REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 22 OF 2015

HASSAN ABDALLAH MOHAMMED.......APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Appeal against the conviction and sentence by Hon. E.K. Too (Ag. SRM) delivered on 10th December, 2014 in Mavoko Principal Magistrates' Court Criminal Case No. 55 of 2014)

JUDGEMENT

1. The appellant, Hassan Abdallah Mohammed was convicted and sentenced for the offence of robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code. The Particulars of the charge were that: the appellant, on 11th January, 2014 at Nonkopir Village in Kitengela township within Kajiado County, jointly with others not before court while armed with dangerous weapons namely pangas and rungus, robbed Paul Wambua Mwanzia of cash KShs. 3,000/- and one mobile phone make Samsung valued at KShs. 3,000/- and a pair of shoes valued at KShs. 15,000/- all valued at KShs. 21,000/- and at the time of such robbery with violence wounded the said Paul Wambua Mwanzia.

2. Aggrieved by the trial court's decision, the appellant lodged this appeal on the following grounds:

> ***i. That the learned trial magistrate erred in points of law and fact by failing to evaluate the evidence as a whole and observe that the prosecution never proved the case beyond reasonable doubt.***
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> ***ii. That the learned trial magistrate erred in points of law and fact by relying on evidence of identification, without observing that the conditions prevailing at the scene of crime were absolutely difficult, for a witness to make any significant identification.***
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> ***iii. That the learned trial magistrate erred in points of law and fact in basing the reason for conviction on inconsistent and incredible evidence of possession of a stolen phone without observing that the recovery was not proven beyond reasonable doubt as required in law.***
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> ***iv. That the learned trial magistrate erred in points of law and fact in allowing the appellant to make written submissions contrary to section 213 and 310 of the CPC and in contravention to the appellant's right to a fair trial and equal opportunity to address the court.***
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> ***v. That the learned trial magistrate erred in points of law and fact by failing to consider the appellant's plausible defence without considering the provisions of law in section 169 (1) of the CPC.***

3. In determining this appeal, I am as a first appellate court minded of the duty to re-evaluate and analyze the evidence a fresh with a view of arriving at my own independent conclusion. This is done bearing in mind the fact that this court did not have the benefit of seeing the witnesses and their demeanor in particular.

4. I shall deal with the second and third ground together.It was the appellant's contention that he was not positively identified since the prevailing conditions at the scene were unfavorable for positive identification. The respondent on the other hand argued that PW 1 stated that he caught a glimpse of the appellant who was illuminated by moonlight. That the next day, PW2 heard noises outside his house and on checking found 3 people two of which ran away leaving the appellant who he saw picking up a phone. That PW3 confirmed that he saw the appellant when he was called to the scene by PW2.

5. Paul Wambua Mwanzia (PW1) recounted that there was bright moonlight on the material day. When he reached near his place while heading home at around 11.20 pm, he took a corner which was a bit dark. He was stopped by four people. One had a mavin and 2 others had jackets similar to police jackets. The other man was at a stall. Two of the men interrogated him on where he was coming from and the one in a mavin cut him on the face using a panga. The other pulled his leg and he fell and the others searched his pockets. He was later after making a report to the police called to identify the suspect who he said he identified as the appellant. He stated that he identified him using his trouser and t-shirt which he had on the material day. Matini Lekoyasu (PW2) stated that he on the material day at around 12.30 pm heard noisesand scream. On checking, he saw three men arguing over some money. Two of them took off while one, the appellant, remained to pick a phone which he put in his pocket. He stated that one part of the phone was black and the other white. He stated that the appellant hit a woman and members of the public beat him up. The village elder who was in company of the police took him away. That PW1 checked the appellant's house and identified shoes which were bloody.

6. Joseph Mweu (PW3) who was the village elder stated that he was called by PW2 and told of the incidence. He found the appellant and some people sharing money. He talked to the people who told him to stop making noise. Members of the public surrounded the person and the two people took off leaving the appellant behind. He then hit a lady on the hand and a baby. He had a phone which was white in colour. He further stated that PW1 recovered his shoes from the appellant's house.

7. Visual identification in criminal cases can cause miscarriage of justice and should be carefully tested. The court in **Wamunga v. Republic (1989) KLR 424** at 426 had this to say:

> ***"Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."***

8. In **Nzaro v. Republic (1991) KAR 212,** the Court of Appeal held that evidence of identification by recognition at night must be absolutely watertight to justify conviction.

