REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 180 OF 2018

LESIIT J.

JUSTUS WESONGA...APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(Being an Appeal arising out of the conviction and sentence of Hon. F. Mutuku (SRM) delivered on 26th July 2018 in Kibera CM Criminal Case No.38 of 2016)

JUDGMENT

The charges

1. The Appellant, Justus Wesonga, was charged in Count 1 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;

> **"Justus Wesonga on the nights of 19th and 20th December 2015, at unknown time, at Samar Construction site along Nyeri Road in Kileleshwa within Nairobi County, jointly with others not before court, while armed with dangerous weapons namely pangas and rungus robbed Boniface Inambili of one laptop (Toshiba) worth of Kshs.105,000/-, 574 (Y-10) metal bars worth Kshs.275,520/-, 16 (Y-25) metal bars valued at Kshs.49,850, 10 rolls of binding wire worth Kshs.22,000, digital video recorder worth Kshs.38,000/-, 39 marine boards worth Kshs.115,050/-, 1 grinder worth Kshs.20,500/-, 2 water pumps worth Kshs.93,000/-, cross cutter Kshs.46,400/-,1 markita circular saw worth Kshs.28,710/-, tape measure worth Kshs.150, all valued at Kshs.794,030/-, the property of Samar Construction Limited, and at the time of the robbery threatened to use actual violence to the said Boniface Inambili."**

2. The Appellant was charged in Count 2 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;

> **"Justice Wesonga on the nights of 19th and 20th December 2015, at unknown time, at Samar Construction site along Nyeri Road in Kileleshwa within Nairobi County, while armed with dangerous weapons namely pangas and rungus jointly with others not before court robbed Boniface Inambili of two mobile phones (Tecno and Samsung) all valued at Kshs. 4,000/-, and at the time of the robbery threatened to use actual violence to the said Boniface Inambili."**

3. When the Appellant was arraigned before the trial court, he pleaded not guilty to the charges. After a full trial, he was convicted as charged in both counts. He was sentenced to serve twenty (20) years imprisonment in each count. The sentences were ordered to run concurrently. The Appellant was aggrieved by his conviction and sentence and therefore filed an appeal to this court.

Grounds of appeal

4. In his petition of appeal, the Appellant raised several grounds of appeal challenging both his conviction and sentence. He contends that the charge sheet was defective. He was aggrieved by his conviction stating that the prosecution failed to establish the ingredients of the offence of robbery with violence to the required standard of proof of beyond any reasonable doubt. He faulted the trial court for convicting him based on unreliable evidence by the prosecution witnesses. He took issue with the fact that material witnesses were not availed by the prosecution to adduce evidence. Finally, he contended that the judgment by the trial court was defective.

Appellant's submissions

5. During the hearing, the Appellant relied on written submissions he had filed in support of his appeal. I have considered the submissions. In those submissions he urged as follows. He argued that the charge sheet was defective since he was charged under both **Sections 295** and **296(2)** of the **Penal Code**, which provide for two separate offences. He submitted that Count 2 was an extension of Count 1 since the charges emanated from the same incident. Citing **Sections 134** and **362** of the **Criminal Procedure Code (CPC)**, the Appellant was of the view that the charge sheet was fatally defective. He urged that failure of the charge sheet to spell out with clarity the exact offence committed was a violation of the provisions of **Section 134** and **135** of the **Criminal Procedure Code,** thus it contravened the Appellant's right to a fair trial as provided by **Article 50(2)(b)** of the Constitution. To this end, he cited the cases of **Laban Koti vs Republic [1962] EA.439**, **Omboga vs Republic [1983] eKLR and Yongo vs Republic [1983] eKLR.**

6. The Appellant further submitted that the ingredients of the offence of robbery with violence were not established by the prosecution. He argued that none of the dangerous weapons as particularized in the charge were recovered from him, nor were the weapons produced in court as exhibits. He urged that he was the only person arrested and charged over the alleged robbery incident. Further, no violence was inflicted upon PW4 since he testified that he did not sustain any injuries. The Appellant faulted the trial court for convicting him based solely on the uncorroborated evidence of PW4. He stated that as a new employee barely three days into the job, it was not possible for him to plan and execute a robbery. He further stated that he was not on duty on the night of the robbery.

