REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL NO. 56 OF 2018

JOSEPH MWANGI MUGA.....APPELLANT

-VS-

REPUBLIC.....RESPONDENT

(Being an appeal against the whole of the judgment of the Hon. C.M J. Mbugi in Thika criminal case No. 2013 of 2012 delivered on the 16th October 2013)

JUDGMENT

1. The appellant was convicted for the offence of robbery with violence contrary to section 295 as read with section 296(2) of the penal code and sentenced to suffer death as per the law provided. It was alleged that on the 16th April 2012 at Gitamayu Coffee Estate within Ruiru in Kiambu County jointly with others while armed with offensive weapons to wit *Pangas*, hammers and *rungus* robbed Joseph Njagi Njuki of two mobile phones make Nokia 1616 and a Sumsang valued at Kshs.8,500/= and at the time of such robbery wounded the said Joseph Njagi Njuki.

2. He appeal is against both the conviction and sentence by an amended petition of Appeal dated and filed the 20th September 2018, on grounds that the charge sheet was defective, that crucial witnesses were not called, that the conviction was based on contradictory evidence and that the trial court failed to consider the defence evidence.

3. The appeal filed written submissions which I have considered. The charge sheet is alleged to have been defective, that it did not support the evidence tendered before the trial court. **In the case Sigilani -vs Republic (2004) 2KLR 480,** the court held that

> ***"the principle of the law governing charge sheet is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable on accused person to prepare his defence"***

4. Two issues for consideration are whether the charge sheet is defective and even if defective, whether justice could still be met with such defect.

I have looked at the charge sheet. It contains a statement of the specific offences with which the accused was charged together with the particulars as may be necessary for giving reasonable information as to the nature of the offence charged – **Peter Ngure Mwangi vs Republic(2004) e KLR**. On the face, the charge as stated is not defective. It satisfies the principles of law as stated in the **Sigilani and Peter Ngure cases above.**

4. This is a first appeal. It is my duty to re-evaluate the totality of the evidence tendered before the trial court and come up with own findings, and to be satisfied that the said findings are sufficient to sustain a conviction **George Anyango Anyang & Dennis Oduo –vs-Republic.** On the onset, it is important to state that the burden of proof in a criminal case always rests with the prosecution to adduce cogent, satisfactory and sufficient evidence to link an accused person to the commission of the offence.

5(a). In the case **Morris Gikundi Mamuude -vs- Republic (2015) e KLR** it was held that such evidence must be so clear, cogent and credible that there would be no possibility of an error, and to be proved to the required standard of proof, beyond reasonable doubt. The court is mandated to consider the quality and credibility of such evidence for a conviction to be sustained.

6. In an offence of robbery with violence, three ingredients must be proved.

1. ***That the offender was armed with a dangerous weapon.***

2. ***That he was in the company with one or more other persons or***

3. That immediately before or immediately after the time of the robbery the offender threatened to use actual violence.

7. **THE EVIDENCE:**

Four prosecution witnesses testified.

PW1 was Joseph Njagi Njugi the complainant then a watchman at Gatumani estate. He testified that on the 16th April 2012 at about 12 noon while at the work place with another the appellant with another armed with *pangas* and hammers attacked them, asked for their telephones but when he refused to hand over the phones, he was hit on the cheek and cut with a *panga* on the right leg knee, after which the robbers took away the two phones and ran away. He further testified that after treatment, he gave the appellant's names to the police as he knew him before by name and also knew his home which was also about 1km from the duty station. The purchase receipts for the telephone sets were also given to the police.

8**. PW2 was PC David Ngare**, attached at AP Ruiru post was the arresting officer. His evidence was that upon the robbery being reported he arrested the appellant on the 21st April 2012 but did not recover any weapon from the appellant.

9. The investigating officer testified as **PW3** and recorded statements from witnesses. His evidence was that the complainant had reported having been attacked by six men who beat him and another man and stole their mobile phones. He too did not recover anything from the appellant, but nevertheless charged him with the offence. His evidence was that the complainant had injuries to his face and thighs.

10. **PW4 a clinical officer** testified having treated the complainant who had injuries on the right cheek, and pain on the left wrist and right knee joint. He produced the P3 form. No other witness testified.

11. The appellant tendered unsworn statement of defence. He denied committing the offence.

It is upon the above evidence that the trial magistrate made a finding that the prosecution had proved its case beyond reasonable doubt.

12. In his judgement, the trial magistrate stated that the evidence before him was the complainant's word against the appellants as no witness testified to have seen the appellant commit the offence. Citing the case **Thuo -vs- Republic NB CA No 26 of 1982** where the court held that

> ***" ...prove as to corroboration becomes important in such cases. A court should warn itself of the danger of acting on the uncorroborated testimony of the complainant but having done so it can convict in the absence of corroboration if it is satisfied that the testimony is truthful."***

13**. Section 143 Evidence Act Chapter 80 Laws of** Kenya provides that a fact can be proved by testimony of a single witness. In such situation the trial magistrate believed in the single testimony of the complainant, and convicted the appellant.