9. This court is therefore duty bound to interrogate whether or not the circumstances in the case at hand were favourable for positive identification.PW1 stated that there was moonlight at the material time. He gave a description of how the robbers were dressed, particularly that one had a mavin while two had jackets that resembled those worn by police officers. While PW1 stated that he identified the appellant by the trouser and t- shirt he had on the material day, it is worth noting that such was how he claimed to have identified the appellant during the identification parade. It is not clear why he did not testify about the trouser and t-shirt in the first instance. I further note that although PW 1 stated that there was moonlight on the material day, it emerged from his evidence that he was accosted after taking a turn to a dark place. In my view, the circumstances therein were not favourable for positive identification and the evidence on identification is not watertight bearing in mind the variation on the mode of identification.

10. The appellant contended that the trial magistrate based the conviction on inconsistent evidence. That PW5 contradicted himself when he stated that he conducted the identification parade on 15th January,

2014 at 15.00 to 16.00 hours and on the other hand stated that he signed the identification parade form on 13th January, 2014. That the evidence of PW5 and PW6 contradict since PW5 stated that PW6 was not present was the parade was being conducted while PW6 stated that they conducted the identification parade and saw the appellant being positively identified. It was further argued that the identification parade was not conducted according to the laid down regulations.

11. On the validity or otherwise of an identification parade, I rehearsh the pronouncement in **John Mwangi Kamau v. Republic (2014) e KLR** where the Court of Appeal held as follows:

> ***"15. Identification parades are meant to test the correctness of a witness's identification of a suspect. See this Court's decision in John Kamau Wamatu –vs- Republic – Criminal Appeal No. 68& 69 of 2008. In this case Eliud, George and Joseph testified that they had indicated in their initial reports that they had gotten impressions of the assailants and they could identify them. However, we cannot help but note that DW1, CPL John Makumi (CPL John), in producing the Occurrence Book testified that the incident was recorded as OB. No. 45 of 24/6/2003; the assailants' were never described in the said report. We also note that the aforementioned witnesses did admit that they never gave the physical description of their assailants to the police. In Gabriel Kamau Njoroge –vs- Republic (1982-1988) 1KAR 1134, this Court observed:-***
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>> ***"A dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted parade. A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade."***
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> ***16. Ideally, a witness ought to give the description of his/her assailant for purposes of organizing an identification parade. In this instant case, the appellant contends that the failure to do so rendered the identification parade worthless. So, what is the consequence of the said failure" In Nathan Kamau Mugwe –vs- Republic- Criminal Appeal No. 63 of 2008 this Court faced with a similar situation expressed itself as follows:-***
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>> ***"<u>As to the compliant in ground six that the witnesses had not given to the police the description of the appellant before the parade, we do not think that failure to describe the person to be identified necessarily renders an otherwise valid parade worthless. Even in GABRIEL's case, supra, the Court did not go so far as to say that a witness must be asked to give a description of the person to be put on the parade for identification</u>. All the Court said was that the witness 'SHOULD' be asked. That is obviously a sensible approach. <u>It is not impossible to have a situation in which a witness can tell the police that though he cannot give a description of the person he had seen during the commission of an offence, yet if he (witness) saw that person again, he would be able to identify him</u>. <u>It would be wrong to deprive such a witness of an opportunity of a properly conducted parade to see if he can identify the person</u>. Again, the police themselves may, through their own investigations, come to know that a particular suspect may have been involved in a particular crime though the witness or witnesses to that crime have not given a description of the suspect. Once again it would be wrong to deny the police the opportunity to put such a suspect on a parade to see if the witnesses can identify him.***
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>> ***In either of the two cases, the parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect. The relevant consideration would be the weight to put on the evidence regarding the identification parade. We reject the contention that because James had not given to the police a description of the appellant, his evidence with regard to the identification parade ought to have been rejected."***
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> ***17. Based on the foregoing, we are of the considered view that the failure to give the description did not invalidate the identification parade. We find the issue that falls for our consideration is the weight to be attached to the said identification evidence. On the issue of whether the***

identification parade was properly conducted we can do no better than to reproduce this Court's observations in David MwitaWanja& 2 others –vs- Republic- Criminal Appeal No. 117 of 2005:-

"The purpose for, and the manner in which, identification parades ought to be conducted have been the subject matter of many decisions of this court over the years and it is worrying that officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor of this Court emphasized that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instructions contained in Police Force Standing Orders. See R v Mwango s/o Manaa (1936) 3 EACA 29. There are a myriad other decisions on various aspects of identification parades since then and we need only cite for emphasis Njihia v Republic [1986] KLR 422 where the court stated at page 424: -

"It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime."