7. The Appellant questioned why PW2 was the one who reported the robbery to the police, as opposed to PW4 who was allegedly robbed. He asserted that the evidence of PW4 that he was hit by the Appellant during the robbery was unreliable since he testified that he did not go to the hospital, nor was any P3 Form tendered into evidence to ascertain his claims. He argued that the trial magistrate failed to apply provisions of **Section 173** of the **Evidence Act.** He stated that majority of the prosecution witnesses testified that they did not know the Appellant. Further, there was contradicting evidence with regard to the date the Appellant was arrested. It was his view that the evidence by the prosecution witnesses was unreliable.

8. The Appellant submitted that the daytime guard, John Ibwaka, and the neighbour, Patti, who allegedly assisted PW4 untie his hands, were crucial witnesses, and ought to have been availed by the prosecution to give evidence. For that proposition the Appellant relied on the case of **Bukenya & Others vs Uganda [1972] EA**. He stated that the prosecution failed to prove its case against him to the required standard of proof beyond any reasonable doubt. In the premises, he urged this court to allow his appeal.

Respondent's submissions

9. Ms. Kibathi, the learned Prosecution Counsel, opposed the Appellant's appeal on behalf of the State. Ms. Kibathi submitted that the prosecution established its case against the Appellant to the required standard of proof of beyond any reasonable doubt. She urged that PW4 narrated to the court the events of that fateful night. She stated that on the material night PW4 was on duty as a night guard together with the Appellant, at Samar Construction Site. PW4 and the Appellant conducted a patrol at the construction site to ensure everything was in order. At about midnight, PW4 told the Appellant that he was going to conduct another patrol. He left the Appellant manning the gate.

10. Ms. Kibathi submitted that PW4 testified that while on patrol he was accosted by a group of about twenty men who tied him up. The Appellant joined the men and suggested that they kill PW4 since he was worried that PW4 would inform the authorities. However, one of the assailants disagreed with him. PW4 was carried to the ground floor where the Appellant took two phones belonging to him. She stated that PW4 told the court that the Appellant took the keys to the gate of the construction site and assisted the assailants remove building materials and load them into a vehicle.

11. Learned Prosecution Counsel submitted that the ingredients of the offence of robbery with violence were established by the prosecution. She urged that the evidence of PW4 established that the Appellant was in the company of several other men, and that during the robbery, personal violence was used on him. Further, the Appellant stole money as well as two mobile phones from PW4. She urged that the evidence of PW1 established that the construction materials stolen by the Appellant and his accomplices from the construction site were valued at Kshs. 794,030/-.

12. Ms. Kibathi further submitted that the Appellant was properly identified as one of the assailants. She stated that through visual and voice identification, PW4 positively identified the Appellant as one of the robbers. She urged that PW4 testified that there were security lights at the scene. Further, she urged, PW4 had worked with the Appellant for three days prior to the robbery incident. She urged that PW4 knew the Appellant very well both physically and by his voice, and that he was therefore able to identify the Appellant.

13. Learned Prosecution Counsel submitted that the conduct of the Appellant after the robbery incident was inconsistent with that of an innocent person. She stated that the Appellant was employed on 17th December 2015. The Appellant was on duty on the material night of 19th December 2015. However, after the robbery occurred, he never reported back to work. His phone was switched off. He did not claim any payment for the days he had worked for the company. Ms. Kibathi urged that his conduct pointed to conduct of a guilty person. She urged the court to uphold the Appellant's conviction.

14. With regard to sentence**,** Learned Prosecution Counsel submitted that since there were no serious injuries inflicted on PW4 during the robbery, she was not averse to the court reviewing the Appellant's custodial sentence of twenty years meted by the trial court.

