REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 47 OF 2016.

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 38 & 39 OF 2016.

ROBERT KIRUI..................................1ST APPELLANT

MICHAEL TERER.............................2ND APPELLANT

WELDON TANUI...............................3RD APPELLANT

LEONARD KIPNGENO......................4th APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(Being an Appeal from against both the conviction and the sentence of

Principal Magistrate Hon. Nyakundi M. delivered on 23rd of February 2016 in NAKURU Court Criminal Case No. 3484 of 2013)

JUDGMENT

1. The Appellants were charged before the Nakuru Chief Magistrate's Court with one count of Robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code, of the laws of Kenya. The particulars of the offence as per the charge sheet were that on the 20th of October 2013 at Ngongongeri farm in Njoro District within Nakuru County jointly with others not before court while armed with dangerous weapon namely *rungus* , *pangas* robbed FM, ½ sack of wheat, 4 Kgs of dry maize flour, 50 kgs of Maize, a hammer and cash money Kshs 4,000 all valued at Kshs 8,500 and at or immediately before or immediately after the time of such robbery used actual violence to the said FM

2. After a fully-fledged trial, the Trial Court convicted the Appellants and sentenced them to death.

3. In brief, the evidence that emerged at the trial was as follows. The Complainant, FM, testified as PW1. His testimony was that on 20/10/2013, he was in the farm at around 3:00pm. He was working in the farm with JO. He heard screams coming from JO's children at their home. He rushed there. He said that he found eight people attacking the children and the midst of a violent orgy of violence: the eight of them were beating up the children. On inquiring why they were doing so, the Complainant says that they turned their ire towards him – with the 1st Appellant stating in Gusii that he would "beat him until he dies." He said that the assailants were armed with knives, *pangas* and *rungus*. He further testified that the assailants continued beating him and only ran away when some Administration Police men went to the scene. Fred testified that he recognized two of the attackers.

4. EK, a thirteen-year old minor testified as PW4. She was one of the children in the home of JO when the assailants allegedly struck. On her part, she saw four assailants. They first went to their home and told her and her siblings that they had been asked by the Police from Njoro to take some items from their house. They carried flour, hammer, beans and wheat from the house. They then started beating E and her younger siblings. Her three siblings managed to escape and went to the farm to call their "uncle", FM, the Complainant. E said that he recognized all the four attackers as people who lived nearby.

5. The screams and commotion at the home of JO also attracted the attention of JMM. He testified as PW5. On his part, he said he was harvesting maize at PW2's (Naomi Kerubo Manti) farm when he heard the screams. He rushed to the scene where he found eight assailants attacking O's children and the Complainant. When he tried to intervene, they turned on him also and he ran away. He only returned to the scene with some AP policemen later.

6. Naomi Kerubo Manti is the owner of the farm where the incident happened. The Complainant is her caretaker. She was not present when the incident happened but she was called about it. She then went home and escorted the Complainant to report to the Police the following day. She testified as PW2. It would seem that some of the property which was stolen was hers.

7. PW3 was the Arresting Officer, Matheri Mugambi. He was, at the time, attached to the Ngongeni AP Post. He testified that he received a letter from the OCS Njoro requesting him to assist in the arrest of the four Appellants. With guidance from the Complainant, he proceeded to arrest the four Appellants in two different homesteads. He testified that they had looked for the Appellants for a week before finally getting them. It emerged during cross examination that the letter written by the OCS, which was produced as an exhibit, did not have the names of the four Appellants.

8. The Investigating Officer, PC Mwakibaga Kibaya, testified as to the formal aspects of the investigations while Jacob Chelimo, a Clinical Officer testified about the injuries suffered by the Complainant. He also produced, with the acquiescence of the Appellants, a P3 Form with respect to the Complainant's injuries.

9. When placed on their defence, each of the Appellants rendered straight denials. The 1st Appellant gave an unsworn statement. He generally gave an account of what he was doing in the two days preceding his arrest on 28/03/2013. He denied that he participated in the attack. So did the 3rd and 4th Appellants: They focused on the days leading to their arrests and insisted that they had not participated in the robbery.

