REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: A.K NDUNG'U J

CRIMINAL APPEAL NO 93 OF 2019

DENIS NYASOKO..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the original conviction and sentence of Hon. S. N. Makila – SRM dated 25th May 2018 at the Chief Magistrate's Court at Kisii in Criminal Case No. 1669 of 2017)

JUDGEMENT

1. The appellant was charged in Kisii Chief Magistrate's Court Criminal Case No. 1669 of 2017 with the offence of Robbery contrary to **Section 295** as read with **Section 296 (2)** of the **Penal Code**. The particulars of the offence were that on the 8th February 2017 at Bomorenda Location, in Kisii South District within Kisii County, jointly with another not before court robbed RICHARD OKEMWA of two mobile phones makes Samsung Zs, Samsung make S3500, black laptop bag, dark blue trouser, red shirt, National Identity card, NHF card, Equity and Co-operative bank ATMs, clinical practicing license and Kshs 26,000/- all valued at Kshs 52,000/- and at the time of such robbery wounded the said RICHARD OKEMWA.

2. The appellant denied the charge and after a full hearing, he was convicted and sentenced to 10 years' imprisonment. Aggrieved by both his conviction and sentence, the appellant filed the present appeal.

3. It is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see ***Okeno v Republic*** **[1972] EA 32**).

4. At the hearing of the appeal, the appellant relied entirely on his written submissions. The appellant submitted that he was convicted under **Section 295** as read with **Section 296(1)** of the **Penal Code** while the charge sheet read robbery contrary to **Section 295** as read with **Section 296 (2)** of the **Penal Code**. On the issue of identification, he faulted the prosecution for not availing the identification parade forms and also questioned the trial court's decision on positive identification as the incident occurred at night when the complainant was drunk. He also contends that the prosecution case was marred with contradictions.

5. Mr. Otieno, state counsel, opposed the appeal and argued that the evidence in the trial court showed that the appellant stole from the complainant. There was no need of an identification parade since the appellant was known to the complainant. The phone that was stolen from the complainant was found in the appellant's possession. The evidence presented in the lower court was sufficient and the 10 year sentence is lenient.

6. At the center of this appeal is the determination of whether the charge sheet was incurably defective. The appellant was charged with the offence of robbery contrary to **Section 295** as read with **Section 296 (2)** of the **Penal Code**. The trial court on this issue held as follows;

> *"In my view the omission contained in the charge sheet is a minor one since it is common knowledge that the sentencing section for simple robbery is section 296(1) of the Penal Code."*

7. The Court of Appeal in **Joseph Njuguna Mwaura & 2 others v Republic [2013] eKLR** discussed in detail the effect of duplicity. The court stated as follows;

"This issue has been dealt with by this Court before in ***Simon Materu Munialu V Republic [2007] eKLR (Criminal Appeal 302 of 2005)****. This Court was confronted with the issue whether a charge sheet citing only section 296 (2) of the Penal Code was sufficient. This Court in that appeal considered the submission that section 295 of the Penal Code creates the offence of robbery, but held that:*

'…the ingredients that the appellant and for that matter any suspect before the court on a charge of robbery with violence in which more than one person takes part or where dangerous or offensive weapons are used or where a victim is wounded or threatened with actual bodily harm or occasioned actual bodily harm is section 296(2) of the Penal Code. It is these ingredients which need to be explained to such accused person so as to enable him know the offence he is facing and prepare his case. These ingredients are not in section 295 which creates the offence of robbery. In short, section 296(2) is not only a punishment section, but it also incorporates the ingredients for that offence which attracts that punishment. It would be wrong to charge an accused person facing such offence with robbery under section 295 as read with section 296(2) of the Penal Code as that would not contain the ingredients that are in section 296(2) of the Penal Code and might create confusion.

……..

We agree that this is the correct proposition of the law. Indeed, as pointed out in ***Joseph Onyango Owuor& Cliff Ochieng Oduor v R (Supra)*** *the standard form of a charge, contained in the Second Schedule of the Criminal Procedure Code sets out the charge of robbery with violence under one provision of law, and that is section 296. We reiterate what has been stated by this Court in various cases before us: the offence of robbery with violence ought to be charged under section 296 (2) of the Penal Code. This is the section that provides the ingredients of the offence which are either the offender is armed with a dangerous weapon, is in the company of others or if he uses any personal violence to any person.*

The offence of robbery with violence is totally different from the offence defined under section 295 of the Penal Code, which provides ***that any person who steals anything, and at, or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or to property in order to steal****. It would not be correct to frame a charge for the offence of robbery with violence under section 295 and 296 (2) as this would amount to a duplex charge."*

8. The Court of Appeal in ***Paul Katana Njuguna v Republic [2016] eKLR*** *considered the issue of duplicity where the appellant had been charged with the offence of robbery with violence contrary to* ***Section 295*** *as read with* ***section 296(2)*** *of the* ***Penal Code.*** *The Court observed as follows;*

"Having considered the law on duplicity as it has evolved, can we say that the charge as framed in the appeal before us was so defective as to have occasioned a failure of justice? Can it be said with any certainty that the said defect is incurable under Section 382 of the Penal Code. We observe that the offence under Section 295 and 296 (2) were not framed in the alternative. So, following the decision in Cherere s/o Gakuli -v- R (supra) Laban Koti -v- R. (supra) and Dickson Muchino Mahero v R. (supra), the defect in the charge herein is not necessarily fatal."

