**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 66 OF 2017**

**PAUL HIUHU NGARI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an appeal arising from conviction and sentence in the Chief Magistrate's Court Nyeri, Criminal Case No.493 of 2016 delivered by R. Kefa Senior Resident Magistrate on 3/10/2017***

**JUDGMENT**

1. **Paul Hiuhu Ngare** the Appellant herein 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 and others on the night of 6th day of May 2016 at Majengo area within Nyeri county jointly robbed James Waruru Wanjohi of his mobile phone make Nokia 105 of S/No 356693058422322 valued at Kshs 4,500/- and immediately before such robbery threatened to use actual violence to the said James Waruru Wanjohi.

2. He also faced an alternative count of handling stolen goods contrary to section 322 (1) (2) of the Penal Code. The particulars were that the Appellant on the night of 6th day of May 2016 at Majengo area within Nyeri county otherwise than in the course of stealing, dishonestly retained one mobile phone make Nokia 105 of S/No 356693058422322 knowing or having reason to believe it to be stolen good.

3.The case proceeded to full hearing and he was found guilty, convicted of the principal count and sentenced to death. Being aggrieved by the judgment he filed this appeal citing the following grounds.

> *(i) That the trial magistrate erred in law and fact while basing his conviction in reliance with the evidence of the complainant and failed to consider the same was riddled with contradictions and inconsistencies*.
>
> *(ii)* That the trial *magistrate further erred in law and fact while concluding the Appellant was positively identified by the complainant without considering the first report was never given to the police with his descriptions before his alleged arrest.*
>
> *(iii) That the trial magistrate lost direction after being influenced with the adduced evidence by the prosecution side and failed to consider the Appellant was being charged with charges which were not adequately proved as the record reveals.*
>
> *(iv) That the trial magistrate lost direction in believing the prosecution proved their case and rejected his defence without considering the irregularities which occurred under article 50(2) (e) of the Constitution 2010 thus section 212 of the Criminal Procedure Code cap 75 laws of Kenya was not met.*

4. The prosecution case was that PW1 **James Waruru Wanjohi** had gone drinking at a club on the lower part of Nyeri town. He was at the said club up to around 2.30 a.m. on the night of 6th May 2016. He only left the club when it closed. Being guided by some two ladies who are bar maids at the said club he walked a certain path with them following.

5. He suddenly saw a group of six (6) men appear. One of them whom he identified as the Appellant removed a knife which he pointed at him and ordered him to remove all that he had. He said there were street lights and he saw these men well. He was able to identify the knife (**EXB1**). The attackers took his phone, make Nokia 105 wrist watch and money (amount unknown) and they disappeared into a miraa den and later, headed towards Majengo.

6. The witness went to Nyeri stage to a tea place, from where he was informed by a watchman of persons who had been arrested by the Police. He went and joined them and was able to identify the Appellant. Searches were conducted on the arrested persons and a phone which he identified as his was found on the Appellant. He then recorded his statement.

7. Apparently the Appellant was wearing a hat and he said in spite of all that he was able to identify him.

8. PW2 **No 67352 Cpl Joseph Kigen** and **PW3 No 88201 PC Oscar Kipkori Kosgei** are police officers from Nyeri police station who were on patrol duties. On the material night they received reports of members of the public being robbed by a group of boys and women around social places. They went to a miraa place in Majengo where they took cover. While there PW2 received a report from a victim of robbery who had been robbed of Kshs.200/-

9. He was directed by PW1 to a miraa stall where the robbers were said to be hiding. He saw the Appellant removing some mobile phones from his pockets and hiding them where they were seated. He immediately called PW3 who came. They found the Appellant with two phones i.e a Nokia and Techno whose ownership he claimed.

10. There and there PW1 arrived and reported how he had been robbed of a phone and Kshs 200/. He identified the Nokia phone **EXB2** as his and the Appellant as the one who had robbed him. The phone was identified by XX marked on the battery. A Nokia phone E721 was marked as MFI4, and said to have been found on the Appellant.

