REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO 52 OF 2015

JOSEPH MUSYOKI MUTUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

***(*An appeal against the original conviction and sentence of Hon. P.O. Ooko PM in Criminal Case No. 1359 of 2013 delivered on 26th March 2015 in the Principal Magistrate's Court at Mavoko)**

JUDGMENT

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 are that on the 1st December 2013 at about 0400hrs at Mlolongo township in Athi River District within Machakos County, jointly with others not before the Court and while armed with offensive weapons namely pangas and metal bars, they robbed Abdul Majid Swaleh Brek of cash 8,500/=, two lorry batteries, 80 litres of diesel, one sack of containing two debes of Irish potatoes and five cabbages all valued at 50,700/=, and immediately after the time of such robbery threatened to use actual actual violence against the said Abdul Majid Swaleh Brek. The Appellant was also charged with the alternative offence of handling stolen goods contrary to section 322(1) as read with section 322(2) of the Penal Code.

The Appellant pleaded not guilty to the charge in the trial court on 2nd December 2013, and on 29th April 2014 when his case was consolidated with another related criminal case. He was tried, convicted of the charge of robbery with violence and sentenced to death.

The Appellant is aggrieved by the judgment of the trial magistrate and has preferred this appeal against the conviction and sentence. The Appellant's grounds of appeal are in his Petition of Appeal filed in Court on 8th April 2015 by his Advocates, Mutinda Kimeu & Company Advocates, and are as follows:

1. THAT the trial magistrate erred and misdirected himself both in law and facts by convicting without proper consideration and analysis of the evidence adduced.

2. THAT the learned Magistrate erred and misdirected himself in failing to find that burden of proof in Criminal case is beyond .reasonable doubt

3. THAT the learned Magistrate erred in failing to ensure that the burden of proof which is beyond reasonable doubt on the part of the prosecution had been discharged.

4. THAT the learned magistrate erred in shifting the burden of proof to the appellant and finding that he had a duty to discharge to proof his defence of alibi.

5. THAT the learned magistrate erred in reaching the finding that the evidence of identification by PW2 of the appellant at the scene was neither challenged nor watered down in any material respect during his cross examination

6. THAT the learned magistrate erred in convicting on the defective charge sheet as the appellant was charged under section 295 as read with section 296 (2) of the Penal Code a charge that was duplex as the appellant should have been charged under section 296 (2) of the penal code as that is the section that provides the ingredients of the offence.

7. THAT the learned magistrate erred in law in finding that the accused was James Musyoki Mutua and convicting him using a wrong name.

8. THAT the learned magistrate erred in law and in fact in relying on doctrine of recent possession despite there being no tangible evidence to support the doctrine of recent possession since there was no inventory filed by the police officers to ascertain the recovery from the appellant and no 'receipt was produced to confirm ownership of the alleged potatoes and cabbages.

9. The learned magistrate erred in convicting the appellant on identification in difficult circumstances by a single witness that was not corroborated.

10. THAT the learned magistrate erred in finding the circumstances amounting to robbery with violence were proved as against the appellant.

11. The court erred and misdirected itself in fact and in law on the Alibi evidence given by the appellant in his defence and thereby occasioning a miscarriage of justice by considering extraneous matter not presented or adduced before the court to the detriment of the appellant.

12. The court erred and misdirected itself in failing to note that no weapon was produced in connection with the said robbery or items that were allegedly stolen in the cause of the said robbery or at all in connection with the appellant.

The Appellant also relied on written submissions filed by his Advocates dated 15th July 2016. The decision in **Ibrahim Mathenge vs R, Machakos Criminal Appeal No 222 of 2014** was cited for the position that the duplex charge was a fundamental breach which goes to the root of the Appellant's conviction, and that it is not the sort of irregularity which is curable under Section 282 of the Criminal Procedure Code. Also cited was the decision in **Ganzi And 2 Others vs Republic, (2005) 1 KLR 52** for the argument that the correct approach that ought to have been applied by the trial Court was to weigh the Appellant's alibi defence against the prosecution evidence, instead of dismissing it as an afterthought.

On the application of the doctrine of recent possession by the trial Court, the Appellant alleged that the there was no evidence that the recovered items were the property of the complainant, as he did not give any evidence to prove that whatever that was allegedly recovered was his property. It was also contended that the said property was not found in the possession of the Appellant, as it was found in a house in which there were other people residing. Reliance was placed on the decision in **Erick Otieno Arum vs Republic, CA (Kisumu)Criminal Appeal No 88 of 2005** in this respect.

