REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 62 OF 2015

NAHASON THEURI MBILU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from conviction and sentence in Nyeri Chief Magistrate's Court Criminal Case No.778 of 2014 delivered by S. Ngungi Principal Magistrate on 29th July 2015

JUDGMENT

1. **Nahashon Theuri Mbilu** the Appellant was charged with the offence of robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code. The particulars being that the appellant on the 20th day of June, 2014 at Nyeri township in Nyeri county, while armed with a dangerous weapon namely a knife, robbed Raphael Obiero Okoth cash amounting to Kshs 1000/-, a mobile phone make Samsung galaxy grand 2 dual sim of serial number 359792052018727, 359793052018725, all valued at Kshs 31,000/ and at the time of such robbery used actual violence to the said Raphael Okoth Obiero.

2. After a full hearing the Appellant was found guilty and convicted of the lesser offence of simple robbery contrary to section 296(1) of the Penal Code and sentenced to fourteen (14) years imprisonment. He filed this appeal against the Judgment and cited the following grounds.

(i) That the trial court erred in law by relying on a defective charge sheet to convict him.

(ii) That the trial court violated his right to a fair hearing when it allowed the trial against him to proceed to determination without him being assigned an advocate at the state's expense as is guaranteed under the constitution causing him to suffer substantial prejudice.

(iii) That the trial court erred in both law and fact when it meted out the maximum sentence for the offence of robbery against him who is a first offender

(iv) That the trial court erred in law and fact in finding that he prosecution had proved its case beyond reasonable doubt.

3. The prosecution case was that PW1 **Dr Obiero Okoth** was on his way home opposite Itara Gardens on 20th June 2014 around 10.45p.m. As he got to the main gate a person approached him from behind and was holding a knife. He addressed him as "old man" and asked for money to buy tea.

4. The person further demanded for money in a loud voice, and put his hands in his shirt pocket removing kshs 1000/-; his phone Samsung galaxy grand 2 Idos s/no 359720520187 2/7 from his right trouser pocket. He opened the phone, removed the back cover, dropped the 2 sim cards and memory card and left. PW1, gave his line as 720735103.

5. He went to the house and slept and left for Nairobi the next day for an urgent meeting. On 23rd June 2014 he reported the matter at Nyeri Police Station. On 5th August 2014 he was called and informed by the police that a phone looking like his had been recovered, from 2 men. Others were arrested later, and he was called to go and identify them. He did so at an identification parade, at Nyeri Police Station.

6. He produced the receipt for the purchase of the phone (EXB12) and identified the phone and 2 cards (EXB1). He said he identified the person by his appearance and his voice as he spoke to him. He said the security lights were from his gate, and were on. He confirmed not having recorded the person's physical appearance in his statement but he was sure the Appellant was the culprit.

7. PW2 **Zachary Muchiri Njori** has a stall at Nyeri old Municipal Market. In July 2014 he went to the center café where Munyi(PW3) worked as a waiter. PW3 had a Samsung galaxy grand 2 phone, and upon agreeing he sold it to him at Kshs 5000/-. PW2 in turn gave him his Alcatel phone. He placed his line No 0723512522 in his new phone.

8. On 5th August 2014 5 p.m as he worked he was approached by a person who introduced himself as Wanjohi who was soon joined by another one. They introduced themselves as C.I.D officers. They asked him for his new phone (EXB1) and its serial number. He was taken to the police station where he recorded his statement and gave the names of the person who sold him the phone. The person (Munyi) was called and was arrested. Both were released on bond to get the person who sold the phone to Munyi.

9. On 11th August 2014 the person who had sold Munyi the phone came to centre café and he was arrested from there. He is the Appellant.

10. PW3 **Nicholas Munyi Njeru** testified that in July 2014 the Appellant met him at centre café where he works. He offered to sell him a Samsung galaxy grand 2 phone at Kshs 5000/-. He told him he had some financial issues he wanted to settle, but he bought the phone. He then sold the phone to PW2. He was later arrested over the same, but released on bond to get the Appellant. Later the Appellant came to the café with another young man and arrangements were made for his arrest.

11. PW4 **No 77258 PC Peter Orwa** received the report, analyzed it and took the necessary steps to trace the phone, through Safaricom. He got the print out which he analyzed. He noted that the phone was using No 0723512522 in the name of Zachary Njori. He finally traced the said Zachary (PW2) and one thing led to another until the Appellant was finally arrested.

12. PW5 **No. 235032 I.P Josphat Langat** conducted an Identification parade in this matter on 16th August 2014. The suspect was the Appellant herein. He said he informed the appellant of his rights to appear in the parade. He placed him among 8 members and PW1 identified him as the culprit.