11. PW3 **No 88201 PC Oscar Kipkorir Kosgei** testified that upon searching the Appellant two phones Nokia E72 **(EXB4**) and Techno (**EXB3**) plus a knife were recovered. On cross examination he said before coming to them at the Miraa stall, PW1 had reported to the Nyeri Police Station.

12. PW4 **No 86344 PC Steven Odhiambo** the investigating officer narrated what PW2 and PW3 had told him. He gave the list of recovered items as: Black Nokia phone from the Appellant **– (EXB2**), Red cover Nokia phone E721 from Norman Kamunu (**EXB4**) Nokia phone no 0562277 from the Appellant (**EXB5).** He produced them as **EXB 2, 4** and **5** respectively. He also produced the inventory **EXB 8**. He confirmed that PW1 had told him he was drunk on the material night.

13. The Appellant in his sworn defence denied the charges. He explained how he had been arrested around Majengo shops while headed to Nairobi on 6/5/16 at 2.00 am. He was searched and relieved of Kshs 4,500/- and his phone Nokia E 721 (EXB4). He said there were street lights where he was arrested from and the place was in front of the AP camp. He denied signing any inventory.

14. During the hearing of the Appeal M/s Wamboi for the Appellant submitted that the charge sheet was defective since it contained both section 295 and 296 (2) Criminal Procedure Code. That the charge sheet prejudiced the Appellant because of the form it was in as he was not sure of what offence he faced. She relied on the case of **Joseph Musyoki Mutua v Republic** ( **High court criminal Appeal no 52/2015)** and **Joseph Njuguna Mwaura and 2 Others Criminal Appeal No 5 of 2008 (Court of Appeal)** It was her argument that a duplex charge contravenes article 50 (2) of the Constitution.

15. Relying on the case of **Erick Macharia Mugo and Another v Republic (**Criminal Appeal **No 32/14 (Court of Appeal**). She submitted that though the evidence revealed that the attackers were armed, this was not stated in the particulars. Further she argued that the circumstances were not favourable for a positive identification. That there was no analysis of the intensity of the lights, distance and position by PW1. To support this she cited the case of **Francis Muchiri v Republic (Criminal Appeal No 56 of 2014 (Court of Appeal).**

16. Counsel further submitted that there was no sufficient evidence on possession and that the identity of the phone was contradictory. On this she cited the case of **Eric Omondi Arum v Republic Criminal Appeal No 85 of 2005.** She pointed out what the witnesses stated in respect to this phone.

17. Counsel for the state Mr Njue counsel for the State opposed the Appeal. He admitted that the charge sheet was duplex, but said the Appellant was not prejudiced as he knew what he was defending himself against. He relied on the case of **Paul Katana Njuguna v Republic [2016] eKLR** saying not all cases of duplicity are fatal. He argued that one does not consider aggravated robbery before considering what robbery is.

18. Counsel contended that in the **Joseph Njuguna Mwaura Case** (supra) the Appellant had complained of having been charged under section 296(2) Penal Code without section 295. The Court of Appeal did not then consider any prejudice to be caused if one was charged under the two sections. This was however later done in the **Paul Katana Njuguna** case (supra) and the Court made mention of their holding in the **Joseph Njuguna Mwaura** case (supra).

19. Mr. Njue submitted that failure to mention the knife in the charge sheet was not fatal as the State was not wholly relying on it, since the other ingredients were available. On the issue of the phone he admitted there were inconsistencies in its model, but PW1 supported by PW2 and PW3 had wholly identified the phone (**EXB2**). Further that the time between the loss and recovery ws very short.

20. He further submitted that on identification PW1 had admitted there were street lights and the Appellant was arrested at the miraa shade with PW1's phone. On the reporting of the incident he argued that it was not PW1 who reported about the loss of Kshs 200/- but another complainant. That failure to recover the watch could not vitiate the evidence already before the court.

21. This being a first appeal this court is enjoined to re-evaluate and reconsider the evidence and arrive at its conclusion. It should also be mindful of the fact that it did not see or hear the witnesses. In the case of **Mwangi v Republic [2004] 2 KLR 28** the Court of Appeal stated the following in respect to this duty.

> **"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.**
>
> **The first appellate court must itself weigh the conflicting evidence and draw its own conclusions.**
>
> **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"**

22. 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 the offence of robbery with violence under section 296(2) Penal Code was established.