Lastly, the Appellant submitted relying on the decision in **Abdalla .Bin Wendoh and Another vs R (1953) EACA 166,** that the identification of the Appellant especially by a single witness at night, cannot be said to be free of error. This is for the reason that the trial Court mainly relied on the evidence of PW2 as the person who positively identified the Appellant at the alleged scene of crime, and although PW2 alleged that the security lights were on, it was around 4:00 am in the morning and the said PW2 was on the upper floor of a building that was 10-15 metres away.

Mogoi Lillian, the learned Prosecution counsel, filed submissions dated 31st August 2016 conceding the

appeal, on the basis that the charge sheet was defective since it was duplex having referred to both section 295 and section 296 (2) of the Penal Code. It was submitted that the charge sheet disclosed two charges with different sentences namely simple robbery and robbery with violence. The prosecution also conceded the appeal on the grounds raised as regards the identification of the Appellant, and contradictory evidence given by the witnesses during the trial.

My duty as the first appellate court is to re-evaluate the evidence and draw independent conclusions as held in **Okeno v Republic (1972) E.A. 32**. However, I am alive to the fact that I did not have the advantages enjoyed by the trial court of seeing and hearing the witnesses, as was observed in **Soki v Republic (2004) 2 KLR** 21 and **Kimeu v/s Republic (2003) 1 KLR 756.**

A brief summary of the evidence adduced before the trial court is as follows. The prosecution called four witnesses. PW1 was Abdul Majid Swaleh Brek, the complainant, who narrated the events of the night of 30th December 2013 while he was sleeping with his two children in the lorry which he was driving which was parked at Mlolongo. He testified that they were attacked by a group of people armed with pangas who opened the passenger door and stole items from the vehicle. He stated it was dark and there were no security lights, andthat he was therefore not able to identify any of the attackers.

PW2 was Jams Mutuku Mutwiri, and he testified that on 1st December 2013 at 4.00 am he was guarding restaurant premises at Mlolongo on the upper floor, when he saw the Appellant open the door of a lorry that was packed 10 to 15 metres away, and remove a sack from inside which he carried away. He claimed the area was covered by bright security lights. PW2 also testified that is the one who led the police to the Appellant's premises where the Appellant was arrested.

PW3 (Corporal Patrick Situma) and PW4 (Sergant Evans Ombui) were the arresting officer and investigating officer respectively, and they testified as to the report of the robbery and arrest of the Appellant.

I have considered the arguments made by the Appellant and the Prosecution, as well as the evidence before the trial court. I find that there are three issues for determination in this appeal. The first is whether the charge against the Appellant was defective; and if the Appellant is found to have been properly charged, the rest of the issues that the court will need to consider are secondly, whether there was a positive identification of the Appellant; and thirdly, whether there was sufficient, consistent and credible evidence to convict the Appellant for the offences of robbery with violence.

On the first issue, the Prosecution conceded that the Appellant was charged under a duplex charge. The rule against duplicity provides that the prosecution must not allege the commission of two or more offences in a single charge in a charge-sheet. Such a charge is sometimes said to be 'duplex' or 'duplicitous'. The rule stems from two important principles: firstly, as a matter of fairness, a person charged with a criminal offence is entitled to know the crime that they are alleged to have committed, so they can either prepare and/or present the appropriate defence.

Secondly, the court hearing the charge must also know what is alleged so that it can determine the relevant evidence, consider any possible defences and determine the appropriate punishment in the event of a conviction. Therefore, it was paramount for the Appellant and the trial Court to be sure if the charge was one of robbery or robbery with violence, as the two offences have different ingredients and therefore attract different defences. I am also minded that the law on the framing of charges requires clarity in the charge sheet as stated in various provisions. Section 134 of the Criminal Procedure Code provides that:

> **"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."**

Section 135 of the said Code in addition provides as follows:

"(1) Any offences, whether felonies or misdeanours, may be charged together in the same charge or information if the offences charged are founded on the same facts, or are part of a series of offences of the same or a similar character.

(2) Where more than one offence is charged in a charge or information, a description of each offences so charged shall be set out in a separate paragraph of the charge or information called a count.

