



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NUMBER 122 of 2015.**

**BETWEEN**

**JOHN MISOLO ODERA.....APPELLANT.**

**AND**

**REPUBLIC .....RESPONDENT.**

*(An appeal from the original conviction and sentence in the  
Chief Magistrate's court at Milimani in Cr. Case No. 497 of 2013  
delivered by Hon. J. Karanja, PM on 9<sup>th</sup> May 2014).*

**JUDGMENT.**

**Background.**

John Misolo Odera, the Appellant herein, was charged alongside four others with the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code. The particulars were that on 10<sup>th</sup> April, 2013 alongside Mfangano street in Nairobi within Nairobi, the Appellant jointly with others not before the court, while armed with a dangerous weapon namely a Somali sword, robbed Lucy Wangechi Mariga of Kshs. 355,000/- in cash and a Nokia mobile phone valued at Kshs, 8,000/-and immediately before such robbery injured the said Lucy Wangechi Mariga.

The Appellant was charged in an alternative charge of handling stolen goods contrary to Section 322(2) of the Penal Code. The particulars of the offence were that on 10<sup>th</sup> April 2013 alongside Mfangano street in Nairobi within Nairobi county, otherwise than in the course of stealing, dishonestly retained a bag containing Kshs. 355,000/- in cash and a Nokia mobile phone all valued at Kshs. 8,000/- knowing or having reason to believe them to be stolen property.

The Appellant was found guilty on the main charge. He was convicted accordingly and sentenced to death. He preferred the instant appeal against both the conviction and sentence. In his Amended Petition of Appeal filed on 30<sup>th</sup> January, 2017 he set out seven grounds of appeal which I have summarized as follows. That the charge sheet was defective, that the judgment did not satisfy Section 169 of the Criminal Procedure Code, that the elements of the offence of robbery with violence were not established, that the prosecution case was riddled with contradictions, inconsistencies and insufficiency of evidence to warrant a conviction and that his defence was not considered.

## **Submissions.**

The appeal was canvassed by way of filing written submissions. Those of the Appellant were filed by M/s D.J.Oluoch & Co. Advocates on 30<sup>th</sup> January, 2017 whilst the Respondent's were filed by learned Principal State Counsel, Ms. Nyauncho on 8<sup>th</sup> February, 2017. On the issue of the defective charge sheet the appellant submitted that the charge was not supported by the evidence. This was with respect to the fact that whereas the charge sheet stated that a Somali sword was used in the robbery none of the prosecution witnesses testified that a sword was used. In that case a key element of the offence of robbery with violence namely that the appellant was armed with a dangerous weapon was not proved. The case of **Alex Mwangi Waweru v. Republic[2016] eKLR** was cited to buttress the submission. In addition, it was the appellant's view that the mere production of a P3 Form was not conclusive proof that the appellant was armed or that the complainant was attacked by his assailants. He took issue with the fact that the charge did not satisfy the provision of Section 134 of the Criminal Procedure Code. This was in light of the fact that the complainant, Lucy Wangechi Mariga gave her name in testimony as Lucy Wangechi Mwanza and in another instance as Lucy Wangechi Munga. He also faulted the charge sheet because the charge was drafted both under Sections 295 and 296(2) of the Penal Code which made it duplex. The cases of **Mwaura v. Republic[2013] eKLR**, **Simon Materu Munialu v. Republic[2007] eKLR**, **Joseph Njuguna Mwaura & 2 others v. Republic[2013] eKLR**, **Peter Mbuvi Wanza v. Republic[2016] eKLR** and **Amos Nyandoha Otaha & another v. Republic[2015] eKLR** were cited in this regard.

The appellant also submitted that the case was fabricated against him. The justification was that the witnesses testified that he was with other assailants and the police made no effort to arrest other suspects. In that case, the court ought to have taken cognizant of the fact that the offence took place along a very busy road, Ronald Ngala Street, in which case he was but a victim of circumstances. That is to say he was mistaken as the robber in place of the real culprit. This fact, according to the Appellant, ought to have been interpreted in light of his plausible defence, which if it had considered he should have been acquitted.