10. The 2nd Appellant gave a sworn statement. He admitted that he was a neighbour to the Complainant. He testified that on the day of the alleged attack, he was at work drying maize at this employer's place. His mother visited him there at 2:00pm to borrow Kshs. 500/-. The 2nd Appellant testified that he remained at his work place until 6:00pm and that therefore he could not have participated in the robbery. He called his employer, Rosaline Chebet Kosgey, who corroborated his story. She testified as DW5 and confirmed that the 2nd Appellant was working in her farm until 6:00pm on 20/10/2013. Christine Cheruto, the mother to the 2nd Appellant also corroborated the aspects of the case about going to visit the 2nd Appellant at his place of work to borrow money. She also testified that the Appellant returned home on that day at around 7:00pm.

11. Finally, Bernard Kirui testified as DW7. He also focused his testimony on what he claimed happened between 25/10/2013 and 28/10/2013 when the Appellants were arrested.

12. After hearing all the witnesses, and their submissions, the Learned Trial Magistrate convicted the Appellants of the charged offence and sentenced each of them to death.

13. The Appellants were dissatisfied by both the conviction and sentence and have appealed on this Court. The grounds of Appeal jointly filed by the 1st and 4th Appellants are that:

> a. *The Learned Trial Magistrate erred in law and in fact in convicting the appellant on alleged evidence of identification that was flawed*
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> b. *That the Pundit Magistrate erred in law and in fact in convicting the appellant on contradicting and conflicting evidence that was inconsistent*
>
> c. *The Learned Trial Magistrate erred in law and fact in convicting the appellant and failing to see that the charges emanated from land conflict*
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> d. *The Learned Trial Magistrate erred in law and in fact in dismissing the appellants plausible defence and failed to advance any cogent reasons for findings*
>
> **e.** *The Learned Trial Magistrate erred in law and fact by failing to note that the case did not satisfy the burden of proof.*
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> 14. The Supplementary Grounds of Appeal filed by the 1st and 4th Appellants are the following:
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> a. *The appellant pleaded not guilty to the offence of robbery contrary to section 296 (2) of the Penal Code*
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> b. *The Trial Magistrate erred in both law and fact by convicting the appellant and failing to note that the charges stemmed from a land conflict*
>
> c. *The Trial Magistrate erred in both law and fact by convicting the appellant while it is conspicuous that the prosecution case was not proved beyond reasonable doubt.*
>
> d. *The Trial Magistrate erred in law and fact in failing to note that there no exhibit found with the appellant*
>
> e. *The Trail Magistrate erred in law and fact in failing to note that there was no corroboration of evidence*
>
> f. *The Trial Magistrate erred in law and fact in dismissing the appellants defence yet the dame was comprehensive enough to raise considerable doubts and water down the prosecution case*

g. *The Trial Magistrate erred in law and fact in convicting the appellant on purportedly the weakness of their defence rather than on the strength of the prosecution case which in itself was an erroneous approach in a criminal trial and a shift of burden of proof*

h. *That in view of the circumstances giving rise to the alleged offences, the death sentence is extremely hard, unjustified and unconstitutional and furthermore the sentence does not capture the mitigation by the appellant*

15. The 2nd and 3rd Appellants jointly filed their Amended Grounds of Appeal. They were as follows:

a. The Learned Trial Magistrate erred in law and in fact by convicting them in the present case yet failed to appreciate that identification was not positively conducted and proved

b. *The Learned Trial Magistrate erred in law and fact by dismissing their defence yet the same was cogent and raised substantial doubt against the prosecution evidence.*

16. The Appeal was argued by way of filed Written Submissions followed by oral submissions by Mr. Ng'etich, Counsel for the 1st and 4th Appellants and Mr. Chigiti, the Prosecuting Counsel.