(3) Where, before trial, or at any stage of a trial, the court is of the opinion that a person accused may be embarrassed in his defence by reason of being charged with more than one offence in the same charge or information, or that for any other reason it is desirable to direct that the person be tried separately for any one or more offences charged in a charge or information, the court may order a separate trial of any count or counts of that charge or information."

I am in addition guided by the decision of a five-judge bench of the Court of Appeal in **Joseph Njuguna Mwaura & 2 Others v Republic [2013] e KLR** ***(Criminal Appeal No 5 of 2008)*** that explained and laid to rest the reasons why charging an accused person with the offence of robbery with violence under sections 295 and 296(2) of the Penal Code would amount to a duplex charge. The said Court, while following its earlier decisions in ***Simon Materu Munialu V Republic [2007] eKLR (Criminal Appeal 302 of 2005)*** and ***Joseph Onyango Owuor & Cliff Ochieng Oduor v R [2010] eKLR (Criminal Appeal No 353 of 2008),*** stated as follows:

"Indeed, as pointed out in *Joseph Onyango Owuor & Cliff Ochieng Oduor v R (Supra)* the standard form of a charge, contained in the Second Schedule of the Criminal Procedure Code sets out the charge of robbery with violence under one provision of law, and that is section 296. We reiterate what has been stated by this Court in various cases before us: the offence of robbery with violence ought to be charged under section 296 (2) of the Penal Code. This is the section that provides the ingredients of the offence which are either the offender is armed with a dangerous weapon, is in the company of others or if he uses any personal violence to any person.

The offence of robbery with violence is totally different from the offence defined under section 295 of the Penal Code, which provides *that any person who steals anything, and at, or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or to property in order to steal*. It would not be correct to frame a charge for the offence of robbery with violence under section 295 and 296 (2) as this would amount to a duplex charge."

I am persuaded by this explanation by the Court of Appeal, particularly as s*ection 296(1) of the Penal Code provides that a person who commits the felony of simple robbery is liable to imprisonment for fourteen years. I am also of the view that this is not a defect that is curable under section 382 of the Criminal Procedure Code, as there are two offences disclosed by the charge namely simple robbery and robbery with violence, which offences attract different penalties under the law. It is also my opinion that there was prejudice caused to the Appellant in this regard as it would not have been clear what offence or sentence was applicable to them.*

*It is my considered opinion that t*his ground of appeal alone is sufficient to dispose of this appeal, and it is not prudent in the circumstances to consider the remaining issues which would go into the merits of the findings of the trial court, given that I have found that the proceedings were based on a defective charge.

The only issue that remains to be considered is whether the appeal should be allowed in its entirety or a retrial ordered. The principles governing whether or not a retrial should be ordered were enunciated in **Fatehali Manji v Republic [1966] EA 343** by the East Africa Court of Appeal as follows:

"In general, a retrial will be ordered only when the original trial was illegal or defective; it

will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person."

In **Mwangi v Republic [1983] KLR 522** the Court of Appeal also held thus:

> **"We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result. In our view, there was evidence on record which might support the conviction of the appellant."**

I am convinced that this is not a proper case for retrial. I have in this regard particularly noted that the identification of the Appellant was not safe, in light of the inconsistencies in the testimony of PW1 and PW2 as to whether there was light at the scene of crime, with PW1 testifying it was night and dark and PW2 that there was light from security lights. PW2 was also a single identifying witness, during the night and was 10 to 15 metres away.

In addition, no evidence was also brought of the complainant's ownership of the items alleged to have been recovered from the Appellant, nor of any violence meted on PW1 or his children, which is a key element of robbery with violence. Lastly, no offensive weapons were recovered from the Appellant. There were thus substantial gaps in the evidence brought during the trial as regards the alleged robbery with violence and the Appellant's involvement in the same.

A retrial is therefore inappropriate in the circumstances as it may serve the purpose of addressing the gaps in the prosecution case. These gaps in the evidence adduced by the Prosecution would also render a conviction of the Appellant for the alternative and cognate offence of handling stolen goods contrary to section 322(1) as read with section 322(2) of the Penal Code unsafe.

I therefore allow the Appellant's appeal and quash his conviction for the offence of robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code. I also set aside the sentence of death imposed upon the Appellant for this convictions, and order that the Appellant be and are hereby set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

DATED AT MACHAKOS THIS 29TH DAY OF MARCH 2017.

P. NYAMWEYA

JUDGE