**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**CRIMINAL APPEAL NO. 29 OF 2019**

**NGUMU NZUKI.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

*(From the original conviction and sentence of Hon. J.N Mwaniki (SPM) in Makueni Senior Principal Magistrate's Court Criminal Case No. 246 of 2017 delivered on 3rd September 2018)*

**JUDGMENT**

1. **Ngumu Nzuki** the Appellant was charged with the offence of **robbery with violence contrary to section 295 as read with 296(2) of the Penal Code**. The particulars of the offence were that on the 1st day of May 2017 at Kilala market, Kilala location in Makueni district within Makueni county, the Appellant jointly with another not before court robbed **Duncan Muema Makusa** of Kshs.85,000/= and at or immediately before or immediately after the said robbery assaulted and wounded the said Duncan Muema Makusa.

2. The Appellant pleaded not guilty and after a full trial, the learned trial magistrate convicted and sentenced him to seven (7) years imprisonment.

3. Aggrieved by the judgment, the Appellant filed this appeal and raised the following 4 grounds;

> ***a) That,*** *the learned trial Magistrate erred in law and fact by convicting him on a duplex charge and failing to observe*
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> *that the prosecution did not prove its case beyond reasonable doubt.*
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> ***b) That,*** *the learned trial Magistrate erred in law and fact by convicting and sentencing him without regard to his basic right for disclosure of the prosecution's evidence as laid down in Article 50 (2) (j) of the Constitution.*
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> ***c) That,*** *the learned trial Magistrate erred in law and fact for convicting him without observing that he was prejudiced for not being represented by a lawyer as stipulated by Article 50 (2) (h) of the Constitution.*
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> ***d) That,*** *the learned trial Magistrate erred in law and fact by failing to consider his plausible defence and the provisions of section 169(1) of the Criminal Procedure Code.*

4. The Appellant canvassed the appeal by way of written submissions and the learned prosecution counsel Mrs. Owenga replied orally.

5. The evidence before the trial court was that **PW1 Duncan Muema**, was a business person and a resident of Wote town. He testified that on 01/03/2017 at about 5.00pm, he was at Kilala market selling clothes. It rained heavily and he rolled his second hand clothes to leave. The clothes were later stolen and on enquiry, he was told that it was the Appellant who had taken them. He traced them to Musango's store *(who was accused 2 before trial court)*.

6. He was later attacked by Beatrice who laid claim on the canvas used by the Appellant to wrap the clothes. Musango

and the Appellant beat him and dragged him to some kiosks. They took Kshs.85,000/= from his pocket and only left him with Kshs.23,000/=. He was rescued by Timothy alias 'Bangu Bangu'. He identified the P3 form which he was given when he reported the matter to the police.

7. On cross examination, he said that he was assaulted by 3 people who also stole Kshs.85,000/= from him. He didn't know the person who took the canvas from his stand. He stated that the Appellant who referred to himself as King'ei used to sell cabbage at the said market.

8. **PW2 Timothy Mutua**, is a resident of Mukuyuni. He testified that on 01/05/2017 he was at the market place when he heard noise and saw the two Appellant and another beating PW1, who was rolling up a canvas. He intervened and PW1 told him that he had lost Kshs.85,000/= to the Appellant and his accomplice. He believed him.

9. **PW3 Constable Julius Kalunda** of Makueni Police station was the investigating officer (I.O). He said that on 01/05/2017 he was on duty when PW1 reported that he had been robbed at Kilala by 3 people as he was winding his day's work. That he had gone to demand the return of his canvas from Beatrice who attacked him together Appellant and another. PW1 was in torn clothes and reported to have lost Kshs.85,000/=. PW3 recorded the witness statements and later arrested the culprits. He also identified the P3 form, a shirt and a brown/black jacket.

10. On cross-examination, he said that according to the report made, PW1 lost Kshs.85,000/= in the assault and had a swollen face when he first saw him. He also said that the canvas had been taken by Beatrice, a man who uses that name as an alias. That Musango was first charged with assault and no money was recovered from him. He believed that Pw1 who was a businessman had that money as it was a market day.

11. When placed on his defence the Appellant elected to remain silent.

12. In his preamble, the Appellant wonders how a case of assault graduated to robbery with violence and contends that a lot of injustice was occasioned against him.