17. In their arguments, the Appellants converged their points of appeal into four. I will briefly summarize them.

18. First, the Appellants argue that the Prosecution case was so badly riven by material contradictions and inconsistencies that it could not produce a case proven beyond reasonable doubts. They point to the following contradictions:

i. They submit that the 7 witnesses called by the Prosecution each had a different account of what happened. In particular, the Appellants submit that the Complainant stated that the Appellants talked to him in Kisii language yet none of them speaks the language.

ii. The Appellants also point out that the OB did not have the names of the Appellants and neither was there a record of items stolen despite the fact that the Complainant stated that he gave the Police this information.

iii. The witnesses had claimed that the letter from the OCS had the names of the Appellants but what was presented to Court, it did not have the names.

19. Second, the 1st and 4th Appellants argue that the evidence of PW2 was taken in error because she was a child of tender years and the *voire dire* conducted was faulty. The argument was that the Court failed to establish the age of the minor during the voire dire hence rendering the procedure fatally defective. They relied on ***Joseph Opondo Onago v Republic [2000] eKLR.***

20. Third, the 1st and 4th Appellants say that it was wrong from the Learned Trial Magistrate to ignore the alibi statement by the 1st Appellant. The 1st Appellant had given unsworn statement to the effect that he was at work on 26/10/2013 when he asked for permission to go see his mother in law. He said that he left with the 4th Appellant. He called a witness, DW7, Bernard Kirui, who corroborated this account. However, this line of argument is unavailing because it is directed at the time of the arrest not the time the offence was alleged to have occurred. The allegations are that the offence was committed on 20/10/2013 and not 28/10/2013.

21. The alibi defence of the 2nd Appellant is more relevant. His testimony was that on the material day (20/10/2013), he was at work until around 6:00pm. His mother had called him asking to be given Kshs. 500/-. The 2nd Appellant says that he asked for that amount from his employer and the mother came to collect the amount that afternoon. The offence was alleged to have been committed at around 3:00pm on that day. The 2nd Appellant's employer, Rosaline Chebet Kosgey, testified as DW5 and corroborated this account in every material particular. It is unclear why the Learned Trial Magistrate found this alibi defence did not raise reasonable doubts even though the Prosecution did not do anything to displace it.

22. The fourth line of argument raised by the Appellants centred on the identification evidence. In short, the Appellants doubted that the identification was free from error in the circumstances. In particular, they pointed out that the OB which was produced in the Trial Court did not contain the names or descriptions of the Appellants. Neither did the letter written by the OCS Njoro Police Station to the AP Post Ngongeni for them to assist in the arrest of the Appellants. The Appellants argued that these omissions are crucial for they may indicate that the later supposed identifications by the witnesses were an afterthought.

23. Mr. Chigiti for the Prosecution submitted that PW 1 mentioned the name of the assailant and the name of the assailant was given; the only problem was that the OB was not availed. The *ratio decidendi* was very clear, he insisted. There was no demonstration of material contradictions. Mr. Chigiti insisted that the incident happened during the day and the evidence tendered was one of identification by recognition and therefore free from error. He also submitted that the court did not disregard the defence of alibi; that it just found it not plausible in the circumstances. He submitted that the ingredients of robbery with violence were met.

24. The duty of a first appellate Court in criminal cases was long stated in ***Okeno v R [1972] EA 32*** thus:

*This Court is not to merely confirm or disconfirm particular hypothesis made by the Trial Court. Even then, this Court must be acutely aware that it neither saw nor heard the witnesses as they testified and, therefore, it must make an allowance for that***.**

25. It is therefore the duty of the first appellate Court to look into the evidence adduced at the Trial Court afresh, re-evaluate and reassess it

and reach its own conclusions. It is with this in mind that I have re-evaluated the whole Trial Court record.

26. Our decisional law is that minor discrepancies and inconsistencies in the Prosecution case can be ignored (see *Erick Onyango Ondeng' v Republic [2014]* eKLR *CRIMINAL APPEAL NO. 5 OF* 2013). In this case, the Court of Appeal stated:

> *With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case*.

