REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 172 & 173 Of 2016.

LUKE BARASA NGOSIA.....1ST APPELLANT.

STEPHEN MASIBA ORECH.....2ND APPELLANT.

VERSUS

REPUBLIC.....RESPONDENT.

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera Cr. Case 1537 of 2015 delivered by Hon. Onginjo, CM on 8th November, 2016).

JUDGMENT.

Background.

1. Luke Barasa Ngosia and Stephen Masiba Orech, hereafter the 1st and 2nd Appellants respectively 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 16th April, 2015 at Riara Road Visno Construction Site along Lavington area within Nairobi County, jointly with others not before the court robbed John Mukita Chacha of cash Kshs. 3,700/- and immediately before such robbery used actual violence to the said John Mukita Chacha. The Appellants were found guilty and convicted accordingly. They were each sentenced to death.

2. Being dissatisfied with the conviction and sentence they lodged the present appeal. They relied on separate amended grounds of appeal filed contemporaneously with the written submissions on 29th May, 2018. Their common grounds of appeal are that the charge sheet was defective for being duplex, that the evidence of the prosecution was contradictory and inconsistent and that their respective defence statements were not considered. Separately, the 1st Appellant argued that crucial witnesses were not called whilst the 2nd Appellant was dissatisfied that the investigations were shoddy.

Evidence.

3. The background to the prosecution case is founded on the evidence of **PW2, John Mwita Chacha**. He was the complainant. He was working at a construction site along Riara Road when on 15th April, 2015 while on night patrol duty he came upon three men at the site. The men apprehended him and led him to the back of the building under construction where they took his uniform and tied him up. One of the robbers searched him and took his mobile phone make Tecno and Kshs. 3,700/-. One other robber was left to act as a sentry while the third left. The one who was guarding him also took off which gave him an opportunity to untie himself. He then climbed a nearby tree and jumped over the fence whereupon he met guards from Radar Security who were known to him. He informed them of the robbery. The guards alerted the authorities but he had to jump back into the compound to ask the caretaker for the gate keys to allow those who responded to enter the site. Shortly, police from Muthangari Police Station arrived at the scene and they searched the site. They found one robber hiding in a pool of water. The 2nd Appellant was found hiding in a heap of timber. He went to hospital for treatment but could not follow up on the P3 form as he lacked resources to travel to and from Nairobi Area.

4. **PW3,** Elphas Okiru worked as a store keeper at the construction site where the robbery took place. He was asleep when he heard a guard call him who informed him that there were robbers in the compound. Shortly afterwards the police arrived. The guard who was calling him was outside the compound but next to where he slept. He threw the gate keys to the guard who was able to open the gate for the police. The Appellants were thereafter found within the compound hiding, one in the basement and another in a pool of water. He testified that on interrogation, the Appellants said that he (PW2) had called them to buy some goods but the witness denied this assertion. **PW1, Bimji Mabji Rabaja** of Vishau Builders and Developers Ltd was called at about 2.00 a.m. by the police and informed about the robbery. Later in the morning we went to the police station where he found the two Appellants who had been arrested at the construction site. PW2 had also been locked up.

5. The case was investigated by **PW5, PC Peter Ojwang** of Muthangari Police Station. His testimony was that on 16th April, 2016, the Appellants were escorted go the police station by **PW4 and PC Manyonge** who had been informed of the robbery through police radio call. At the time, the two officers were on patrol at about 2.30 a.m. and on arrival at the scene they apprehended both Appellants and escorted them to the police station. PW5 confirmed that an employee and another suspect were arrested but later released because there was no evidence to link them to the robbery. He denied that he received Kshs. 1,000/= from one Wycliffe Odhiambo who was one of the suspects released.

6. **DW1,** 1st Appellant, in his sworn defence stated that he was a barber. On 15th April, 2015 he closed the shop at 9.00 p.m. before going to meet his friend, one Wycliffe Odhiambo, and they went to a club where they had some alcohol. They left the club at around 11.00 p.m. and were arrested a few meters from it. They were kept in the vehicle the whole night as the vehicle patrolled and arrested more people. In the morning they were taken to Muthangari Police Station where they were booked. At around 9.00 a.m. they were called and asked to pay Kshs. 1,000/- each to earn a release. Wycliffe paid and was released. He, the 2nd Appellant and two others were taken to the OCS' office where a man of Asian descent identified one of the men as his employee. On 17th April, 2015 he was brought to court and charged.