Summary of the facts of the case

15. PW1, Eliud Nganga, was a store keeper at Samar Construction Site. He was on duty on 19th December 2005. He stated that he took stock of all the materials that were in the store and on the yard before he left work at 1.00 pm. He recorded the inventory of the items in the store and on yard in a book. The following day, he was informed by the guard that the construction site had been broken into. He went to the site where he found police officers. They asked him to verify whether any items had been stolen from the site. The padlock to the store had been broken. He counterchecked the inventory he had recorded the previous day and discovered that several items had been stolen from the yard as particularized in the charge sheet. Upon cross examination, PW1 stated that the Appellant was unknown to him.

16. PW2, Simon Ndegwa, worked at Rapid Security Limited at the material time, where the Appellant was employed as a guard. He testified that the Appellant was employed on 17th December 2015. He was deployed as a night guard to Samar Construction Site in Kileleshwa, to work on shift between 6.30 pm to 6.30 am. PW2 testified that the Appellant had worked at the construction site for three days prior to the robbery incident. On 20th December 2015, at about 6.00 am, PW2 received a call from a supervisor at Samar Construction Site informing him that a robbery had occurred at the site. He went to the scene. He interrogated Boniface Inambili, who was on duty together with the Appellant on the material night. The Appellant was nowhere to be found.

17. Boniface informed PW2 that he was patrolling the site while the Appellant was manning the gate. He saw several people coming towards him. Two of them tied him up. They took him to the basement. The Appellant took the keys to the gate from his pocket. PW2 stated that he saw ropes at the scene and lorry tyre marks. Machines and assorted construction materials had been stolen, as well as laptops and desktops from the offices. PW2 reported the robbery at Kileleshwa Police station. One week later, the Appellant was traced at Kangemi where he was arrested.

18. PW3, Gabriel Kimani Njenga, worked as a foreman at Samar Construction Site. He was on duty on 19th December 2015. He left work at 1.00 pm. The following day, he received a call from Engineer Otieno informing him that a robbery had occurred at the construction site. When he went to the site he discovered that the CCTV recorder was missing. Upon cross examination, he stated that the Appellant was unknown to him.

19. PW4, Boniface Inambili, was employed as a guard by Rapid Security. He was deployed as a night guard to Samar Construction Site. He worked together with the Appellant. On 19th December 2015, he reported to work at 6.00 pm. The Appellant was already at the site. They patrolled the site and ensured that everything was okay. At midnight, he told the Appellant that he was going to do another patrol around the premises. On his way back, he saw someone standing inside the building that was being constructed. He stated that there was a security light on the scene. The person approached him, searched him and asked him for the security alarm code. He told him that he did not have it. Several other people suddenly appeared and accosted him. PW4 stated that there were about twenty assailants at the scene. They tied his hands and legs together. The Appellant joined them and suggested that they kill PW4 to eliminate him as a witness. His accomplices however were not of the same view. They carried PW4 from the first floor and took him to the ground floor.

20. PW4 stated that the Appellant came and took two phones and a wallet from his pockets. He also took the keys to the gate. The Appellant went back upstairs. PW4 testified that he could hear the assailants load up construction materials into a vehicle. Everything went silent at about 4.00 am. PW4 managed to untie his legs. He walked to the gate and found it open. There was no one at the compound. He called out to a neighbour who came and helped him untie his hands. They managed to call the site manager who informed the owner about the robbery. The manager came to the site accompanied by police officers. He informed the police what had happened. He stated that the appellant hit him on his chest with his fist. PW4 stated that he had worked with the Appellant for three days prior to the robbery.

21. PW5, Police Corporal John Nyasoko, was the investigating officer in the present case. He testified that on 20th December 2015, PW2 and David Ndirangu from Samar Construction Site came to Kileleshwa Police Station and reported a robbery that had occurred the previous night at the stated construction site. PW5 accompanied them to the scene. He interrogated PW4 who was on duty together with the Appellant when the robbery occurred. PW4 told him that at about 12.00 am, he was conducting a patrol within the site. PW5 said that PW4 told him that he was at the basement, and that when he came back to the ground floor, he found the Appellant standing with other people. They accosted him and tied his hands and legs. The Appellant took the key to the gate from PW4's trousers. He also stole his two phones make Samsung and Techno. PW4 told PW5 that he heard the assailants loading up construction materials into a vehicle.