14. I have re-evaluated the prosecution evidence. The offence is alleged to have been committed at an estate gate, at about mid-day. The appellant was with another person whom he named as Njumo. Both were on duty as watchmen. This other person- Njumo- was not called to testify as to the robbery with violence of their two telephone sets were not recovered with the appellant or at all the weapons allegedly used to injure the appellant was also not recovered. It is instructive to note that during the alleged robbery, the victims, appellant and Njumo did not scream or call for help yet it was at midday. They did nothing.

15. The appellant did not tell the court what type of estate they were guarding. Was it a residential estate, a business estate or an agricultural estate? I am not supposed to assume or look for evidence because each of them is of a different character and if a robbery was being committed at the estate, such robbery would also have different characteristics. This in my view are important factors that the prosecution witnesses failed to testify to, and equally the trial magistrate failed to apply his mind to while analysis the evidence.

16. The totality of evidence before the trial court was purely circumstantial and uncorroborated.

The complainant stated that the offence was committed around 12.00noon on the 16th April 2012. The robbery was reported at the police post on the 21st April 2012 six days after the act. On the day of robbery the 16th April 2012 though the complainant stated to have been taken to Ruiru police station no report of robbery with violence was demonstrated as no occurrence book or any other record was produced to the court for certification that such offence was indeed committed.

17. The complainant testified that he marked the attackers. He did not elaborate in which manner he marked them. In his own words, he testified that he did not give the police officers description of the attackers because he knew them before. The second attacker, or the five others were neither named nor arrested.

The complainant did not explain to the court why he took five days after the alleged attack to report the incident to the police yet it was his evidence that he knew the appellant and the other attacker by recognition and also knew his house. The complainant testified there being two including the appellant while the investigating officer testified to have been informed of six attackers.

18. There is no doubt therefore that the prosecution evidence was contradictory and inconsistent in very material aspects.

Even if the complainant stated having known the appellant before the alleged attack, why would he not give the description to the police to

facilitate his arrest soon after the attack?

What of the other person or persons who are alleged to have been in the company of the appellants? Whether they are six or one other person?

19. In the case **Morris Gikundi Kamunde** (**Supra**) it was held that the court is mandated to scrutinize evidence of identification and facts of such identification given as such identification is of highest importance as given by those who purport to have identified the offenders (See also **David Gathu Kangethe -vs- Republic (2015) e KLR.**

20. In my view, even when identification of an attacker by recognition is alleged, description of that attacker is important for it to be credible – **Peter Wanyutu Kahiga –vs- Republic (2017) e KLR.**

21**.** The matter of identification by recognition was discussed in the case **Turnbull & Another –vs- Republic (1973) EA 549** when the court rendered that

> ***"….the Judge should direct the jury to examine closely how identification by each witness came to be made. How long did the witness have the accused under observation.***
>
> ***At what distance? In what light?--- Had the witness even seen the accused before?***
>
> ***How often? ----recognition may be more reliable than identification of a stranger …."***

The above principles and pointers are necessary as failure to observe them pay lead to mistaken identify.

22. In the instant appeal, the only reason the complainant picked on the appellant, in my view, is that he was alleged to have stolen coffee from the appellant's employer factory. However other than so stating, the complainant could not state when or under what circumstances the said coffee was stolen, and further he did not record/state the matter of stolen coffee by the appellant to the police station.

23. The Court of Appeal in **James Mungu Karumba –vs- Republic (2016) e KLR** emphasized the need for a properly organized identification of a suspect by an identification parade. More so where the suspect is unknown to the complainant in the instant appeal, no identification parade was conducted to enable the complainant to positively identify the offender conclusively.

I have stated, and it is evident now that there were material inconsistences in the prosecution's case, including obvious suspicion without any basis that it was the appellant who committed the offence.

24. As to whether the inconsistencies are curable by revision or reversible under **Section 382 of the Criminal Procedure Code** depends on the circumstances of each case.

The trial court despite the above obvious contradictions found the prosecution's case to be credible and truthful.

25. I do not agree with the trial court's findings because such substantial contradictions and suspicions go to the root of the prosecution's evidence and credibility of the prosecution's witness and in particular the complainant's evidence.

26. In the case **John Nyaga Njuki & 4 Others –vs- Republic (2002) e KLR** the court held that

> ***"But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused."***

27. The discrepancies and contradictions in the prosecution's evidence in my view are too glaring and too grave to be ignored.

The said evidence is not sufficient nor watertight to sustain the conviction on such grave offence as robbery with violence.

28. When a person's life and liberty are at stake, the court is under a duty to strictly scrutinize the prosecution's evidence and to be satisfied that no doubt at all exists in its mind as to the guilt of such person. It is the duty of the prosecution to bring to court watertight evidence that points squarely to the guilt of an accused person.

Having so rendered, I came to the conclusion that the prosecution did not prove its case against the appellant to the required standard of proof, beyond any reasonable doubt that it is the appellant with others, who committed the offence.

29. Consequently the appellant's appeal is allowed. I quash the conviction and set aside the sentence.

The appellant is set at liberty unless otherwise lawfully held.

Dated and signed at Nakuru this 27th day of March 2019.

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J.N. MULWA

JUDGE

Dated, signed and Delivered this 10th Day of April 2019.

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C.MEOLI

JUDGE