REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 89 OF 2016

(An Appeal arising out of the conviction and sentence of Hon. A.R. Kithinji – PM delivered on 24th March 2016 in Makadara CMC. CR. Case No.459 of 2013)

JAMES KIAMBUTHI WANJIRU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, James Kiambuthi Wanjiru was charged with eight (8) counts of **robbery with violence** contrary to **Section 295** as read with **Section 296(2)** of the **Penal Code**. In some of the counts, the charges states that he was being charged under **Section 292(2)** of the **Penal Code**. The court will address this issue at the later part of this judgment. The particulars of the offence were that between 23rd and 27th January 2013, the Appellant jointly with others not before court, while armed with a Maasai sword robbed the eight complainants listed in the charge sheet of various sums of money and coffee kettles and at or immediately before or immediately after the time of such robbery used actual violence to the said complainants. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to all the charges. After full trial, he was convicted of four (4) of the eight counts. He was sentenced to death. He was aggrieved by his conviction and sentence. He has filed an appeal to this court against the said conviction and sentence.

In his petition of appeal, the Appellant challenged his conviction and sentence on the following grounds: he was aggrieved that he had been convicted on the basis of contradictory and inconsistent evidence adduced by the prosecution witnesses. He faulted the trial magistrate for convicting on the basis of weak evidence that could not establish the charges against him to the required standard of proof beyond any reasonable doubt. In a further supplementary ground of appeal, the Appellant challenged the verdict reached on the ground that the charges brought against him were defective within the meaning of **Section 214(1)** of the **Criminal Procedure Code**. He was aggrieved that he had been convicted on the basis of defective proceedings because the convicting magistrate did not comply with **Section 200(3)** of the **Penal Code**. He was of the view that the evidence of identification that was adduced against him did not establish his guilt to the required standard of proof. He was of the opinion that the witnesses called to testify against him were coached to frame him of the charges. In particular, he was aggrieved that he was convicted on the basis of recovery of the stolen kettles yet there was no evidence that connected him with the recovery of the same. He was finally aggrieved that the evidence that he adduced in his defence was not taken into consideration by the trial magistrate before arriving at the verdict to convict him. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed upon him.

Prior to the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. During the hearing of the appeal, he urged the court to take into consideration his written submission. He further submitted that the Occurrence Book revealed that the report of the alleged robberies was made on 28th January 2013 long after the robberies had taken place. The Occurrence Book report did not indicate whether the complainants had identified him. Neither was the description of the assailants given in the first report made to the police. No police identification parade was held. Ms. Aluda for the State opposed the appeal. She submitted that the prosecution had adduced sufficient culpatory evidence which connected the Appellant to the offences that he was convicted of. The Appellant was recognized by those that he had robbed. They knew him prior to the robbery incidents. Some of the items robbed from the complainants were recovered in the Appellant's possession. She urged the court to dismiss the appeal.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellants. As was held by the Court of Appeal in **Njoroge –Vs- Republic [1987] KLR 19 at P.22**:

> ***"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though***

it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)".

The issue for determination by this court is whether the prosecution adduced sufficient evidence to enable the trial court convict the Appellant on the charges that were brought against him to the required standard of proof beyond any reasonable doubt.

The Appellant has put forward both technical and substantive matters in support of his appeal. On the technical side, the Appellant argued that the charges in Counts 2, 4 and 7 that he was convicted of were defective since he was charged under the wrong provision of the **Penal Code**. This court's perusal of the charge sheet revealed that indeed the Appellant was charged under the wrong provision of the law. Instead of being charged under **Section 296(2)** of the **Penal Code**, he was charged under **Section 292(2)** of the **Penal Code**. **Section 292(2)** of the **Penal Code** does not exist. What exists is **Section 292** which provides as follows:

"Any person who takes, conceals or otherwise disposes of any ore any metal or any mineral in or about a mine, with intent to defraud any person, is guilty of a felony and is liable to imprisonment for five years."