22. PW5 also interrogated PW3 who searched the store and listed down items that had been stolen. PW1 had done an inventory of all the items at the site prior to the robbery. PW5 produced into evidence the inventory of the stolen items as Prosecution exhibit 1, assorted invoices and delivery notes of the stolen items as Prosecution exhibit 2, list of stolen items as Prosecution exhibit 3, dispatch note stating that the Appellant was dispatched to work as a night guard at Samar Construction Site as Prosecution exhibit 4, a copy of the Appellant's vetting form with the Appellant's name and identity card dated 17th December 2015 as Prosecution exhibit 5, and a copy of the Appellant's job application letter as Prosecution exhibit 6.

23. PW5 stated that they arrested the Appellant on 26th December, 2015 at his house in Kangemi, with the help of PW2 who identified him. They recovered new electronic items that the Appellant had recently purchased together with receipts of the same. However, none of the stolen items were recovered from the Appellant.

Defence statement

24. The Appellant was put on his defence. He gave an unsworn statement. He testified that on 26th December 2015, he was at his house in Kangemi when police officers came and arrested him. They took him to Kileleshwa Police Station. They interrogated him with regard to a robbery incident. He denied being involved in any robbery. He told the court that he was employed by Rapid Security and dispatched to Samar Construction Site as a guard. He stated that he worked at the site for only two days i.e. 17th and 18th December 2015. He was standing in for a guard who was away. He testified that on 19th December 2015, he was summoned by his supervisor who informed him that the guard he was standing in for had returned. He was asked to await his next assignment. He denied the charges against him.

Analysis and determination

25. This being a first appeal, this Court has a duty to analyze and evaluate afresh the entire evidence adduced before the trial court and draw my own conclusions, while bearing in mind that I neither saw nor heard the witnesses and give due allowance. The Court of Appeal in the case of **Gabriel Kamau Njoroge vs Republic [1987] eKLR** stated this regarding the duty of the first Appellate court:

> **"It is the duty of the first Appellate court to remember that parties are entitled to demand of the court of first appeal a**

decision on both questions of fact and of law and the court is required to weigh conflicting evidence and draw its own inferences and conclusions, but bearing in mind always that it has neither seen or heard the witnesses and make due allowance for this."

26. I am guided by the case of <u>**Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic**</u>, Criminal Appeal No. 272 of 2005 where it was stated as follows:

> **"In the same way, a court hearing a first appeal (i.e. a first appellate court) also has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There is now a myriad of case law on this but the well-known case of** *Okeno vs Republic [1972] EA 32* **will suffice. In this case, the predecessor of this court stated:**
>
> 'The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala vs. R. [1975] EA 57). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.' **"**

27. After considering the submissions by both the prosecution and the Appellant, and after considering the evidence adduced by both sides, the issues which arise for determination in this appeal are:

i. Whether the charges brought against the Appellant were defective and or duplex;

ii. Whether the evidence of identification was safe;

iii. Whether prosecution proved its case on the charges brought against the Appellant, to the required standard of proof;

iv. Whether the elements of the offence of robbery with violence were proved;

v. Whether the prosecution failed to avail vital witnesses;

vi. Whether the Appellant's alibi defence was cogent.

28. This court has analyzed and evaluated afresh the evidence adduced before the trial court as well as the rival submissions made by the parties to this appeal.

29. On whether the charges brought against the Appellant were defective and or duplex. The Appellant, in his grounds of appeal stated that the charge sheet was defective and bad in law for duplicity, for invoking **Sections 295** and **296(2**) of the **Penal Code**.