**The Appellant's submissions**

13. On the issue of duplicity, the Appellant submits that it was wrong to frame the charge of robbery with violence under two sections as it meant that he had been charged with two offences. He contends that the prosecution must not allege the commission of two or more offences in a single charge as it offends two important principles *to wit*; that the accused person is entitled to know the crime facing him so as to prepare his defence, secondly, so that the trial court is able to determine the relevant evidence, consider possible defences and determine punishment on conviction. He relies *inter alia* on **Criminal Appeal No. 302 of 2005; Simon Materu Munialu –vs- R (2007) eKLR** where the Court of Appeal held;

> *"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 an offence of 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 so might create confusion.*

14. The Appellant further submits that when an accused person is charged with the offence of robbery with violence contrary to section 295 as read with 296(2) of the Penal Code, he is automatically prejudiced and that prejudice cannot be cured by section 382 of the Criminal Procedure Code (CPC).

15. On whether the offence of robbery with violence was proved beyond reasonable doubt, the Appellant submits that the three ingredients of the offence are; that the offender should be armed with a dangerous or offensive weapon, should be in the company of one or more other person and should immediately before or immediately after the time of robbery wound, beat, strike or use any other violence to the victim.

16. He submits that it was a grave contradiction for PW1 to say that he had wrapped his second hand clothes in a canvas and then deny knowing the person who took his canvas in cross examination. He contends that the contradiction was a clear indication that PW1 was not being truthful. He also contends that the stolen clothes were not described and there was no indication as to whether they were recovered. Further, the Appellant wonders how a robber could steal part of the money and leave the rest. According to him, it would have been better to state that PW1 lost money during the fight instead of fabricating a story to fix him with such a serious charge.

17. He also submits that since PW1 knew his attackers, he should have allocated the roles played by each in the act of stealing just as he was categorical about what each of them did in assaulting him. He submits that from the evidence of the arresting officer, the implication is that the offenders were together during the arrest and therefore wonders why there was no recovery. According to him, the only reasonable explanation is that the money got lost and was not stolen. He contends that the offence of assault, which he had been initially charged with, was the proper one in the circumstances.

18. He also submits that the alleged attackers were not armed and did not waylay or ambush PW1. That the incident did not take place at a secluded place but in a market during the day and as such, must have been observed by many more people and not just the single witness brought to court. It's also his contention that the Investigating Officer did not even visit the scene in order to identify the offence that had been committed.

19. The Appellant submits that the offence involves the use of violence yet there was no evidence to show that PW1 was injured. That there was no evidence from the doctor or any document proving any kind of injury.

20. On ground **(b)**, he submits that failure to provide him with witness statements in advance violated his Constitutional right to a fair trial and that even though the trial magistrate made an order that the witness statements be provided, he did

not follow up to ensure there was compliance. He contends that it was not possible to prepare a proper defence without

knowing the evidence that was to be used against him. He relies *inter alia* on the case of **Thomas Patrick Gilbert Cholmondeley –vs- R (2008) eKLR** where the Court of Appeal stated that;

> *"We think it is now established and accepted that to satisfy the requirement of a fair trial guaranteed under our Constitution 2010, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial, all the relevant material such as copies of statement of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items."*

21. He submits that the fact of him proceeding with the trial and cross examining witnesses is immaterial and does not take away his constitutional right and cannot be a yardstick for measuring a fair trial. On representation, he submits that he was up against the prosecution with all the powerful state machinery on its side and contends that in criminal trials, it makes a lot of difference if an accused person is not represented and relies on the case of **Pett –vs- Greyhound racing Association** where Lord Denning stated that;

> *"It is not every man who has ability to defend himself on his own. He cannot bring out the point in his own favour or the weakness in the other side. He may be tongue tied, nervous, confused or wanting in intelligence. He cannot examine or cross examine witnesses. We see it every day. A magistrate says to a man; "you can ask any question you like," where up the man immediately starts to make a*
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> *speech. If justice is to be done, he ought to have the help of someone to speak for him and who better than a lawyer who has trained for the task."*

22. He has also cited **Macharia –vs-R (2014) eKLR** where the Court of Appeal expressed itself as follows;

> *"Article 50 of the Constitution sets out a right to a fair hearing; which includes the right of an accused person to have an Advocate, if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the guilt of their crime may receive a state appointed lawyer, if the situation required it. Such cases may be those involving complete issues of fact or law, where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties, or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence. We are of the considered view that in addition to a situation where 'substantial injustice would otherwise result, persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense."*

23. The Appellant submits that from the wording of Article 50, the right to a State funded counsel is dependent of the *'substantial injustice'* test which can be discerned from; the complexity of the case, seriousness of the offence and ability of the accused person to conduct his own defence.