Indeed, Police Form 156 which is designed pursuant to Force Standing Orders issued by the Commissioner of Police under section 5 of the Police Act Cap 5 Laws of Kenya and which is invariably used in the conduct of identification parades expressly provides for 16 or so requirements which ought to be observed. As far as is relevant to this case, Standing Order 6(iv) (d) and (n) state as follows:

"6. (iv) Whenever it is necessary that a witness be asked to identify an accused/suspected person, the following procedure must be followed in detail: -

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(d) The accused/suspected person will be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself. Should the accused/suspected person be suffering from a disfigurement, steps should be taken to ensure that it is not especially apparent;

…………………………………………………

(n) The parade must be conducted with scrupulous fairness, otherwise the value of the identification as evidence will be lessened or nullified;"

12. PW5 who conducted the identification parade gave evidence of how the parade was conducted. He stated that he called the accused and put him in another office. He then looked for eight people whose complexion and height were similar to those of the appellant. He informed the appellant of the reason for the parade and he accepted to have the same conducted. PW1 was then called to identify his assailant and he identified the appellant by touching the appellant. The appellant did not object to the manner in which the parade was conducted. In view of the above disposition on how an identification parade ought to be conducted, I find that the parade was properly conducted and the contradictions in PW5 and PW6's evidence do not touch on the matters in question. The said contradictions in PW5 and PW6's evidence does not cast doubt on whether or not the appellant was involved in the robbery.

13. It was contended that the appellant was convicted on a duplex charge which was said to be fatal. The

appellant relied on **Joseph Njuguna and others v. R (2013) e KLR** among other cases where the courts found a duplex charge is defective.

14. Section 295 of thePenal Codeprovides as follows:

> ***"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 property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery"***

15. The side notes therein refer to it as definition of robbery but it can be seen to go beyond definition and outlines the elements of the felony. Section 296 on the other hand creates the offence of aggravated robbery and provides a stiffer penalty of capital punishment. It states:

> ***"(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.***
>
> ***(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other persons, or if, at or immediately before 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".***

Section 296 (1)provides the punishment for the offence of robbery whileSection 296 (2)provides for a situation where the robbery as defined in ***Section 295*** is aggravated and sets out what makes it aggravated while spelling out a more severe sentence for the aggravated circumstances.

16. The Court of Appeal in **Joseph Njuguna Mwaura & 2 Others v. Republic[2013] e KLR** had this to say on the issue of duplicity of a charge:

> ***"We reiterate what has been stated by this Court (sic) 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 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 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".***

17. Despite so considering, the court dismissed the appeal. This is in view of the consideration of the effect of the said duplicity. In the case of **Cherere s/o Gakuli v. R.[1955] 622 EACA,** it was held:

> ***“The test still remains as to whether or not a failure of justice has occurred. In ouropinion, the result of the application of this test must depend to some extent upon the circumstances of the case and the nature of the duplicity".***

18. And **Mwaniki v. Republic[2001], EA 158 (CAK)**, where the Court of Appeal held as follows:

> “***Where two or more offences were charged in thealternative in one count, the charge was bad for duplicity and a substantial defect was created that must be assumed to be embarrassing or prejudicial to an accused as he would not know what he was charged for and if convicted, of what he had been convicted***.”