30. In <u>**Cherere s/o Gukuli vs R**</u>**. [1955] 622 EACA**, the Court of Appeal observed the following on the applicable test for a charge found to be duplex:

> **"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".**

31. The Court of Appeal in <u>**Obedi Kilonzo Kevevo vs Republic [2015] eKLR**</u> held thus:

> ***"The test applicable for an appellate court when determining firstly the existence of a defective charge, and secondly its effect on the Appellant's conviction is whether the conviction based on the alleged defective charge occasions miscarriage of justice resulting in great prejudice to the Appellant. In the case of <u>JMA v Republic (2009) KLR 671,</u> it was held inter alia that:***
>
> *"It was not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the CPC was meant to cure such an irregularity where prejudice to the Appellant is not discernable.""*

32. 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**. **Section 295** of the **Penal Code** is the general definition section for the offence of robbery. While **Section 296(2)** is the definition of what constitutes robbery with violence and the penalty for it. What the prosecution did was to use the definition section for the offence of robbery in conjunction with the provision particularizing the offence of robbery with violence to frame the charges facing the Appellant. The issue is whether in doing so it rendered the charge defective, and secondly whether the Appellant suffered any prejudice as a result.

33. Even if there may be a defect in the charge, the Appellant was put on notice of the charge he was facing and what constitutes the charge. The particulars of the charge supported the charge of robbery with violence. The defect, if any, in the penal section of the charge sheet did not prejudice the Appellant. It was clear to this court that the Appellant knew the charge that he was facing. He ably defended himself during the entire trial. The particulars set out in the charge were clear and enabled him to defend himself. He was therefore well informed of the charges he faced. Even if there was a defect, I am satisfied it did not cause the Appellant any prejudice. In any event, I am satisfied that the same is curable under **Section 382** of the **Criminal Procedure Code.** I find this ground of appeal to be without merit, as no miscarriage of

justice was occasioned on the Appellant.

34. The Appellant urged that the charge was defective in that Count 2 was an extension of Count 1 since the charges emanated from the same incident, and hence bad for duplicity. Although the two offences were committed at the same locus in quo, the robberies were committed against two different complainants who testified before this court; PW1 who testified on behalf of the company complainant in support of Count I and PW4 who was the complainant in Count 2. The mere fact that the offences occurred in the same transaction is not a bar to the prosecution to prefer multiple charges as long as the particulars of the preferred charges support them. I have looked at the charges against the Appellant. The two charges are distinct, the items stolen as listed in the particulars of each charge were different, and the complainants were different. I find that this ground of appeal has no merit and must therefore fail.

35. With regard to whether the evidence of identification was safe, the learned trial magistrate considered this issue and observed as follows:

> **"PW2 a manager at Rapid Security corroborated PW4's evidence and said the accused was employed as a guard by the company on 17th December 2015 and assigned at the Samar Construction Site to relieve a guard who was on off duty. A dispatch note dated 17th December 2015 for the accused was produced as Pexh-4 and a vetting form of the same date produced as Pexh-5, a copy of an application letter dated 17th December 2015 done by the accused to the security company together with his identification card were produced as Pexh-6. He confirmed the accused worked for three days from 18th to 20th December 2015 and was working as a night guard together with PW4. No records were however availed to show that the accused had reported to work on the night of the incident.**
>
> **The accused in his unsworn statement confirmed that he was employed by Rapid Security Company and only worked for two days that is on the 17th and 18th December 2015 at Samar Construction Company…**
>
> **Even though the accused denied being at the scene at the time of the robbery, I am convinced he was actually on duty together with PW4 and escaped immediately after the incident until he was arrested on 26th December 2015. He informed the court that the supervisor had told him the person he was relieving had returned but never called the supervisor to confirm the same and neither did he cross-examine the manager (PW2) on the issue.**
>
> **From the aforesaid evidence, I find the accused was well identified by PW4 as one of the robbers who attacked him and stole his property together with that of Samar Construction Company. PW4 knew the accused as a workmate only to turn against him and rob him. This was therefore a case of recognition and it was held in Anjoni & others vs. Republic [1980] KLR 59 that: *"Recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon personal knowledge of the assailant in some form or other*.""**