(iii) Whether the Appellant was identified as one of the robbers.

(iv) Whether the Appellant was found in possession of the stolen property (phone).

**Issues No (i)**

**Whether the charge sheet was defective**

23. 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 Njugna 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.**

24. Its finding therefore was that section 137 Criminal Procedure Code would be complied with if an accused person is charged, under section 296(2) of the Penal Code. It explained that section 137 Criminal Procedure Code requires one to be charged under the section creating the offence and in the case of robbery with violence section 296(2) which creates the offence gives it the ingredients required before one is charged under it and it also spells out the punishment.

25. In the more recent decision of **Paul Katana Njuguna v R [2016] eKLR** the Court of Appeal referred to its decisions in the cases 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.

26. Finally the Court of Appeal in the **Paul Katema Njuguna case**

(supra)found as follows:

**38**. "***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 any 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.***

***39. 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.***

***40. 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 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.***

27. 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.

**Issue No (ii)**

**Whether the offence of robbery with violence under section 296(2) Penal Code was established**

28. Section 296 Penal Code provides for the ingredients in a case of robbery with violence.

- Offender must be armed with a dangerous weapon

  OR

- Offender must be in company with one or more other persons

  OR

- Immediately before or after such robbery threatens or wounds or uses violence against any person.

It provides that proof of any of the three ingredients is sufficient hence the use of the word OR.

29. The charge sheet shows that there was a threat to use actual violence which is one of the ingredients. It was also PW1's evidence that he was accosted by a group of six (6) men. He was thereafter threatened by one of the six (6) men with a knife. After the attack he was robbed of his phone Nokia 105 S/No 356693058 – 422322 valued at Kshs 4,500/-. I am satisfied that the offence of robbery was committed against PW1.

**Issue No. (iii)**

**Whether the Appellant was identified as one of the robbers**

30. The time of incident was around 2.30 am which was late into the night. PW1 had been drinking alcohol at a night club and only left when it was closed. It is not clear for how long he had been drinking. He said when the incident happened, he was in the company of two ladies who had been selling him beer at the night club. These two ladies must have witnessed what took place but none was called as a witness.

31. In cross examination he contradicted himself when he at first said "**there were other people who saw how I was robbed**". Still in cross examination later he says" **"From the club to where the robbery took place is around 40 metres. There were no people around.**" This is at page 9 lines 5 and 14-15. Was he really sure whether there were people or not?

32. It is not clear what level of sobriety PW1 had at the time of the attack.

This is a person who had been drinking late into the night. PW4 No 86344 **PC Steven Odhiambo** who is the investigating officer stated this in cross examination at page 55 lines 17-18.

> **"The complainant told me he was drunk on the material date."**

This statement by the investigating officer answers my question very well on PW1's level of sobriety at the time.

33. The court was faced with a scenario where it was dealing with the issue of identification of a stranger at night by a drunk witness (PW1). The Court of Appeal at Nyeri in the case of **John Nduti Ngure v Republic Criminal Appeal No 121/14** stated this of visual identification:

> **"One again, this court has repeatedly stressed that: Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification"**
>
> See **Wamunga v Republic [1989] KLR 424**

34. M/s Wamboi for the Appellant relying on the case of **Francis Muchiri Joseph** (supra) submitted that the intensity of the lighting was never explained by PW1. Mr Njue for the State agreed that the streets were lit and even the Appellant confirmed that. It's not clear whether both PW1 and Appellant were talking about the scene of the robbery or the Miraa shade. PW4 the investigating officer stated this in his evidence in chief:

> **"I visited the scene. I was taken by the officers who arrested the accused persons. It was a structure where miraa is sold and it is dark at night and the lighting is inadequate. The streetlight is covered by other structures hence making the scene dark."**

35. After what PW4 (the investigating officer) stated about lighting at the scene I don't think it is an issue to belabor any more. The investigating officer (PW4) once again in cross examination said:

> **"the complainant stated that he found the two ladies within Majengo area and inquired if he would buy miraa and as they were escorting him to the place, he was robbed by the two male accused persons."**

36 . Indeed this statement is contrary to what PW1 told the court when he said he had requested two ladies to take him to where he could get a lodging. Secondly the two ladies are the ones who had been serving him beer at the night club. So which is which? Upon careful scrutiny of the evidence by PW1 and PW4, I am not satisfied that it is without error. It can't be relied on without any other independent evidence to corroborate it.