9. In this case, the appellant understood the charge against him, participated in the hearing by cross examining the witnesses and mounted a defence at the close of the prosecution case. He raised no complaint before the trial court and in the circumstance I find that there was no miscarriage or failure of justice on the ground that the charge was duplex.

10. I now turn to whether the prosecution proved its case beyond reasonable doubt. **Section 295** of the **Penal Code** states as follows;

"Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery."

11. On the other hand **Section 296(2)** of the **Penal Code** states:

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

12. Although the charge read: Robbery contrary to **Section 295** as read with **Section 296 (2)** of the **Penal Code**. The particulars were as follows;

1. DENIS NYASOKO*: On 8th February 2017 at around 2300 hrs at Bomorenda location, in Kisii South District within Kisii County, jointly with another not before court robbed RICHARD OKEMWA of two mobile phones makes Samsung Zs, Samsung make S3500, black laptop bag, dark blue trouser, red shirt, National Identity card, NHF card, Equity and Co-operative bank ATMs, clinical practicing license and Kshs 26,000/- all valued at Kshs 52,000/- and at the time of such robbery wounded the said RICHARD OKEMWA.*

13. From the particulars, the appellant was charged with the offence of robbery with violence as the particulars allege the offence described under **Section 296(2)** of the **Penal Code**. The ingredients constituting the offence of robbery with violence were stated in the case of **Johana Ndungu vs. Republic CRA 116/1995** thus:

"In order to appreciate properly as to what acts constitute an offence under Section 296 (2) of one must consider the subsection in

conjunction with Section 295 of the PC. 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 after to further in any manner the act of stealing. Thereafter, the existence of the afore described ingredients constituting robbery are presupposed in the three sets of circumstances prescribed in Section 296 (2) which we give below and any one of which if proved will constitute the offence under the subsection:

1. If the offender is armed with any dangerous or offensive weapon or instrument; or

2. If he is in company with one or more other person or persons; or

3. If at or immediately before, or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person."

14. *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."* (see **Dima Denge Dima & Others vs. Republic Criminal Appeal No. 300 of 2007**).

15. The evidence emerging from trial was as follows. Richard Okemwa Ongwacho (PW 1) recalled that on 8th February 2017 he left the bar and boarded the appellant's motorcycle. He was in the company of Esther Nyatichi (PW 4). About 100 meters from his house the appellant slowed down, turned off the motor cycle and switched off the headlights. Two boys appeared from the bush and assaulted him. The appellant also joined the two and they kicked and boxed him. He testified that they stole his wallet that had his Kshs 26,500/-, Samsung Zs, Samsung S3500, black laptop bag, dark blue trouser, red shirt, charger and earphones. PW 1 was treated at Iyabe District Hospital by Thomas Muruga Obora (PW 6) who observed that he had sustained bruises on the neck and classified his injuries as harm. PW 4 recalled that on the material day they boarded the appellant's motor cycle and she was alighted midway, while PW 1 and the appellant proceeded.

16. Alex Akama (PW 2) testified that he loaned some money to the appellant and that as security the appellant gave him a Samsung phone. He told court that later when he demanded payment of the money from the appellant, the appellant told him that he should sell the phone and recover the amount owed. He sold the phone to Denis Buli Mangoa (PW 5) who sold it to Julius Barongo Anyiega (PW 3). The phone was later traced back to PW 2 who informed the police that he got the phone from the appellant.

17. Joshua Mwau No 87827 (PW 7) was the investigating officer recalled that PW 1 reported the incident and he began his investigations. He traced the missing phones through Safaricom and on 9th September 2017 the phones were traced back to PW 3. His investigations revealed that the appellant had earlier disposed of the phone to PW 2. He later charged the appellant.

18. The incident occurred at night and it would be crucial to first establish whether the appellant was positively identified. The court in **Wamunga v. Republic (1989) KLR 424 at 426** had this to say:

"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 a conviction."

19. I have interrogated the circumstances under which identification was made. PW 1 testified that the accused was known to him as he had carried him before. He also identified the appellant through an identification parade. Pw4 also testified that he knew the appellant who operated a *bodaboda* business and that she boarded his motor cycle together with PW 1. Although the incident occurred at night PW 1 testified that on that particular night there was moonlight. All these are circumstances in my view favour positive identification.

20. Any doubts on identification of the appellant are cast away by the doctrine of recent possession which the prosecution relied on in proving their case. In **Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic Criminal Appeal No. 272 of 2005** this doctrine was explicated thus:

"It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof:

i) that the property was found with the suspect;

ii) that the property is positively the property of the complainant;

iii) that the property was stolen from the complainant;

iv) that the property was recently stolen from the complainant.

The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."

21. PW 1 testified that the appellant and two other attacked him and stole his money and other items that he had. The Samsung phone belonging to PW 1 was traced back to the appellant through the testimony of PW2, PW3 and PW5. PW 1 was treated by PW 6 who described the injuries he sustained as harm. After considering the totality of the evidence by the prosecution, I find that the prosecution proved the ingredients of robbery with violence beyond reasonable doubt.

22. This would call for enhancement of the sentence meted out by the trial court. However, following the decision of the Supreme Court in **Francis Karioko Muruatetu & Another v Republic SC Petition No. 16 of 2015 [2017] eKLR**, the death sentence as required **by Section 296(2)** of the **Penal Code** is no longer mandatory. I find no reason to interfere with the 10 year sentence.

23. With the result that the appeal herein has no merit and is disallowed in its entirety.

Dated, Signed and **Delivered** at **KISII** this **22** day of **July 2020.**

A. K. NDUNG'U

JUDGE