19. What falls for this court’s determination in this issue therefore is whether or not the duplicity occasioned to the appellant confusion as to the exact charge he was faced with. In my view and as correctly submitted by the respondent, the duplicity of the charge occasioned the appellant no prejudice

since he understood what he was charged with and in fact went ahead and cross-examined witnesses on that aspect. He further never raised the issue of duplicity during trial. He cannot therefore be heard to say that he was prejudiced by the duplicity. Therefore, duplicity in the circumstances of this case was not fatal. Every trial court is enjoined to have regard to the provisions of Section 137 of the Criminal Procedure Code so as to ensure that charges levelled against the accused persons are properly laid down and ingredients thereof understood by the accused person. Section 296(2) of the Penal Code creates the offence of robbery with violence as well as providing the penalty therefor whereas Section 295 merely deals with the definition of the term “robbery”. The key issue of concern herein is whether the duplicity of the charge had the effect of prejudicing the Appellant. It is noted that the Appellant herein pleaded to the charges and proceeded with the hearing all through upto the point where he tendered his defence. It is believed therefore that he understood the essential ingredients of the charge. He also vigorously cross–examined the witnesses at length and which left no doubt that he had clearly understood that he faced a charge of robbery with violence as contemplated under Section 296 (2) of the Penal Code. In the **Mwaura case (supra)** the Court of Appeal despite accepting that the charges were duplex went ahead to dismiss the appeal on the ground that the Appellant had not suffered any prejudice due to the duplicity of the charges. Hence I find the duplicity of the charges as contended by the Appellant did not prejudice him in any way since he proceeded with the case with the knowledge and understanding that what he faced was a charge of robbery with violence contrary to Section 296(2) of the Penal Code. The presence of Section 295 in the charge sheet did not add any confusion to the charge of robbery with violence since the same only dealt with the definition of robbery while the degree of violence as captured in the particulars of the charge supported the charge of robbery with violence under Section 296(2) of the Penal Code. Again the error in the charge sheet is one which is cured under Section 382 of the Criminal Procedure Code since the Appellant suffered no prejudice in the trial as there was no confusion whatsoever as to the kind of offence he faced. The Appellant at the outset did not raise any objection with the charge sheet and duly participated in the trial from the start to finish. I find there was no miscarriage of justice occasioned to the Appellant.

20. From the prosecution evidence, the appellant was found in possession of PW1’s phone and shoes, a fact that was not rebutted by the appellant. He further failed to offer an explanation of how he got possession of the said items. In view of the above, I draw an inference that he participated in the robbery. See: **Peter Kariuki Kibue v. Republic, (2001) e KLR**where the court dealt with a similar matter where the appellant was found in possession of recently stolen items and he failed to give a satisfactory explanation as to how he came by them. Thecourt stated that:

> ***“The appellant was in law duty bound to offer a reasonable explanation as to how he came to be in possession of the items, otherwise than as the thief or guilty receiver. This is a rebuttable presumption of law based on the provisions of Section 119 of the Evidence Act”***

And **Malingi v. Republic, [1989] KLR 225**, where the Court of Appeal had this to say about the doctrine of recent possession:

> ***“By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts. Firstly, that the item he has in his possession has been stolen; it has been stolen a short period prior to their possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and the circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the items. The doctrine being a rebuttable presumption of facts is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole or was a guilty receiver.”***

The evidence of Martin Lekoyasu (PW.2) and Joseph Mweu (PW.3) was that the Appellant was found at the scene of the robbery and the two (2) witnesses saw him pick up the stolen mobile phone and attempted to flee but was overpowered by members of public who beat him up. The Appellant led the members of public to his house where the Complainant’s bloodstained shoes were recovered and which

were positively identified by the Complainant. The Appellant failed to offer any explanation of how he obtained the stolen items. Besides the evidence of the two (2) witnesses further corroborated the complainant's claim of having been violently robbed a few minutes back. The trial court's finding that the Appellant was one of the robbers is quite sound as that the Appellant was arrested immediately within the scene of crime and that two of the stolen items were promptly recovered from him. Hence the doctrine of recent possession was correctly applied by the trial court since the recovery of the stolen items took place a few minutes after the robbery incident. The Appellant was confirmed to have been in company of other suspects who escaped.

21. The doctor having confirmed PW1's injuries, and in view of the above disposition, I find that the ingredients of robbery with violence were proved beyond reasonable doubt by the Respondent.

22. In the result the Appeal herein lacks merit. The same is ordered dismissed. The conviction and sentence by the trial court is upheld.

It is so ordered.

Dated, signed and delivered at Machakos this 24th day of November, 2017.

D.K. KEMEI

JUDGE

In the presence of:-

Machogu – for Respondent

Hassan Abdallah Mohammed – Appellant

Kituva – Court clerk