7. **DW2,** 2nd Appellant also gave a sworn defence. He denied committing the offence. He stated that he worked at a hotel in Lavington. On 14th April, 2015 he had traveled home and traveled back to Nairobi at night. He went back to his business place at Ole Dume Road where he sold mandazis and tea at night. Before dawn the firewood almost ran out. He made a phone call to John Mukita Chacha, PW2, a guard who used to give him firewood. PW2 asked him to go for the wood and he walked to the site where PW2 directed him to the location of the firewood. After about fifteen minutes he heard PW2 being called at the gate and when he opened it was the police who arrested him after PW2 denied he had called him to the site. The storekeeper also denied he knew him but was also arrested. He stated that the storekeeper was later released but that he was charged alongside DW1, whom he did not know.

Submissions and Determination

8. Both Appellants filed written submissions which they highlighted orally while Ms. Atina, for the Respondent canvassed the appeal by way of oral submissions. The Respondent opposed the appeal. I have accordingly considered the respective rival submissions after which I have concluded that the issues arising for determination are;

i. Whether the charge sheet was fatally defective.

ii. Whether the prosecution failed to call crucial witnesses.

iii. Whether the determination was based on contradictory and inconsistent evidence.

iv. Whether the offence was proved beyond reasonable doubt.

v. Whether the sentence meted was proper.

9. On whether the charge sheet was defective, the argument was twofold. Firstly, the fact that the charge sheet was duplex as it drawn under Sections 295 and 296(2) of the Penal Code. Secondly, that the particulars of the charge were at variance with the evidence adduced. The crux of the first limb of the argument was settled in the case of **Paul Katana Njuguna *v.* Republic[2016] eKLR,** thau:

> ***"So, while it would be undesirable to charge an accused person under both sections in the alternative, it would not be prejudicial to that accused person if the offences are not framed in the alternative. As we have already noted the rule against duplicity is to enable an accused know the case [****she/he****] has to meet. We accept as the correct position in law that uncertainty in the mind of the accused is the vice at which the rule against duplicity is aimed. If there is no risk of confusion in the mind of the accused as to the charge framed and evidence presented, a charge which may be duplex will not be found to be fatally defective."***

10. Therefore, the mere fact that a charge is duplex does not, of itself, render a charge sheet defective. The test is whether it occasions an accused any prejudice. In the present case, the Appellants were charged with the offence of robbery with violence. They pleaded to this charge. They defended themselves for this offence and evidence adduced was intended to establish the offence. As such, they were not prejudiced by the mere fact of drawing the charge sheet under the two provisions.

11. On the second limb, the Appellants submitted that the charge did not accord to the evidence adduced. They laid their assertion on the introduction of a stolen phone in the evidence that was not indicated in the charge sheet and also the assertion of actual violence which was not proved by the evidence. Section 134 of the Criminal Procedure Code provides for the manner in which a charge should be drawn, that ***"such particulars as are necessary for giving reasonable information as to the nature of the offences charged".*** I agree that the evidence adduced must support the charge. But again not all evidence that would be adduced would be condensed into the charge sheet. Further, a minor omission that does vitiate the substance of the offence or lessen the culpability of an accused would not be considered to render a charge sheet defective. Thus, a court must consider the circumstances of each case before rendering its verdict.

12. In present case, the submission by the Appellants was that the mobile phone stolen from PW2 was only introduced in evidence but it was not indicated in the charge sheet that it was one of the stolen items. As I shall hereafter demonstrate, the Appellants were arrested on the scene, which erased any doubt as to their participation in the robbery. As such, the omission of the mobile phone in the charge was not material as it did not lessen the fact that they were culpable.

13. On the submission that actual violence was not proved, I also underscore that fact that violence must not necessarily be proved by medical evidence. Violence may be meted on a victim but may not be of such magnitude as to compel him to go to hospital. Furthermore, under Section 296(2) of the Penal Code, a proof of any of the ingredients of the offence is sufficient to establish the offence of robbery with

violence. And so it did not matter that in the present case the victim did not adduce medical evidence as proof that actual violence was meted on him. I shall also demonstrate that the offence charged was proved beyond a reasonable doubt.

14. The Appellants questioned the failure to call security guards from Radar Security. In rebuttal, Ms. Atina submitted that under Section 143 of the Evidence Act the prosecution was only required to call sufficient evidence and that the mentioned witnesses were superfluous because if called would have given repetitive evidence. The court cannot agree more. The evidence the alleged witnesses would have adduced was tendered by the complainant and arresting officer. The only fresh evidence they might have offered related to the particular nature of the alarm that was raised requiring the police to respond. However, the arresting officer did testify that he received information about the ongoing robbery from the 999 control room which is indicative that an alarm was indeed raised. In the circumstances, I find that the witnesses were not crucial and the prosecution case was not weakened by dispensing with their evidence.