13. The Appellant gave a sworn defence and called one witness. He denied the charge saying on 20th June 2014 he was at home with his mother who was quite ill and he never left home. He denied knowing PW2 but admitted knowing PW3 who was his friend and a waiter at a hotel he used to frequent. He said he had borrowed Kshs 2000 from PW3 which he did not refund on time and thats why PW3 was bitter with him, and that the charges are as result of that. He admitted having been picked at an identification parade by the complainant.

14. His mother (DW2) **Catherine Nyawira** was his witness. She said she suffered a serious injury in May 2014. On 18th June 2014 her body was in a lot of pain and she was not able to walk. The Appellant was the one assisting her and the children. He was at her home on 20th June 2014.

15. When the Appeal came for hearing Mr. Gathoni for the Appellant submitted on four grounds, having filed supporting authorities. He contended that the charge was defective and duplex from the way it was framed. He referred to the case of **Joseph Njuguna Mwaura & 2 others. V R [2013] eKLR**. He added that the Appellant was not represented and the charge should have been dismissed.

16. He further submitted that the Appellant's right to fair hearing was violated as he was not provided with a legal counsel by the state. This was a mistrial he contended.

17. He argued that having been convicted of simple robbery, the maximum sentence of 14 years imprisonment meted out on him was too harsh. He finally submitted that the case was not proved beyond reasonable doubt, as the identification parade was not properly considered by the trial court.

18. Mr Njue for the State opposed the appeal and filed authorities. He conceded that the charge sheet was duplex but not defective. He said the issue the court should ask is whether the appellant was prejudiced by the duplex charge sheet. He argued that there is no robbery with violence unless we first reflect on what is robbery under section 295 Penal Code.

19. He referred to the case of **Paul Katana Njuguna v Republic [2016] eKLR** where the Court of Appeal found no duplicity on a similar charge sheet. He submitted that the Appellant was well aware of what he was facing and defending himself against.

20. On the right to legal representation he submitted that Parliament enacted the Legal Aid Act of 2016 way after the promulgation of the 2010 Constitution. This issue was considered in the case of **Joseph Kakai Kaswili v Republic [2017] eKLR.** He therefore submitted that the Appellant was convicted way before the enactment of the Legal Aid Act.

21. Counsel defended the maximum sentence saying the circumstances could not allow for a lesser sentence as the Appellant was armed with a knife. He summarized the evidence and said the prosecution proved its case and PW1 identified his phone. He also identified the Appellant at an identification parade. His alibi was considered but found to be a sham.

22. This is a first appeal and this court has a duty to re -evaluate and reconsider the evidence on record and arrive at its own conclusion.

I am alive to the fact that I did not see nor hear the witnesses and I have to give an allowance for that.

23. In the case of **Mwangi v Republic [2004] 2KLR 28** the Court of Appeal stated the following in respect to this duty:

> **(i) An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to have the appellate court's own decision on the evidence.**
>
> **(ii) The first appellate court must itself weigh the conflicting evidence and draw its own conclusions.**
>
> **(iii) It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to**

support the lower court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court had the advantage of hearing seeing the witness.

24. I have considered the entire evidence on record plus the grounds of appeal. I have equally considered the submissions by both counsel and the authorities cited. I find the issues falling for determination to be as follows:

(i) Whether the charge sheet was defective.

(ii) Whether any of the ingredients in section 296(2) of the Penal Code were proved.

(iii) Whether the appellant was identified as the robber.

(iv) Whether the sentence was harsh and excessive.

Issue No. (i)

Whether the charge sheet was defective

25. The charge sheet clearly shows that the appellant was charged under section 295 as read with section 296(2) Penal Code. It is therefore duplex as section 296(2) is sufficient to cover both the offence and the punishment. In the case of **Joseph Njuguna Mwaura & 2 Others v R [2003] eKLR** the Court of Appeal discussed the issue being raised here in detail. It referred to its observation in **Simon Materu Munialu v R [2007] eKLR.** Its finding therefore was that section 137 Criminal Procedure Code would be complied with if an accused person is charged, under section 296(2) P.C because section 137 of the CPC requires one to be charged under the section creating the offence and in the case of robbery with violence under section 296(2) Penal Code as that section creates the offence by giving it the ingredients required before one is charged under it and it also spells out the punishment.

26. In the more recent decision of **Paul Katana Njuguna v R [2016] eKLR** the Court of Appeal referred to its decisions in the case of **Joseph Onyango Owuor & Another v R** (Criminal Appeal No 353 of 2008), **Joseph Njuguna Mwaura** (supra); **Simon Materu Manialu** (supra); on the issue of a defective charge when the charge of robbery with violence is brought under section 295 as read with section 296(2) of the Penal Code. All the above appeals were dismissed which is a clear indication that duplicity of the charge was not central to those decisions.