27. On my part, after reviewing the evidence on record, the following aspects of the case have stood out as problematic:

> **a. First, the Complainant testified that during the attack, he was able to identify two of the attackers – the 1st and 2nd Appellant. He said that he did not know the other two. Yet, there was no account by any of the witnesses how the other two Appellants were identified or linked to the attack. While EK (PW4) claimed that she identified the four attackers, the Arresting Officer stated that it was the Complainant who guided them on who to arrest and then, after the arrest, it was the Complainant who "identified" the four Appellants. It is unclear how the Complainant was able to identify two of the attackers he did not recognize during the attack.**
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> **b. Second, while PW1 said that he recognized the 1st and 2nd Appellants, he did not report their names to the Police (as recorded in the OB) or in the letter written to the Administration Police to help in the arrest of the Appellants.**
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> **c. Third, PW1 (the Complainant) and PW5 (JMR) speak of eight attackers but PW4 (EK) speaks of four attackers.**
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> **d. Fourth, while PW1 (the Complainant) and PW4 insisted that the attackers fled while carrying the stolen goods, PW5 (JMR) testified that the attackers threw down the goods they had stolen and never ran away with goods. In yet another account, PW4 (EK) had earlier testified thus:**
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> ***The 3rd Accused entered my father's bedroom. He took mud in the house and smeared his face. He told us that the officers from Njoro sent them to remove their items from the house. They removed flour, hammer, beans half sack, wheat half sack…..The 3rd Accused removed the items outside (sic) they carried and left….They carried them and took them to their home…..***
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> **e. Fifth, PW1 (the Complainant) testified that the attackers started beating him as soon as he got to John's home. However, the testimony of PW4 (EK) was that the Complainant was beaten as he tried to follow the attackers as they fled. Additionally, given that the specific attacker who assaulted him had a *panga* in one hand and a *rungu* in the other, it appears quite curious that the Complainant only suffered only tenderness on his face.**
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> **f. PW4 (EK) claimed that when she and her siblings raised alarm, the Complainant and her father (JO) could not hear as they were far off in the farm; and her three younger siblings had to run to the farm to call them. Yet, PW1 (the Complainant) insisted that he heard screams from the homestead of John and ran to see what was happening.**
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> **g. Generally, the accounts of PW1 (the Complainant), PW4 (JMR) and PW5 about what happened seem to differ quite wildly.**
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> **28. There are three other critical aspects of the case that, in my mind, amplify these contradictions and raise serious doubts as to the credibility of the Prosecution narrative as presented in Court.**
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> > **a. *First*, it is alleged that the Appellants stole the following: half sack of wheat; 50kgs of maize; 4 kgs of dry maize flour; a hammer and cash (Kshs. 4,000/-). Yet, the narrative by PW1 (the Complainant) is that the Appellants fled while carrying their stolen loot. The Complainant offered that they helped each other to carry the loot as they fled. This seems quite implausible: that assailants would run away in the light of day carrying such heavy items and yet the Complainant could not out-run them?**
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> > **b. *Second*, there is an incomplete explanation about Administration Police who came to the scene with JMR (PW5) after the Complainant allegedly reported the incident on the phone. The first mystery is why the Administration Police Officers who responded immediately could not pursue assailants who were carrying as heavy objects as more half sacks of wheat and maize? The second mystery is why none of the Administration Police Officers not called to testify?**
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> > **c. *Third*, he Complainant did not report to the Police on the day of the attack. Instead, he waited until the following day to go report in the company of PW2.**
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> > **d. *Fourth*, there is the curious case of JO. JO is the father to EK (PW4). He was in the farm working with PW1 (the Complainant) when the attack allegedly happened. It was his home that was attacked. It was his four young children who were first attacked. Yet, the accounts given by the three eye witnesses (the Complainant; EK and JMR) do not have J playing any role at all. Indeed, the Complainant says when he heard John's children screaming, he ran to the scene *alone*. Where was John left? Why? No explanation at all is given for this mystery.**

e. *Fifth*, on the question of identification, PW3, the arresting officer had this to say:

The Complainant came to the Police Post [and] identified the suspects and we released one whom he did not identify at the AP Post.

