannot be the case regarding the right in Article 50 (2) (h). We are thus in agreement with Mr. Ole Kina, that the right to legal representation at state expense, under the said article, is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict without more. We must however emphasize the fact that in accordance with the language of the Constitution, this particular right is not open ended. It only becomes available "if substantial injustice would otherwise result".***

57. In **Bernard Kiprono Koech vs Republic [2017] eKLR** in considering an argument similar to what is now before me, Justice Mumbi Ngugi stated:

> ***"39. Secondly, there is now a framework in place, which was not in place at the time of the appellant's trial, under which an accused person can apply under section 40 of the Legal Aid Act No. 6 of 2016 for legal representation at state expense. Section 43 of the Act imposes a duty on the court to inform an accused person of his right to apply for legal representation. It provides as follows:***
>
> ***43. (1) A court before which an unrepresented accused person is presented shall —***
>
> ***(a) promptly inform the accused of his or her right to legal representation;***
>
> ***(b) if substantial injustice is likely to result, promptly inform the accused of the right to have an advocate assigned to him or her; and***
>
> ***(c) inform the Service to provide legal aid to the accused person.***
>
> ***40. I am satisfied that in the present case, there was, first, no substantial injustice as suggested in the Karisa Chengo case resulting to the appellant. Secondly, it is evident that the accused fully understood the charges facing him, and was able to address himself to the issues that arose."***

58. In this case, the appellant seemed well versed and understanding of the charges that faced him. He was even ready to prosecute his case but opted out of this. However, the appellant did not reveal to court what were his reasons for opting to go back to the cells rather than participate in the criminal proceedings.

59. In the circumstances, I am satisfied that no substantial injustice resulted on the appellant by the failure of provision of legal representation.

60. Taking all the above into consideration, it is my opinion that the appellant's right to a fair trial as enshrined in Article 50 (2) of the Constitution was not infringed.

Whether the case against the appellant was proved beyond reasonable doubt

61. The appellant was charged with two counts of the offence of robbery with violence. What constitutes the offence of robbery with violence was well captured in the case of **Oluoch v Republic (1985) KLR** where the Court of Appeal stated:

> ***"…Robbery with violence is committed in any of the following circumstances:***
>
> ***The offender is armed with any dangerous and offensive weapon or instrument; or***
>
> ***The offender is in company with one or more person or persons; or***
>
> ***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."***

62. In the case of **Dima Denge Dima & Others vs Republic, Criminal Appeal No. 300 of 2007**, it was stated that:

> ***"…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."***

63. The evidence adduced before the trial court pointed to the appellant as the person who in the company of others invaded the complainants and assaulted them and stole their money and took household item

some of which were found in possession of the appellant. These items were produced in evidence as PExhibit Nos. 3,4,5,6,7,8,9,10,11 (a), 11(b), 11(c), 14,15, 16 (a) and (b) and which items were positively identified by both PW1 and PW2 the complainants, victims of the robbery, as their goods which had been stolen on the night of 9.6.2019.

64. It is not in doubt that both PW1 and PW2 were harmed during the robbery as was evidenced by the P3 forms produced by PW9 as exhibits 2 and 13 respectively.

65. Juxtaposed against this, it is noteworthy that no defence was offered by the appellant contrary to his ground of appeal that the trial court failed to consider his defence and alibi. This is not to say that the appellant was under any duty to prove his innocence but that the evidence as adduced by the prosecution witnesses was not controverted. That evidence was clear that the appellant was positively identified at the scene of crime during the attack and in an identification parade as the person, among others, who attacked and robbed and injured the two complainants. The evidence was watertight and proved all the elements of the robbery with violence on both counts as charged. Accordingly, it is my opinion that the prosecution proved its case against the appellant beyond reasonable doubt. The trial magistrate therefore was well within the law to find the appellant guilty of the offence of robbery with violence as charged.

Whether the sentence was manifestly harsh and should be interfered with

66. The appellant submitted that the sentence passed on him was excessive and manifestly harsh considering the circumstances of the offence. In response, the respondents filed a Notice of enhancement of Sentence seeking to have the appellant's sentence enhanced from a 14-year sentence to the death sentence.

67. Upon conviction, the trial court sentenced the appellant to 14 years' imprisonment on each count, the sentences to run consecutively. The punishment for robbery with violence is provided for in section 296(2) of the Penal Code that provides that in case of a conviction the offender shall be sentenced to death.

68. The Court of Appeal in the case of **J**. **J.W. v Republic [2013] eKLR** held as follows on enhancement of a sentence by the High Court:

> ***"It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under Section 354 (3) (ii) and (iii) of the Criminal Procedure Code. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal."***

69. In this case, the prosecution filed a Notice of Enhancement of Sentence dated 19th October 2021 and filed in court on the same date. On the 22.11.2021, this court also warned the appellant that he stood to have his sentenced enhanced if he proceeded with the appeal but the appellant opted to have his appeal determined on merit.

70. The circumstances of this case point to an appellant who was not remorseful at all as he opted to say nothing in his mitigation. However, in this appeal it was his submission that he was not aware of the dire consequences of the offence and that he was a first time offender.

71. In the circumstances, it is my opinion that this is a case that is ripe for enhancement of the appellant's sentence, as the sentence imposed on the appellant was illegal.

Whether the judgement passed by the trial magistrate complied with section 169 of the Criminal Procedure Code

72. The appellant pleaded in his petition of appeal that the trial magistrate had rendered an unsound judgement as the same did not comply with section 169 of the Criminal Procedure Code.

73. Section 169 of the *Criminal Procedure Code* provides as follows:

> ***"169(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, shall contain the point or points for determination, the decision thereon and the reasons, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.***
>
> ***(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.***
>
> ***(3) In the case of an acquittal, the judgment shall state the offence which the accused person is acquitted, and shall direct that he be set at liberty."***

74. I have perused the judgement rendered by the trial magistrate and note that it complies with section 169 in its entirety. The appellant's claim is therefore unfounded and thus fails.

Whether the court should order a retrial of the appellant

75. The law as to when a retrial should be ordered has long been settled. In the renowned case of **Opicho v Republic [2009] KLR 369,** the Court of Appeal held as follows:

> ***"In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a trial should be ordered. Each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest of justice require it."***

76. In **Muiruri v R [2003] KLR 552**, the Court held that:

> ***"It [retrial] will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Some factors to consider would include, but are not limited to, illegalities or defects in the original trial. (See Zedekiah Ojuondo Manyala Vs Republic (Criminal Appeal No. 57 of 1980); the length of time which has elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely of the prosecution's making or the court's."***

77. Applying these principles to this appeal, it is my opinion that this is not a case fit to warrant a retrial. There was nothing illegal or defective about the trial court proceedings and further, it is also not in the interest of justice that a retrial be ordered as it will serve no purpose.

78. In the circumstances, I find this appeal devoid of merit. I dismiss the appeal and uphold the conviction of the appellant by the trial court.

79. On the sentence imposed, having found that the same was illegal, I hereby set aside the fourteen (14) years imprisonment imposed by the trial court on each count of robbery with violence on account of illegality and order that the file be placed before the Honourable trial Principal Magistrate, to impose appropriate lawful sentence. The appellant shall appear before the trial magistrate virtually for proper sentencing on 14/2/2022.

80. File herein closed and the Registry to expeditiously resubmit the trial court record to Bondo PM's Court for further necessary action as directed by this court.

81. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 20TH DAY OF JANUARY, 2022

R.E. ABURILI

JUDGE