24. He argues that as a layman, the offence facing him was complex as he was unable to comprehend the issues of law pertaining to the requisite ingredients, secondly, he contends that the death sentence hanging over his head qualified the offence as a serious one and thirdly, he submits that keeping mum during his defence was enough indication of inability to conduct his defence.

**The Respondent's Submissions**

25. Mrs. Owenga for the Respondent opposed the appeal and submitted that there was overwhelming evidence against the Appellant.

**Analysis and Determination**

26. This is a first appeal and it is now settled that the duty of a first appellate court is to scrutinize the evidence on record, make it's own findings and draw it's own conclusions giving due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses. See **Okeno –v-R 1972 E.A 32; Simiyu & Another –vs- R (2005) I KLR 192.**

27. Having considered the grounds of appeal, record of appeal and the parties's submissions, I will deal with the grounds of appeal separately and then consider whether the case was proved beyond reasonable doubt or not.

**Duplicity**

28. Duplicity occurs where one count contains more than one offence. Section 295 describes the offence of robbery and section 296(2) describes the offence and sentence. It is now trite that a charge of robbery with violence under section 296(2) alone should be sufficient as the section is self-contained. I therefore agree with the Appellants that indeed the charge was duplex. According to the Appellant, duplicity means automatic prejudice but in my view, each case is unique and the effect of duplicity should be analyzed according to the circumstances of each case. In this case there no indication that the Appellant did not understand the charge or failed to comprehend what the case was about.

**Disclosure of the prosecution evidence**

29. From the record, the initial plea was taken on 09/05/2017 after which the charge sheet was amended and the Appellant pleaded to the amended charge sheet on 29/09/2017. On 14/12/2017, the Appellant raised the issue of witness statements and the prosecution undertook to supply.

30. The first hearing was conducted on 05/03/2018 but the record does not show whether the Appellant was asked about his readiness to

proceed. It looks like the hearing just took off without any input from the Appellant. It is noteworthy that despite having been given bail/bond, the Appellant was in custody during the entire trial most probably due to inability to meet the bail/bond terms. It is therefore quite evident that he was not furnished with the witness statements in advance. The accused were not even reminded of the charge.

31. As correctly submitted by the Appellant, Article 50 (2) (j) of the Constitution provides for the right of the accused person to be informed in advance of the evidence the prosecution intends to

rely on, and to have reasonable access to that evidence while sub-article (c) provides for the right of the accused to have adequate time and facilities to prepare his defence. All this is aimed at advancing the right to a fair trial which cannot be met if the accused is not furnished with the prosecution's evidence ahead of the full trial.

32. Accordingly, my considered view is that making an order that an accused person be furnished with prosecution's evidence is not enough. A trial court is adequately empowered to ensure compliance with its orders and must stretch further to ensure that compliance is achieved and guard against violation of an accused person's constitutional rights. This is especially important in cases like this one where the accused person attends to his trial while in custody and may not have the opportunity to follow up with the prosecution.

33. Accordingly, I agree with the Appellant that failure to furnish him with witness statements in advance was a violation of his right to full disclosure of the prosecution's case. It is also evident that the trial court failed in its duty to safeguard against violation of the constitution. Further, the failure by the Respondent to submit on this important issue buttresses the fact of that violation.

**Legal representation**

34. According to the Appellant, he was exposed to substantial injustice and therefore entitled to a state funded counsel. He contends that there was a death sentence hanging on his head hence making the offence very serious. Be that as it may, the death penalty was still a legal sentence for the offence facing

the Appellant and it was very legitimate for him to feel like the death penalty was still hanging on his head despite the fact that he was eventfully sentenced to 7 years' imprisonment. **In Karisa Chengo & 2 Others –vs- R, Cr Nos. 44, 45 & 76 of 2014,** the Court of Appeal held as follows;

> *"…substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise."*

35. The issue of providing legal representation for all persons facing a death penalty is quite noble. The only challenge is the finances and laid down processes for that to come to fruition. I am sure once funds are made available it will assist.

