REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 17 OF 2018

BETWEEN

SAMUEL GATITU MUGO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara in Cr. Case No. 2612 of 2013 delivered by Hon. A. R. Kithinji (SPM) on 20th December 2017)

JUDGMENT

1. The Appellant, **Samuel Gatitu Mugo** and another were charged 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 on the 19th day of May, 2013 along Mfangano Lane in Nairobi within Nairobi County, jointly with another not before court, while armed with dangerous weapons namely pistols robbed **Daniel Kamau Muraya** of motor vehicle registration number KBJ 752J Toyota Hiace matatu, two ATM cards, PSV license badge all valued at Kshs. 1,503,500/= and cash of Kshs. 800/= all totaling Kshs. 1,504,300/= and immediately at the time of such robbery used actual violence to the said **Daniel Kamau Muraya.**

2. The Appellant pleaded not guilty to the charge. Upon trial he was convicted of the offence and was sentenced to serve fifteen (15) years imprisonment. Aggrieved by both his conviction and sentence, he preferred an appeal to this Court. I duplicate his grounds of appeal as under:

> ***i. That the learned trial magistrate erred in law and fact when he failed to note that the particulars of the charge sheet were at variance with the evidence adduced in contravention of Section 214 of the Criminal Procedure Code.***
>
> ***ii. That Section 200 of the Criminal Procedure Code was not adhered when Hon. Kithinji took over the proceedings from Hon. E. Nyutu (PM).***
>
> ***iii. That the learned trial magistrate erred in law and fact when he failed to find that the Appellant's participation in the robbery incident was doubtful as PW1 did not give his name or description in the initial report***
>
> ***iv. That the learned trial magistrate erred in law and fact by finding that the Appellant was positively identified when the prevailing conditions at the scene of crime were not favourable for positive identification.***
>
> ***v. That the learned trial magistrate erred in law and fact when he failed to find that the prosecution witnesses' narration of the evidence was unbelievable and illogical.***
>
> ***vi. That the testimonies tendered to establish Appellant's mode of arrest was riddled with doubts hence not enough to sustain a conviction.***
>
> ***vii. That the learned trial magistrate erred in law and fact when he failed to note that the burden and standard of proof was not discharged by the prosecution.***
>
> ***viii. That the learned trial magistrate erred in law and fact when he dismissed his plausible defence that there was a grudge between him and the complainant.***

Submissions

3. This appeal was canvassed by both written and oral submissions. The Appellant appeared in person and tendered both written and oral submissions. His written submissions were filed on 21st May, 2019. The Respondent was represented by the learned State Counsel Ms. Nyauncho who only tendered oral submissions.

4. The Appellant submitted that the charge sheet was defective for being at variance with the evidence adduced. He argued that the charge sheet indicated that the complainant (PW1) lost Kshs. 800/= in the robbery whereas in his testimony before the trial court, he stated that he lost Kshs. 600/=. He also took issue with PW1's testimony that he also lost a jacket in the robbery yet the same was not indicated in the charge sheet. In his view, it was fatally wrong for his conviction to stand on such a charge sheet.

5. The Appellant further submitted that the provisions of **Section 200 (3)** of the **Criminal Procedure** were not complied with when Hon. Kithinji took over the proceedings from Hon. Nyutu who had taken the evidence of PW1 and PW2. He stated that the trial court record clearly indicated that Hon. Kithinji did not explain to him that he had a right to recall the witnesses who had already testified. He argued that in the absence of the mandatory question envisaged in the said provision and his answer thereto, the succeeding magistrate forfeited his jurisdiction to continue with the conduct of and conclude the case. He submitted that this was fatal to the entire trial.

6. Further, the Appellant submitted that PW1's first report did not contain a description of his assailant and/or his name to prove that the person who robbed him was the Appellant herein who is well known to him. He submitted that PW1's first report which he was furnished with clearly indicated that PW1 did not know who robbed him. In his view therefore, it is clear that PW1 framed him for an offence he did not commit because of a grudge that they have had between them for a long time. He also faulted the trial court for failing to consider the existence of the grudge between them before finding him guilty of the offence.