It was the appellant submission that the prosecution case was riddled with contradictions which the court ought to have resolved in his favour. He referred to contrasting evidence of the witnesses with respect to the number of the assailants who attacked the complainant. He also faulted the failure to adduce exhibits by the makers.

He submitted that the charge as drafted also violated Article 50(2)(b) of the Constitution which provides that every person should have a right to a fair trial which includes the right to be informed of the charge with sufficient detail. He submitted that the charge sheet in question was also not endorsed by the Office of the Director of Public Prosecutions contrary to Article 157(6)(a) of the Constitution and Section 23 of the Office of the Director of Public Prosecutions Act which came to effect on 16<sup>th</sup> January, 2013. He submitted that the charge sheet only had the stamp of the OCS Central Police Station which had no prosecutorial powers.

Learned State Counsel, Ms. Nyauncho opposed the appeal. She submitted that elements of the offence of robbery with violence were proved beyond reasonable doubt. It was her case that although no evidence was adduced that the appellant was armed with a Somali sword at the time of the robbery, under Section 296 (2) of the Penal Code, the prosecution was enjoined to prove any of the three elements provided thereunder. In this respect, the prosecution had clearly established the necessary elements.

With respect to the submission that the charge sheet was defective because of the discrepancies in the name of the complainant, it was her view that the error was technical and curable under Section 382 of the Criminal Procedure Code.

With regard to drafting the charge under both Sections 295 and 296 (2) of the Penal Code, learned counsel submitted that the charge sheet would only be bad if it prejudiced the appellant. In this case, her view was that the appellant was not prejudiced because he knew the charge he was facing which is what he defended himself against. Further, that the failure to have the charge sheet endorsed by the office of

the Director of Public Prosecution was not fatal because it did not offend Section 137 of the Criminal Procedure Code. She submitted that the prosecution proved its case beyond a reasonable doubt and urged that the appeal be dismissed.

### **Evidence.**

The prosecution's case was set off by the evidence of PW1, Lucy Wangechi Mariga. She was the complainant in the case. The robbery occurred at about 10.30 a.m. on 10<sup>th</sup> April, 2013. She had just withdrawn money through a cheque from the Bank of Africa to the tune of Ksh. 350,000/=. She put the money in her handbag which also had Ksh. 5,000/= making a total of Ksh. 355,000/=. In addition, the handbag also had a mobile phone make Nokia valued at Ksh. 8,000/=. She was crossing the road along Ronald Ngala Street when she was hit on the neck by somebody. The straps of her handbag were also being pulled. Another person was holding her hand. She had been attacked by a group of young men who managed to escape with her handbag leaving her on the ground. Coincidentally, **PW3 PC Wais Abdulajuj Mohamed** and **PW4 PC Geoffrey Kosgei** from Kamukunji Police Station were on patrol along Ronald Ngala Street. They noticed the commotion and witnessed PW1 being robbed. PW3 managed to get hold of the appellant who was one of the robbers who had strangled PW1 and escaped with her handbag. The joy of the appellant was short lived as PW3 managed to arrest him red handed with the handbag before he could escape from the scene. Immediately he recovered the handbag, he and PW4 walked to where PW1 was seated. They informed her that they had recovered her handbag. Together with the appellant she was escorted to Central Police Station where she reported the matter and recorded her statement.

The entire sum of Ksh. 355,000/= was recovered. A woman suspect was also arrested and released after investigations failed to link her with the offence. PW1 sustained injuries to the head, tongue, neck and cheek. She was treated and a P3 Form filled by **PW7, Doctor Joseph Maundu** of Police Surgery on 11<sup>th</sup> April, 2013. The Doctor confirmed the said injuries.