27. Finally the Court of Appeal in the **Paul Katema Njuguna case***(supra)* found as follows:

"***Having considered the law on duplicity as it has evolved, can we say that the charge as framed in the appeal before us was so defective as to have occasioned a failure of justice" can it be said with an certainty that the said defect is incurable under section 382 of the Penal Code. We observe that the offence under section 295 and 296 (2) were not framed in the alternative. So, following the decision in Cherere s/o Gakuli v R (supra) Laban Koti v R (supra) and Dickson Muchino Mahero v R (supra), the defect in the charge herein is not necessarily fatal.***

We appreciate that section 296(2) of the Penal Code creates the offence of robbery with violence or aggravated robbery. In our view, the offence of robbery must first be demonstrated before proceeding to demonstrate the ingredients provided in section 296(2) of the Penal Code. As a corollary to this proposition, an accused person facing those charges would in defence seek to demonstrate that no offence of robbery was committed and that the ingredients alleged under section 296(2) were absent or were not demonstrated by the prosecution.

In the matter before us, we are unable to detect any prejudice which the appellant suffered. The record shows that the appellant suffered no confusion when the charge, as framed, was read to him and when the witnesses testified, he fully cross examined them. He raised no complaint before both the trial court and before the High Court. 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 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.

28. In the present case besides submitting on the duplex and defective charge the Appellant did not say he had been prejudiced by the said charge sheet. The record shows he well understood the charge he was facing and he fully participated in the proceedings, through vigorous cross examination. I therefore find that the charge though duplex was not fatally defective.

29. On the issue of failure to provide the appellant with legal representation, the cases **of Omari Bakari v R [2016] Eklr and Joseph Katheri Kaswili v R 2017 eKLR** have covered that point legally. Article 50(2)(h) of the Constitution provides:

"Every accused person has the right to a fair trial, which includes the right—

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly"

This is a right that was introduced in the 2010 Constitution. A legal framework had to be put in place to operationalize it. Money had to be set aside for that purpose, since the counsel appearing would have to be remunerated.

30. The Legal Aid Act was enacted in 2016. The appellant's case was heard and finalized before the enactment of the Legal Aid Act. He cannot therefore claim to have been denied that right. In fact its because of the the Legal Aid Act that the State got him a counsel to represent him in this Appeal. That ground therefore fails.

Issue No (ii)

Whether any of the ingredients in section 296(2) of the Penal Code were proved

31. PW1 testified that the attacker was just one and had a knife. This knife was never used against him, at all, not even threatening him. It makes it difficult to ascertain that indeed a knife was there. The evidence here tends to uncover an offence of robbery contrary to section 296(1) P.C other that the one that the Appellant was charged with. The learned trial magistrate correctly found so.

Issue No (iii)

Whether the appellant was identified as the robber

32. On identification PW1 explained why as a Medical Doctor certain features of the robber stuck in his mind. He clearly explained that there was security light outside his house and he was able to see. He however admitted that he never gave this description to the police.

33. PW4 used the information in respect of the phone to contact safaricom and finally the person using PW1's stolen handset was apprehended. One arrest led to another until the final arrest of the Appellant who was said to have sold the phone to PW3. In cross examination he admitted not only knowing but being a friend to PW3. There was no reason why PW3 would lie against him.

34. He raised an alibi supported by his mother (DW2), saying he was nowhere near the scene. Even if for a while this court says he was not at the scene of the robbery what explanation does he give for possession of the phone just a few days after PW1 was robbed of the same? He gave no explanation but simply denied being at the scene.

35. The chain of possession presented by the prosecution witnesses leaves me in no doubt that the case satisfies the requirements in the case of **Arum v R [2006] 1KLR 233** The constructive possession squarely links him to the robbery.

Issue No (iv)

Whether the sentence was harsh and excessive

36. The Appellant was sentenced to serve fourteen (14) years imprisonment which is the maximum sentence for the offence under section 296(1) penal code. He was said to be a first offender. He mitigated saying he was aged 22 years then. Despite considering the mitigation he was still given the 14 years imprisonment which is the maximum sentence, yet not mandatory.

37. The record shows that the Appellant first appeared in court on 12th August 2014 having been arrested the previous day. He remained in custody up to the time he was convicted on 29th July 2015.

38. Considering his stay in remand; the fact that he did not use any violence on the victim; the phone was recovered; his youthful age and that he was a first offender the Court should have exercised its discretion and given him a lesser sentence.

39. In conclusion I find that the Appeal partially succeeds. The conviction is upheld and the sentence of 14 years is set aside and substituted with a sentence of five (5) years imprisonment from the date of conviction.

Orders accordingly.

Dated, signed and delivered this 29th day of November 2018 in open court at Nyeri.

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HEDWIG I. ONG'UDI

JUDGE