7. Learned State Counsel, Ms. Nyauncho opposed the Appeal. She submitted that the Appellant's conviction was safe because the prosecution proved its case beyond a reasonable doubt. She also argued that the sentence imposed was reasonable in the circumstances of the case. In her view therefore, both the conviction and sentence should accordingly be upheld.

Determination

8. This court will first address itself on whether **Section 200 (3)** of the **Criminal Procedure Code** was duly complied with. This is because if the same is found in the Appellant's favour, the entire trial will be declared a mistrial hence it may not be necessary to summarize the entire evidence. The Section provides as follows:

> ***"Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right".***

9. A perusal of the trial court's proceedings reveals that the trial commenced before Hon. Nyutu Principal Magistrate who took the evidence of two witnesses. Thereafter, the case was reallocated to Hon. Kinthinji, Senior Resident Magistrate and directions under **Section 200(3)** of the **Criminal Procedure Code** taken on 6th October 2015. The proceedings on the said date were recorded as follows;

> ***"Before: Hon. Kithinji (Mr.) PM***
>
> ***Prosecutor: CI Bahati, SC Kuiyoni***
>
> ***Cc: Vincent***
>
> ***Accused: Present***
>
> ***Interpretation: English/Kiswahili***
>
> ***Advocate Ongeri for accused***
>
> ***Case is partly heard by Hon. Nyutu. Two witnesses had testified. We can proceed where it was left.***
>
> ***Court: Provisions of Section 200 CPC complied with. Case to proceed where it was left.***

10. From the above extract of the trial court's proceedings, it is evident that the learned trial magistrate did not appreciate the need to comply with the mandatory provisions of **Section 200 (3)** of the **Criminal Procedure Code**. He did not read out and explain to the Appellant his rights under the said provision, presumably because the Appellant's counsel told him that they could proceed from where the case had stopped. This constituted a miscarriage of justice because the said provision is meant to protect the rights of an accused person and not his advocate. Needless to state is that the duty of ensuring that the law is adhered to squarely lies on the trial magistrate in mandatory terms. The magistrate must also record the manner of full compliance *not only for completeness of the record but also to ensure proper administration of justice by strictly adhering to the rules of procedure governing criminal trials.*

11. In the case of **John Bell Kinengeni vs. Republic [2015] eKLR**, the Court of Appeal stated as follows regarding non-compliance with this requirement of the law:

"….the duty is reposed on the court and there is no requirement that an application be made by the accused person for such compliance, and that failure to comply with that requirement would in an appropriate case render the trial a nullity as section 200(3) requires in a mandatory tone that the succeeding magistrate (read judge) shall inform the accused person of the right to demand a recall of any or all witnesses to be reheard by the succeeding magistrate. In Cyrus Muriithi Kamau and another versus Republic Nyeri Criminal Appeal No. 87 & 88 of 2006, the Court added that the use of the words "shall inform the accused person of that right" in section 200(3) (supra) was clearly meant to protect the rights of an accused person and the duty to see that the right is protected is placed on the trial magistrate and the burden to inform an accused person of the right to have the previous witnesses resummoned and reheard is placed on the magistrate in mandatory terms. In Bob Ayub Alias Edward Gabriel Mbwana Alias Robert Mandiga (supra) the court ruled that the mere mention in the judgment that section 200(3) was complied with is hollow without any evidence from the record that it was actually complied with in accordance with the law."

12. Having made the above observations, I find that the failure to comply with the requirements of **Section 200(3)** of the **Criminal Procedure Code** vitiated the entire trial and rendered it a nullity. Notably however, this defect may be corrected by quashing the conviction arising from such a trial and ordering a retrial as envisaged under **Section 200(4)** of the **Criminal Procedure Code**. The said provision:

"Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial". *[emphasis mine].*

13. Before ordering a retrial, the court must take into account several factors, paramount being the nature of the illegalities or defects in the original trial, the length of time that 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 not, whether on consideration of the available and admissible evidence, a successful conviction might ensue on retrial and that the retrial should serve the interests of justice. (See **Muiruri vs. Republic (2003) KLR 552,** and **Mwangi vs. Republic (1983) KLR 522).**

14. In the present case, the prosecution called a total of seven witnesses. The complainant (**PW1) Daniel Kamau Muraya** testified that on 19th May 2013 at about 7.00 am while driving along Mfangano Lane, the Appellant and another man approached him. He knew the Appellant well as he had previously seen him in Eldoret where he used to work as a conductor. The Appellant stopped him and got onto the passenger's seat as the other man enquired to know why he did not have any passengers. When he turned to look at the Appellant, the other man hit him on the head with a heavy object causing him to lose consciousness. The Appellant pulled him off the driver's seat then the other man jumped onto the seat.