**PW5, PC Solomon Makau** and **PW6, PC Daniel Kiilu** both of Central Police Station were on patrol duties along Kenyatta/Moi Avenues on 22<sup>nd</sup> April, 2013. They arrested a group of about 10 suspects and locked them up at Central Police Station. It was there that PW3 confirmed that about five of the suspects had participated in the robbery of 10<sup>th</sup> April, 2013. Those who were identified were charged alongside the appellant while the others were released.

On 4<sup>th</sup> February, 2014 the trial court delivered its ruling under Section 210 of the Criminal Procedure Code. The Appellant's co-accused persons who were the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> accused were accordingly acquitted but the appellant was put on his defence and subsequently convicted.

In his own defence, he stated that on 10<sup>th</sup> April, 2013, he was on duty in Nairobi town where he worked as a matatu tout for matutus plying Route No. 46. Between 11. a.m and. 12.00 mid day he heard a commotion along Ronald Ngala street and went to see what was happening and found a lady being held by a policeman. The policeman was holding a handbag. For unknown reasons he was arrested by another police officer who was standing by. Another lady was also arrested but released on arrival at the police station. He denied that he committed the offence. He stated that he was not properly identified as no identification was carried out. He called one witness, **Magdalene Adoyo Odera** his mother who testified as **DW2**. Her testimony was that she was with the appellant in the morning of 10<sup>th</sup> April, 2013. After breakfast the appellant left for work but never returned home.

### **Determination**

I have deduced that there are only two issues for determination, namely whether the charge sheet was defective and whether the offence was proved beyond a reasonable doubt. On the 1<sup>st</sup> issue for the determination, the appellant submitted that the name of the complainant differed in separate instances. That is to say that in her evidence she testified that she was Lucy Wangechi Mwanza whereas the charge sheet indicated her name as Lucy Wangechi Mariga. According to the appellant the discrepancy in the

names vitiated the prosecution case. This was because it implied that the person who testified was not one and the same person who was robbed. He relied on the case of **Nelson Kitesse Maweu & 2 others v. Republic (2008)eKLR** to buttress the submission.

I have looked at the typed record of proceedings. Indeed, PW1 initially testified as Lucy Wangechi Mwanza. The name of the complainant in the charge sheet is Lucy Wangechi Mariga. She was recalled for cross examination on 24<sup>th</sup> May, 2013 when she gave her name as Lucy Wangechi Mariga Munga. A closer look at the hard written proceedings shows that her name was throughout written as Lucy Wangechi Mariga. There was therefore no error and no doubt as to the name of the complainant. Any error was only reflected in the typed proceedings which was clearly a human typographical error, most likely due to inability to read the hand writing.

The case law cited under this submission can also be clearly distinguished from the instant case. In that case, the charge sheet referred to a totally different complainant a fact that was conceded to by the state. In the present case though, the problem arises from a typographical error.

The other issue raised on the charge sheet is that the particulars of the charge disclosed that a Somali sword was used in the commission of the offence which fact was not alluded to by any of the prosecution witnesses. According to the appellant, this implied that the evidence adduced did not support the charge, a matter that should have earned the appellant an automatic acquittal. Section 134 of the Criminal Procedure Code spells out the information that should constitute the particulars of a charge. It provides as follows:

***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.***

A look at the evidence of all prosecution witnesses does attest that none alluded that a Somali sword was used in the robbery contrary to the spelt out particulars of the offence. The test then is whether this discrepancy rendered the charge sheet a nullity. This can be simply explained by analyzing the evidence and determining whether the same established the particulars of the offence. Under Section 296 (2) of the Penal Code the offence of robbery with violence is defined as follows:

***“if the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”***

The elements of the offence under the definition can be dissected as follows:

That if the offender;

*(a) is armed with any dangerous or offensive weapon or instrument, or*

*(b) is in company with one or more other person or persons, or*

*(c) at or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person.*

The use of the word *or* implies that a proof of any of the three elements is sufficient to establish the offence of robbery with violence. Therefore, even if the appellant was not armed with a Somali sword but the prosecution establishes any of the other two elements namely: *that he was in the company with one or more other person or persons or if at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to the complaint* is sufficient to warrant a conviction. Of course, other factors play in such as identification. For purposes of this submission, I find

and hold that the mere fact that it was alleged in the charge sheet that the appellant used a Somali sword which was not supported by the witnesses' evidence did not render the charge sheet defective.