**Issue No (iv)**

**Whether the Appellant was found in possession of the stolen property (phone)**

37. It was PW1's evidence that he was robbed of a mobile phone Nokia 105, wrist watch and money. The wrist watch and money were never recovered. PW1 is said to have identified his phone (EXB2) by some marks on it.

38. This recovery was within a very short time after the alleged robbery.

This would therefore be recent possession. The doctrine of recent possession applies where possession by the suspect is of property belonging to the complainant which had been recently stolen from him.

39 .The Court of Appeal in the case of **Erick Otieno Arum v Republic [2006] eKLR** held thus;

> **In our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses. In case the evidence as to search and discovery of the stolen property from the suspect is conflicting, then the court can only rely on the adduced evidence after analysing it and after it accepts that which it considers is the correct and honest version."**

40. The witnesses who testified on recovery are PW1, PW2 and PW3. PW1 said he was told by a watchman at Nyeri stage of persons who had been arrested by the police and he went there and found the Appellant. A search was conducted by the police and his phone (**EXB2**) was found on the Appellant.

41. PW2 **No 67352 Cpl Joseph Kigen** said he saw the Appellant hiding phones and on him were found two phones i.e. Techno and Nokia phones. The phone he identified as belonging to PW1 was a Nokia E721 **(EXB4**). PW3 also testified that the Nokia phone belonging to PW1 and found on the Appellant was not Nokia (**EXB4**). According to him the phone identified by PW1 as his was Nokia 0168 (**EXB5**)

42. PW4 produced an inventory **(EXB8**) showing the list of recoveries to be as follows among others:

Nokia black (**EXB2**) from the Appellant.

Nokia E721 (red cover) from Norman Kamunu

Nokia No. 0562277 from the Appellant.

43. A casual look at the inventory (**EXB 8**) shows that there were **4** items recovered from the Appellant. It shows 3 phones having been recovered from him i.e. two Nokia phones and a Techno and a knife. There is a deleted word Techno and E 724 Nokia which was clearly inserted by hand as seen on the inventory (EXB8). It is not clear if this was the original list. The question I ask myself is whether this phone was positively identified and if it was found with the Appellant.

44. It is clear from the evidence of PW1, PW2, PW3 and PW4 that it is not clear which phone belonged to PW1. He pointed out the Nokia phone (**EXB2**) as his phone. PW2 pointed at **EXB4** as PW1's phone; PW3 pointed at **EXB5** as PW1's phone, while PW4 pointed at **EXB**2. So which was PW1's phone and which one was found on the Appellant? Secondly PW2 and PW3 who were the recovery agents had their story to give.

45. PW2 said he recovered a Nokia phone and a Techno phone (**EXB 2 & 3**) on the Appellant, while PW3 said they recovered a Nokia phone (**EXB4**) and Techno (**EXB3**) on the Appellant. The evidence on the inventory does not support their evidence at all.

46. It cannot therefore be said that the property was positively identified by PW1, let alone it being found in the Appellant's possession. The evidence of PW1, PW 2 and PW3 on the recovery is contradictory and the inventory evidence makes matters worse.

47. PW1 said the battery had 2XX. It is nowhere recorded in the evidence that the court ever saw the 2XX on any battery. I find that the evidence herein fails the test set out in the **Eric Otieno Arum** case (supra).

48. After a thorough analysis of the evidence on record I have come to the conclusion that the case against the Appellant was not proved to the required standard of beyond reasonable doubt. The result is that the Appeal succeeds and I allow it.

49. The conviction is quashed and the sentence set aside. The Appellant shall be released unless otherwise lawfully held under a separate warrant.

Orders accordingly.

**Signed, dated and delivered this 26th day of November 2018 at Nyeri.**

**.....**

**HEDWIG I. ONG'UDI**

**JUDGE**