15. Upon regaining consciousness, he found himself at a hospital in Tigoni with an injury on his head. His belongings listed in the charge sheet as well as the PSV motor vehicle registration number KBJ 752J Toyota Hiace matatu which he had been driving at the time of the attack were also missing. He reported the matter at Tigoni Police Station but was referred to Kamukunji Police Station where he was issued with a P3 form. He gave a description of the person who robbed him to the police and told them that one of the robbers was known to him. He later led the police to arrest the Appellant in Eldoret. On 7th June, 2013, he positively identified the Appellant in an identification parade conducted at Kamukunji Police Station.

16. In his defence, the Appellant admitted that PW1 was indeed known to him as they had worked together for one Macharia in Eldoret for over thirty years. He however denied committing the offence and claimed that PW1 framed him because of a grudge he had been holding against him since he lost his job and thought that he was behind the same.

17. The offence of robbery with violence as established under **Section 296 (2)** of the **Penal Code** carries three elements. These are that:

a) The offender is armed with a dangerous or offensive weapon or instrument; or

b) The offender is in the company of one or more person or persons; or

c) If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any personal violence to any person.

18. In the present case, even though PW1 claims to have found himself in a hospital at Tigoni with an injury on the head, no medical officer or any other person from the facility was called to confirm the same. He also claims to have been given a P3 form by the police but none was adduced in evidence. Further, despite PW1 claiming that he informed the police that one of the attackers was known to him and gave his description, no such report was presented in court. I cannot therefore rely on the subsequent identification of the Appellant by PW1 to the police thus leading to his arrest in Eldoret in connection to the offence herein.

19. I have also noted serious inconsistencies in the evidence regarding the identification parade. PW1 testified that he positively identified the Appellant in an identification parade conducted on 7th June, 2013. **PW4, Inspector Florence Bukhala** of Kamukunji Police Station testified that she conducted an identification parade for the Appellant at the police station on the same date with the assistance of one PC Korir. She however noted that the Appellant was never identified by the witness who was PW1 herein. **PW6, Inspector Simon Mugira** also testified that he conducted an identification parade for the Appellant on 8th July, 2013. According to him, the witness, PW1, positively identified the Appellant in the said identification parade.

20. Firstly, I am unable to comprehend why it was necessary to conduct an identification parade for the Appellant if at all the witness had identified him to the police a day or two earlier leading to his arrest as alleged. Secondly, it is unfathomable how PW1 was able to identify the Appellant who was well known to him in one identification parade and not the other. These inconsistencies are so substantial and material to the issue of identification of the Appellant and should not have been ignored by the trial court.

21. There was also the failure to call either the arresting officer in the respect of the Appellant or the investigating officer so as to confirm the circumstances of the arrest and the evidence leading to the charge. Their evidence was critical in proving the prosecution's case. In the case of **Bukenya & Others vs. Uganda (1972) EA 549**, it was held that:

> ***"The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent. Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."***

22. In view of the foregoing, I am of the view that even if the same evidence was tendered in court, a conviction might not result. Additionally, the Appellant has been in custody from June 2013 which is over six (6) years now. Ordering a retrial in the circumstances of this case may only give the prosecution an opportunity to fill in the gaps in their case which is likely to cause injustice to the Appellant. In the premises, I will not order a retrial in the interests of justice.

23. Accordingly, I allow this appeal, quash the Appellant's conviction and set aside the sentence imposed by the trial court. I order that the Appellant be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DELIVERED AND DATED THIS 31ST DAY OF JULY 2019.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Appellant present in person

2. M/s Akunja for the Respondent.