36. **It was evident from the case that the prosecution relied on both direct evidence of identification and recognition to secure the conviction of the Appellant. When considering the evidence of identification, the quality of identification is critical. This was considered in** the celebrated case of **R vs Turnbull [1976] 3 All ER 551** Lord Widgery CJ observed as follows:

> **"The quality of identification evidence is critical; if the quality is good and remains good at the close of the defence case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger."**

37. **The need to carefully examine the evidence of identification is very important. In the case of Wamunga vs Republic [1989] eKLR 426** the Court of Appeal held:

> **"It is trite law that 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 favourable and free from possibility of error before it can safely make it the basis of conviction."**

38. I find that the learned trial magistrate subjected the evidence of identification to a careful evaluation. He also directed himself correctly on the law. He cited the case of **Anjononi and others vs. R [1980] KLR 59**, where the Court of Appeal held thus:

> **"This was however a case of recognition, not identification of the assailants; recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon personal knowledge of the assailant in some form or other."**

39. I agree with his finding that PW4 positively identified the Appellant, not only for having reported to work for the night shift with him, but for the fact he had worked with him for three continuous days. He also considered the conditions of lighting at the scene at the time the robbery took place and found there was sufficient light at the scene. At the same time, the learned trial magistrate found that there was other evidence to support the evidence of identification. I agree with him. PW2, the Appellant's supervisor testified that the Appellant had been deployed to work at the Samar Construction site on 17th December 2015. He tendered into evidence the Appellant's dispatch note to the site as P. Exhibit 4. He told the court that the Appellant was on duty on the material night when the robbery occurred. I find that in addition to the evidence of PW4, that of PW2 corroborated PW4's evidence that indeed the Appellant had been deployed to Samar Site on night duty, which included the night in question.

40. I find that the evidence of identification adduced by the prosecution was watertight. The identification was that of recognition rather than mere identification of a stranger. In addition, there was the other evidence of PW2 that the Appellant had been deployed to work at the complainant company for night duty two days before the night in question, and was so engaged on the material night. The Appellant's conduct of disappearing from his work station on night of the robbery and keeping away without reporting to his employer speaks of conduct

of a person with a guilty mind.

41. After evaluating and analyzing afresh the evidence in this case, I find that the prosecution proved, to the required standard of proof of beyond any reasonable doubt, that indeed the Appellant was part of the gang that robbed the complainant.

42. On the issue of whether the elements of the offence of robbery with violence were proved. The Appellant contended that particulars of the offence of robbery with violence were not established by the prosecution. He urged that there was no indication that PW4 was occasioned any actual violence or suffered any bodily harm; that he was the only person who was arrested in connection with the robbery; and that no weapons alleged to have been used during the robbery were recovered from him.

43. The offence of robbery with violence as described under **Section 296(2)** of the **Penal Code** is complete where the prosecution proves, in addition to fact robbery took place, that any one of the following circumstances. Proof that the accused used or threatened to use violence; or he committed the offence in company with another or others; or was armed with offensive weapons at the time the robbery took place. (See ***Oluoch v Republic*** ***[1985] KLR 549***).

44. In the present appeal, the prosecution established that the Appellant was in the company of others not before the trial court, at the time the robbery was committed. Further PW4 testified that the Appellant hit him on his chest with his fist and that the assailants tied his hands and legs together with a rope. He stated that the Appellant took his phones and wallet from his pocket. The evidence of PW1 established the items stolen from Samar Construction Company at their construction site during the robbery. I find that the ingredients of the offence of robbery with violence were established by the prosecution in respect of the two counts facing the Appellant. There is no merit on this ground.

