REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO 19 OF 2015

PETER MUTHINI KISUNA …..... APPELLANT

VERSUS

REPUBLIC…….……RESPONDENT

***(*An appeal against the original conviction and sentence of Hon. L.N Mugambi SPM in Criminal Case No. 169 of 2014 delivered on 17th October 2014 in the Senior Principal Magistrate's Court at Kangundo)**

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 15th March 2014 at Kamanzi Market Kivaani in Kangundo District within Machakos County, jointly with others not before the Court and while armed with unknown types of firearms robbed Ndolo Mwendo Musyoka of cash of Kshs 7,000/=, and at or immediately after the time of such robbery threatened to use actual violence The Appellant pleaded not guilty to the charge in the trial court on 2nd December 2013, and on 20th March 2014, after which 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 and Memorandum of Appeal filed in Court on 17th November 2014, and in Supplementry Grounds of Appeal and submissions dated 3rd November 2016 that he availed to this Court.

His grounds of appeal are that on two main areas, firstly that of identification and secondly on a duplex charge. These are as follows:

1. THAT, the learned trial Magistrate erred in law and fact by convicting the Appellant in reliance of the identification evidence by PWl and PW2 which occurred in difficult conditions.

2. THAT, the learned trial Magistrate erred in law and fact by holding that there was sufficient light at scene without enquiring to know the intensity of the said light, its colour and distance in relation to point identification.

3. THAT, the learned trial Magistrate erred in law and fact by holding that the Appellant was arrested by PW l and PW 2 without proper warning that the chase occurred in darkness hence possibility of mistaken identity could occur.

4. THAT, the learned trial Magistrate erred in law and fact by convicting the Appellant in reliance

on a charge which is duplex.

The Appellant in his submissions contended that the robbery was alleged to have taken place in the night at about 9:30 pm in a bar in which the type of light was not described, and relied on the decisions in **Eria Sabwato vs Rep (1960) EA 714,** and **Charles Maitanyi vs Rep (1985) 2 KAR 25** for the position that the evidence of identification in such difficult circumstances must be watertight, and that the trial magistrate did not test the intensity of the light or the distance between the counter and the door where the Appellant was alleged to have stood behind another person. Further, that the chase and arrest of the Appellant was also alleged to have taken place in the darkness and no witness gave evidence to have identified the Appellant on arrest.

It was further submitted that the Appellant was charged with an offence of robbery with violence contrary to section 295 as reads with section 296(2) of the Penal code , and that it was wrong in law to frame a charge of robbery with violence under these two sections. Reliance was placed on the decisions in **Joseph Njuguna Mwaura and Others vs Republic (2013) e KLR** and Amos **Nyandoha Otaha and Another vs Republic, Cr. Appeal No.238 &239 of 2014** at Machakos**.**

According to the Appellant, the trial court had powers to order the prosecution to alter the charge by way of amendment under section 214 of the Criminal Procedure Code, but failed to comply. In addition, that amending the charge sheet now as a result of this appeal or by way of retrial will prejudice him, and that this was a serious omission which cannot be cured by the provisions of section 382 of the Criminal Procedure Code as the charge sheet deprived him of the ability to understand the charges he was facing, as well as his rights to plea.

Ms Rita Rono, the learned prosecution counsel, filed written submissions in response dated 15th February 2017, wherein she urged that the prosecution called a total of six witnesses who proved the case beyond reasonable doubt. Further, that on the ground raised on identification PWl testified that on the material date he saw the Appellant who was standing behind a man wielding a gun at the door, and that the Appellant then entered the bar and ordered the patrons to lie down which clearly indicates that the Appellant was clearly identified and was present during the robbery. It was also contended by the prosecution that there was sufficient lighting at " Matithini Yaya Beehive pub" as there was electricity hence the Appellant cannot purport there was mistaken identity.

In addition that there was no duplicity as the Appellant was charged under section 296(2) of Penal Code and not section 295 as submitted. Lastly, that if the Appellant was to rely on the defense of alibi he should have informed the Prosecution at the earliest time possible and not during defense, to give the prosecution enough time to ensure that the alibi establishes reasonable doubt as to whether or not the accused was at the scene of crime. Reliance was in this regard placed on the decision in **Basil vs Okaroni, Busia H.C. Criminal Appeal 49.**

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 six witnesses. PW1 was Jackson Ndolo Muendo , a bartender at Matithini Yaya Beehive Pub, and he narrated the events of the night of 15th March 2014 and testified that at 9.30pm, while at the pub, the Appellant with two other robbers who were armed with a pistol robbed the pub of Kshs 7,000, two mobile phones, six bottles of Guinness and five packets of sportsman cigarettes. He testified that there was electricity light on in the pub and that the robbers then fled after shooting at one of the customers and dropping a pistol magazine and live ammunition, and that after the patrons gave chase, they arrested the Appellant in a home in the neighbourhood where the Appellant had been held hostage by dogs.

PW2 was Shadrack Mulei Maithya, a patron in the bar who also reiterated the events narrated by PW1. PC Stephen Amanja was PW3 and he testified as to receiving the report of the robbery at the pub, and on

arrival finding that the Appellant had been arrested and beaten by the members of the public. He rescued the Appellant who had serious injuries and took him to hospital. After treatment and discharge the Appellant was then charged with the offence he was convicted of.

PW5 (Inspector Samwel Mwawasa) and PW6 (Chief Inspector Johnson Bulemi) were the Deputy OCS and investigating officer respectively, both from Kangundo Police Station, and they testified and reiterated the evidence of PW3 as to the report of the robbery and arrest of the Appellant. PW5 also testified that he collected a magazine and ammunition from the pub which he handed over to PW6. PW6 also produced as exhibits items recovered from the Appellant.

The last witness, PW4, was Johnston Musyoki Mwongela who testified that he is attached to the CID as a firearms examiner and he produced his report and a detachable magazine which is a component of a firearm being a pistol, , three ammunitions and a bullet core as exhibits. He stated that he had received the same on 11th April 2014 from PW6 for examination.

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 offence of robbery with violence.

On the first issue, the Prosecution denied that the Appellant was charged under a duplex charge and stated that he was charged only under section 296(2) of the Penal Code. However a perusal of the charge sheet shows that the Appellant was indeed charged with the offence of robbery with violence contrary to section 295 as read with 296(2) of the Penal Code.

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 him.*

*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 the concerns raised as to the identification of the Appellant at the time of his arrest as no evidence was brought as to whether or not there were lights at the place of his arrest after he had been chased in the dark and arrested in a different place from the scene of crime, and no identification parade was conducted to confirm if the Appellant was the person seen in the pub.

In addition, no evidence was also brought of the complainant's ownership of the items alleged to have been stolen by the Appellant, neither were any of the stolen items or offensive weapon 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 conviction, and order that the Appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

DATED AT MACHAKOS THIS 24TH DAY OF APRIL 2017.

P. NYAMWEYA

JUDGE