The appellant further submitted that the charge was defective because it was drafted under Section 295 and 296(2) of the Penal Code. This court has severally delivered itself on this matter. There is no doubt that the two provisions of law provide for two distinct offences which would render the charge sheet bad for duplicity. However, in determining whether the trial should be rendered a nullity on account of the duplicity, the test is always whether that duplicity prejudices the accused. See the case of **Paul Katana Njuguna v. Republic[2016] eKLR** in which the Court of Appeal held that:

***“As we have already noted the rule against duplicity is to enable an accused know the case to meet. We accept as the correct position in law that uncertainty in the mind of the accused is the vice to 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.”***

In the present case, the statement of the offence is clearly the offence of robbery with violence. This is the offence that the appellant pleaded to and the evidence was adduced to establish. It is also the offence the appellant defended himself against. Respectively, no prejudice was occasioned to him merely by drafting the charge sheet under both Sections 295 and 296 (2) of the Criminal Procedure Code.

The appellant also urged the court to find that the charge sheet was defective because it was not endorsed by the office of the Director of Public Prosecutions. In this regard, court must have regard to the preamble of Section 137 of the Criminal Procedure Code. The same provides that a charge or information shall not be open to objection in respect of its form or content if it is framed in accordance with the Code itself. I have already spelt out that a charge must contain the particulars spelt out under Section 134 of the Code. The instant charge, respectively, conformed to Section 134. This submission therefore lacks merit.

The next issue for determination was whether the offence was proved beyond a reasonable doubt. This is a case in which the appellant was caught red handed and on the spot at the scene of crime. He had just strangled PW1, snatched her handbag which contained the money and the mobile phone and as he attempted to flee the scene was caught by PW3 and PW4 both police officers from Kamukunji Police Station. Both gave a vivid account of how they noticed the commotion as PW1 was being robbed and on approaching the scene saw the appellant hitting and strangling PW1 and thereafter fleeing with her handbag. Fortunately, he was caught on the spot before he could escape with it. The two witnesses entirely corroborated the evidence of PW1 with respect to how the offence was committed. No doubt therefore the evidence against the appellant was direct and the issue of mistaken identity could arise.

The question now is whether the elements of the offence of robbery with violence were established. From the testimony of PW1, 3 and 4, the appellant was accompanied by a large group of young boys. They accosted PW1 although it is the appellant who snatched the handbag from her. PW1 recalled that the appellant strangled her before he snatched the handbag from her. As a result and in the struggle she sustained injuries to the cheek, tongue and neck which were confirmed by PW7. PW3 also recalled the men who attacked PW1 raining blows on her before robbing her. It is from the blows and strangle that she sustained the bruises on the left cheek, left side the tongue and pain in the neck. Section 296 (2) of the Penal Code provides that if an accused wounds, beats, strikes or uses any other personal violence on a complainant is an element sufficient to establish the offence of robbery with violence. I need not over emphasize that the evidence in this case duly established the offence of robbery with violence. Furthermore, the appellant had stolen PW1's money and phone before he was abruptly arrested.

The appellant's defence on the other side as rightly submitted by the Responded did little to aid him. It did not dislodge the fact that he was at the scene and was caught red handed committing the offence. An identification parade would have been of no use in the circumstances. His witness, the mother could not also attest to events at the scene of the offence. She only testified having last seen him when they took breakfast together. I dismiss the defence as lacking in merit.

In the end, I find that the prosecution proved their case beyond a reasonable doubt. I dismiss the appeal and uphold both the conviction and sentence. It is so ordered.

**DATED and DELIVERED 18<sup>TH</sup> DAY OF October, 2017.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

***In the presence of:***

- 1. In person the Appellant.*
- 2. M/s Sigei for the Respondent.*