45. The Appellant contended that the prosecution failed to call material witnesses necessary to prove their case against him. He urged that the daytime guard, John Ibwaka, and the neighbour of PW4 at the locus in quo, one Patti ought to have been called as witnesses. **The neighbour was said to have assisted PW4 untie his hands after the robbers had left. The said neighbour was however not a witness to the robbery. Further,** there is no legal requirement in law on the number of witnesses necessary to be called as witnesses to prove a fact. **Section 143 of the Evidence Act is proof of that.** In the case of **Joseph Kiptum Keter vs Republic [2007] eKLR** the Court of Appeal held inter alia thus:

> "***Bukenya vs. Uganda*** ***[1972] EA*** **549 clearly states that** ***the prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."***

46. I find that the prosecution called sufficient number of witnesses to establish the charges on the required standard of proof. The witnesses identified by the Appellant in his submissions were not material witnesses, and failing to call them did not adversely affect the prosecution case, neither did it prejudice the Appellant in any way. That ground has no merit.

47. On whether the Appellant's alibi defence was cogent. The Appellant in his defence did not deny working at Samar Construction Site as a night guard. He however denied being on duty on the material night of the robbery. He told the court that on 19th December 2015, he was summoned by his supervisor who informed him that the guard he was standing in for had returned. He was asked to await his next assignment.

48. Regarding the defence of *alibi* an accused person need not prove that his defence is true. It is sufficient if he creates a doubt in the mind of the court as to the veracity of the prosecution case. In the case of **UGANDA v. SEBYALA & OTHERS [1969] EA 204**, the learned Judge quoted a statement by his lordship the Chief Justice of Tanzania in Criminal Appeal No. 12D 68 of 1969 where his lordship observed:

> **"The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts."**

49. The Appellant's defence of *alibi* does not create any doubt in the mind of the court as to the strength of the prosecution case against the Appellant. The prosecution case was watertight. Further, the Appellant's defence was displaced by the evidence of the prosecution, not only the eye witness account of PW4, but that of PW2 who was his supervisor. Furthermore, the Appellant's contention that PW2 told him not to report to work at the Complainant's premises on the day the robbery took place was an afterthought as he did not cross examine PW2 about that important factor. Furthermore, his disappearance from his place of work after the incident negates his alibi defence, and also his assertion of innocence. I find that the Appellant's alibi defence does not hold. Nothing turns on this ground.

50. Having come to the conclusion I have in this appeal, I find that the Appellant's appeal against conviction in both counts lacks merit.

51. On sentence, the principle applicable is that sentence is a matter of exercise of discretion by a trial court and an appellate court ought not to disturb such sentence unless it was exercised on the wrong principles of law, or out of a misdirection, or is illegal, or erroneous or excessively harsh in all the circumstances of the case.

52. The Appellant challenges the sentences as excessive and harsh. Appellant was sentenced to serve a custodial sentence of twenty (20) years in both counts. The sentences were ordered to run concurrently.

53. I have considered that the Appellant was a first offender. He stated that he was the sole breadwinner of his family. He had spent two and half years in remand custody prior to his conviction by the trial court. In addition, he has been in custody for approximately two and half years since his conviction. I have taken into consideration the period that the Appellant was in pre-trial detention, and the period that he has spent in prison serving sentence.

54. This court also noted that the complainant did not sustain serious injuries during the robbery. I however did consider that the value of the stolen items was astronomical, and that nothing was recovered.

55. Taking these factors into consideration, I do find that the sentence of twenty (20) years imprisonment in both counts imposed against the Appellant by the trial court was excessive in all the circumstances of this case. Accordingly, I set aside the sentence and substitute it by an order of this court sentencing the Appellant to serve ten (10) years imprisonment in each count to run concurrently from the date of sentence by the lower court. For avoidance of doubt that date is 17th August 2018.

56. Those are my orders.

DATED AT NAIROBI THIS 27th DAY OF APRIL, 2021.

LESIIT, J

JUDGE

DELIVERED THROUGH TEAMS

In the presence of

Lesiit, J ……………………………………………….Presiding Judge

Kenneth Kinyua ……………………………….Court Assistant

Appellant…………………………………………….In person

Ms Ogweno holding brief Ms Akunja ….For the State/Respondent

Interpretation: English/Kiswahili

LESIIT, J.

JUDGE