15. The next issue was Appellants' assertion that the evidence adduced by PW2, PW3 and PW4 pertaining to the response of the police and there was inconsistent and contradictory rendering it unreliable. The 1st Appellant stated that PW3 testified that he was arrested alongside a column in the basement while the 2nd was found in water whereas PW2 testified that one robber was found in the water and another in a heap of timber with PW4 testifying that the 1st Appellant was found in water while the 2nd Appellant was found in the basement. The relevant evidence with regards to this inconsistency is clear from the evidence of PW2 and PW4 who gave differing locations of arrest for the two Appellants. However, it is clear that when the 1st Appellant cross examined PW4 he stated that the 1st Appellant was arrested next to the columns while the 2nd was found in the water which was consistent with the evidence of PW3. With regards to the evidence of PW2 he was consistent on where the suspects were arrested.

16. My view is that the inconsistencies were so minor and did not vitiate the fact that the Appellants were found on the site, the scene of the robbery. Whether one was found in a heap of timber or columns of timber is immaterial as the wording depends on the witness testifying. The evidence of PW2 therefore sufficiently corroborated that of PW3 and PW4.

17. On proof of the offence, PW2 testified that he was accosted by three men, one of whom robbed him of Kshs. 3,700/-. The money in question was never recovered from the suspects arrested but it is clear from his evidence that there was a third member of the gang who got away. What is of importance is whether the Appellants were identified. The complainant could not identify any of the assailants. However, the suspects were arrested at the *locus in quo* while perpetrating the offence. From the evidence of PW2, PW3 and PW4 the scene was fenced and the Appellants were arrested inside the premises. The Appellants, in their defence statements gave alternative scenarios pertaining to their arrest. The 1st Appellant testified that he was arrested on his way from a club, not at or near the scene of the offence, and later framed for committing the offence. The 2nd Appellant testified that while he was arrested at the scene he was there at the behest of the complainant who was selling him firewood.

18. A critical analysis of the evidence attests that the 1st Appellant's defence suffers from credibility issues. In it he testified that he was charged alongside four other men and referred to a charge sheet to the effect. The provenance of the charge sheet in question was called into question by the investigating officer who questioned the lack of signatures or a stamp on the same. Further, it is clear that when the Appellants were produced in court for purposes of plea taking, 17th April, 2015. The court clearly noted in its coram "both present" but the plea was deferred to 20th April, 2015. It finally took place on 22nd April, 2015 and only the two Appellants pleaded. It also clear that the charge sheet clearly indicates the date to court as the initial date of 17th April, 2015. Thus, the 1st Appellant's defence lacked merit.

19. With regards to the 2nd Appellant his defence was that he was a businessman and was called to the scene to purchase firewood by the complainant. The complainant however denied this assertion. Again, the issue of the sale of firewood only arose during his defence. The witness was never cross examined on it. PW3 on the other hand testified that when they interrogated the suspects who had been arrested at the site they said they had been called to purchase goods by the caretaker and the guard which was not proved. I thus find that the 2nd Appellant did not adduce a plausible explanation for his presence at the scene. Hence, his defence did not rebut the evidence adduced by the prosecution that he was present at the scene as a member of the gang of robbers.

20. On proof of the elements of the offence, under Section 296(2) of the Penal Code, a proof of any of the ingredients sufficiently establishes the offence of robbery with violence. It was established that the robbers were more than one in number and that PW2 lost some money during the robbery. In view therefore, I conclude that the offence was proved beyond a reasonable doubt and that the conviction was safe.

21. As regards the sentence in light of the Supreme Court judgment in **Francis Karioki Muruatetu *v.* Republic[2017] eKLR** the mandatory death sentence is now unconstitutional. A court must look at the circumstances of a case as well as the accused person's mitigation before passing a sentence. The Appellants in this case were both first offenders and the 1st Appellant mitigated that he had young family and that he was suffering in prison. The 2nd Appellant mitigated that he was a family man with children and was self-employed. He urged the court to set him free so he could support his family. Nothing was stolen from the premises. The injuries occasioned to the complainant were minor. Taking into account all these factors and further considering that both Appellants have been in custody, since 17th April, 2015 I find that four years imprisonment is sufficient sentence, a period that will take into account time already spent in custody of one year six months and 24 days.

22. In sum, I uphold the conviction but substitute the death sentence with a four year jail term. It is so ordered.

Dated and delivered at Nairobi this 31st July, 2018

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. *1st Appellant in person.*
2. *2nd Appellant in person.*
3. *Mr. Momanyi for the Respondent.*