This court's perusal of the court proceedings reveal that no effort was made by the prosecution to amend the charge sheet to reflect the correct charge under **Section 296(2)** of the **Penal Code**. The Appellant has argued he was prejudiced by this fact and therefore his appeal ought to be allowed. In **Ole Naeni v Republic [1984] KLR 484,** the court (Aluoch J) in dealing with a case where the charge as appeared in the charge sheet was different from the particulars held that such charge could not be sustained as it occasioned miscarriage of justice to the Appellant. This is what the Learned Judge said at Page 485:

"When the hearing of this appeal started before me, Mr. Nyairo, State Counsel, conceded on the ground that the section under which the Appellant was charged, did not exist, as rule 29(1) of cap 364, was the rule dealing with "Notification of infected areas", and not a penalty section for "Moving animals without a permit". Mr. Nyairo relied on the case of Uganda v Keneri Opidi reported in [1965] EALR page 614. I have gone through the case and I would say, it provides a useful guide. I find that the Appellant suffered a miscarriage of justice in having been convicted under rule 29 of cap 364, Laws of Kenya. The miscarriage of justice suffered cannot be cured under section 382 of the Criminal Procedure Code, because it goes to the root of the matter…"

Article 50(2)(b) of the **Constitution** provides that every accused person has the right to a fair trial which includes the right to be informed of the charge with sufficient detail to answer it. In the present appeal, it was clear that Counts 2, 4 and 7 were incurably defective because the charges brought against the Appellant were brought on the basis of a section of the **Penal Code** that did not exist. The particulars of the charge did not match with the charge that was brought against the Appellant. The Appellant's right to fair trial was infringed in that he was not informed of the charges that he was facing in sufficient detail to enable him answer to the charges. In the premises therefore, this court holds that Counts 2, 4 and 7 that the Appellant was convicted of cannot stand and is hereby declared to be incurably defective since it occasioned the Appellant miscarriage of justice and breached his right to fair trial. His appeal against conviction and sentence on Counts 2, 4 and 7 is hereby allowed as a result of which his conviction on those charges are quashed and the sentence imposed upon him set aside.

In respect of the remaining count (i.e. Count 1), the complainant in that charge PW1 Anna Wangari Mwangi testified that on 23rd January 2013, she was accosted by the Appellant at about 3.30 a.m. as he was walking from town towards Gikomba market. He was robbed of Kshs.650/- and a coffee urn after the Appellant had threatened to stab her with a sword. She testified that she recognized the Appellant because he used to see the Appellant seated outside the Family Bank Branch at Gikomba. She however conceded that she did not report the robbery incident on 23rd but rather reported it on 27th January 2013, four days after the incident. When the Occurrence Book was produced in court during the hearing of the appeal, it became apparent to the court that indeed the complaint was made to the police on 28th January 2013 and not 27th January 2013 as stated in court by the witness. It was clear that this report was made after the Appellant's arrest by PW5 Corporal Jackson Kimaiyo who was on patrol at 1.00 a.m. on that night. On re-evaluation of the evidence adduced in regard to whether PW1 identified the Appellant during the robbery incident, it was apparent to this court that no report of the robbery was made contemporaneous with the time the robbery occurred. It was also clear that in the first report that was made to the police by PW1, five days after the incident, she was not sure who had robbed her because she did not give the description of her assailant.

Taking into consideration the totality of the evidence adduced, it was clear to this court that the evidence of identification adduced by this complainant was inconsistent and could not sustain a conviction. The complainant testified that she was able to recognize the Appellant as the person who robbed her. She was able to recognize him because, according to her, she used to see him seated outside the Family Bank's Gikomba Branch. If she indeed recognized the Appellant as her assailant, *why didn't she immediately report the incident to the police? Why didn't lead the police to the arrest of the Appellant because, according to her, she knew where find the Appellant?* The evidence adduced by this witness is incredible because it leaves many gaps which unfortunately the trial court filled up by failing to properly evaluate the evidence of identification which clearly was allegedly made at night in circumstances that did not favour positive identification. The evidence of recovery of the stolen items allegedly in the Appellant's possession was not sufficiently substantiated to connect the Appellant to the robbery in question. In his defence, the Appellant explained that he was arrested while delivering timber at a timber yard within Gikomba. He was at the material time employed as a turn-boy. He was surprised when he was charged with the offences for which he was convicted. This alibi defence which was not displaced by the evidence which was adduced by the witnesses produced by the prosecution.

The upshot of the above reasons is that the appeal lodged by the Appellant shall be allowed as a result of which his conviction on the four counts of robbery with violence is hereby quashed. The sentence imposed on the Appellant is set aside. He is ordered released from prison forthwith and set at liberty unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 14TH DAY OF FEBRUARY 2018

L. KIMARU

JUDGE