This is curious because it suggests that somehow the Complainant identified the Appellants at the Police Post without the aid of an Identification Parade. Needless to say, this casts a long shadow on the identification of the witnesses especially when coupled with the fact that the names or descriptions of the Appellants were not included in the OB or the letter written by the OCS to aid in their arrest. This aspect of the case is not aided by the fact that the OB book went missing shortly after the trial. It was not available at the time of the trial and though the Court gave orders for it to be produced, the OCS, Njoro Police Station reported that the OB was missing.

29. Perhaps seen singly, each of these discrepancies might be explained away by necessary loss of memory or inadvertence or human error or slips. However, seen as a whole, they are quite material. They cast grave doubts on the credibility of the Prosecution case. It seems to me that some incident happened on 20/10/2013 at Ngongongeri Farm. It is unclear, however, whether the incident was robbery. It is also unclear who the actors were. In the circumstances, it was unsafe to convict the Appellants of the offence of robbery with violence.

30. **There is another aspect of the case that became obvious upon perusal of the Trial Court record.** The charge sheet shows that the Appellants were charged under section 295 as read together with Section 296 (2) of the Penal Code Act. Though the Appellants have not raised it as a ground for appeal, as a first Appellate Court with the duty to evaluate the entirety of the Trial Court Record, I am duty bound to point out that our decisional law has established that this is considered duplex charge.

31. In ***Joseph Njuguna Mwaura and Others vs R, (2013) eKLR***, the Court of Appeal was categorical that framing a charge of robbery as happened here under sections 295 and 296(2) of the Penal Code would amount to a duplex charge. The said Court, while following its earlier decisions in ***Simon Materu Munialu V Republic [2007] eKLR (Criminal Appeal 302 of 2005)*** and ***Joseph Onyango Owuor & Cliff Ochieng Oduor v R [2010] eKLR (Criminal Appeal No 353 of 2008),*** stated as follows:

> ***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.***

32. Many other cases have since followed this reasoning in the ***Joseph Njuguna Mwaura Case***. There is nothing in the present case which distinguishes it from this decisional rule of law. I, thus, find that the charge as framed in this case against all the four Appellants was duplex and therefore defective. As ***Joseph Mwaura Case*** and its progeny have announced, duplicity is not a curable defect under section 382 of the Criminal Procedure Code.

33. Having come to this conclusion, this, alone, would have disposed this appeal: the conviction cannot stand in the face of the duplex charges. However, it would not have ended matters. I would still have had to determine if the other grounds of appeal would have independently succeeded so that I can make a determination whether a retrial is appropriate in the circumstances.

34. Having perused and analysed the record of the trial Court with the keenness and evaluative eye demanded of an appellate Court as I did above, I have come to the conclusion that a retrial would not be appropriate here. The case of **Makupe v Republic**, **Criminal Appeal No 98 of 1983, the Court of Appeal at Mombasa on July 18, 1984 (Kneller JA, Chesoni & Nyarangi Ag. JJ A**) set out the general test to be utilised in determining whether a retrial should be ordered or not: In general a retrial will be ordered when the original trial was illegal or defective. Conversely, a retrial will not be ordered where the conviction is set aside because of insufficient evidence. The court must in ordering a retrial take the view that had the case been properly prosecuted and admissible evidence adduced, a conviction might fairly result.

35. In the present case, for the reasons stated above, I am not persuaded, that properly prosecuted there might be sufficient admissible evidence to result in a conviction. I have discussed at length above the problematic aspects of the case.

36. **In the circumstances, it is the duty of this Court to quash the conviction and set aside the sentence imposed which I hereby do. The Appellants shall be set at liberty unless otherwise lawfully held in custody**.

37. Orders accordingly.

Dated and delivered at Nakuru this 30th day of May, 2019

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JOEL NGUGI

JUDGE