**Whether the case was proved beyond reasonable doubt.**

36. The ingredients of the offence of robbery with violence were captured well by the Appellant but I find relevance in the explanation given by the Court of Appeal in **Criminal Appeal No. 116 of 1995**; **Johana Ndungu -vs- Republic** *(unreported)* The Superior Court expressed itself as follows;

> *"In order to appreciate properly as to what acts constitute an offence under section 296 (2) one must consider the sub-section in conjunction with section 295 of the Penal Code. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or properly at or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed 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 sub-section;*
>
> 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.*
>
> *Analyzing the first set of circumstances the essential ingredient, apart from the ingredients including the use or threat to use actual violence constituting the offence of robbery, is the fact of the offender at the time of robbery being armed with a dangerous or offensive weapon. No other fact is needed to be proved. Thus if the facts show that at the time of commission of the offence of robbery as defined in Section 295 of the Penal Code, the offender was armed in the manner afore-described then he is guilty of the offence under sub-section (2) and it is mandatory for the court to so convict him.*
>
> *In the same manner in the second set of circumstances if it is shown and accepted by court that at the time of robbery the offender is in company with one or more person or persons then the offence under sub-section (2) is proved and a conviction thereunder must follow. The court is not required to look for the presence of either of*

*the other two set of circumstances.*

> *With regard to the third set of circumstances there is no mention of the offender being armed or being in company with others. The court is not required to look for the presence of either of these two ingredients. If the court finds that at or immediately before or immediately after the time of robbery the offender wounds, beats, strikes or uses any other violence to any person (may be a watchman and not necessarily the complainant or victim of theft) then it must find the offence under sub-section (2) proved and convict accordingly." (emphasis mine)*

37. I have underlined the above sections to demonstrate that the presence of all those ingredients must be in furtherance of the act of robbery. In this case, the item at the centre of the robbery was said to be Kshs.85,000/= belonging to PW1. I have carefully looked at the totality of the evidence and I am inclined to agree with the Appellant that indeed, PW1's contradiction about the canvas was grave. He could not on one hand say that his canvas was taken by Beatrice and on the other hand deny knowledge of the person who took the canvas. The Appellant and his co accuseds were not strangers to PW1 and as such, it was either he knew or did not.

38. It is true the Appellant suffered injuries. The real issue is whether he had Kshs.108,000/= on himself such that when Kshs.85,000/= was taken away he remained with Kshs.23,000/= as stated. The issue of the cash was his word of mouth with no support at all. This incident occurred at a market place and Pw2 was not the only one present. Pw1's evidence needed real backing to support the allegation that besides the beating he was robbed. This failure plus his own contradictions casts doubt on whether he was robbed or not.

39. I have also taken note of the Appellant's submission that the offence of assault was the better one in the circumstances. To me, this is an acknowledgement by the Appellant that he was indeed at the loqus in quo and was engaged in a pull and push with PW1. I see it as nothing more than a typical market brawl and the probability is that the money got lost in the scuffle as opposed to being robbed. In fact, the P3 form under 'General medical history' indicates as follows;

> "*Assaulted on 01/05/2017 at 5:00 pm by three people well known to him at Kilala market sustaining visible injuries."*

40. Further, when the I.O (PW3) was cross-examined by the Appellant, he responded as follows;

> "*Complainant said he was assaulted and lost Kshs.85,000/= in the assault. He had swollen face when I saw him."*

Accordingly, my considered view is that the evidence on record disclosed the offence of assault and not robbery with violence. It's for that reason that the Appellant was initially charged with assault contrary to section 251 Penal Code. It means he only changed his story after the Appellant's arrest.

41. **I therefore find merit in the appeal which I hereby allow. The conviction is quashed and the sentence set aside. The Appellant to be released forthwith unless lawfully held under a separate warrant.**

Orders accordingly.

**Delivered, signed & dated this 28th day of November, 2019, in open Court at Makueni.**

**.....**

**Hon. H. I. Ong'udi**

**Judge**