REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 196 OF 2013

SOMO ABDULAHI ALIO……..…….APPELLANT

VERSUS

REPUBLIC …….RESPONDENT

(Being an appeal from the original conviction and sentence from the judgment in the Chief Magistrate's Court at Kibera Criminal Case No. 1949 of 2012 delivered by Hon. Wachira, P.M on 10th October 2013).

JUDGMENT

The Appellant was charged with two counts of robbery with violence contrary to Section 295 as read with section 296(2) of the Penal Code. The particulars of the first count were that on 10th April, 2012 at Wilson City Cotton Slums in Langata within Nairobi county, jointly with others not before the court while armed with dangerous weapons namely metal bars robbed Kelvin Mwenda Kimathi of Kshs. 200/=, mobile phone make Nokia 1168 and a bunch of keys all totaling to Kshs.2,500/= (Two Thousand Five Hundred Shillings) and at the time of such robbery assaulted the said Kelvin Mwenda Kimathi.

The particulars of the second count were that on 10th April 2012 at Wilson City Cotton Slums, Langata, within Nairobi County, jointly with others not before the court, while armed with dangerous weapons namely metal bars robbed Lilian Wangiri Mwaniki of a mobile phone, national identity card and voters card all valued at Kshs. 5,000/(Five Thousand Shillings) and at the time of such robbery assaulted the said Lilian Wangari Mwaniki.

He was convicted in both counts and sentenced to death. The death sentence in the second count was held in abeyance. Being dissatisfied with the conviction the Appellant exercised his right to appeal to this court. His grounds of appeal, based on his Amended Grounds of Appeal are that:

1. The conviction was illegal as it was based on a duplex charge.

2. The trial magistrate erred in relying on identification evidence of PW1 and PW2 that was not sufficient.

3. The prosecution's case was not proved beyond reasonable doubt.

4. The provisions of Section 169(1) of the Criminal Procedure Code were not complied with.

The Appellant filed written submissions whilst learned State Counsel Miss Atina made oral submissions.

The Appellant's submission in a nut shell was that he was not properly identified given the time of the day and the fact that PW2 confirmed that it was around 7.00 p.m. He contended that an identification parade was necessary to ensure that he was properly identified. He asserted that his identification was a case of mistaken identity. The fact that the chief to whom the matter was initially reported was not brought to adduce evidence was prejudicial to him as he did not get to ascertain whether the O.B Report and the initial complaint varied.

Learned State Counsel, Ms. Atina on the other hand submitted that the charge was not duplex as framed and even if it was, it was not prejudicial in nature to the Appellant as to constitute a miscarriage of justice. She submitted that the identification of the Appellant was above board. Miss Atina also disputed that Section 169 of the Criminal Procedure Code was not complied with. Finally, she submitted that the case had been proved beyond reasonable doubt and urged the court to dismiss the appeal.

This being a first appeal, the court is under an obligation to weigh the evidence as a whole and reach its own independent conclusion. This was set out in the case of ***Okeno Vs Republic*** **(1972) EA 32 where the court stated thus:**

> ***"An Appellant on first appeal is entitled to expect the evidence as a whole to be submitted to fresh and exhaustive examination (Dinkerrai Ramkrishan Pandya Vs Republic (1957) EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (Shanlal M Ruwala Versus Republic (1957) EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions;. 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 has had the advantage of hearing and seeing the witnesses''.***

On whether Section 169 of the Criminal Procedure Code was not complied with, I I make reference to the same which provides as follows:

> ***"169. (1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.***
>
> ***(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.***
>
> ***(3) In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty."***

I have looked at the judgment of the trial court and the same was in tandem with the said provision. The presiding officer wrote it in the language of the court. It was properly dated and signed on 10th October 2013. The points for determination could easily be deciphered from the body of the judgment. The judgment also clearly pointed out that the Appellant was found guilty of two counts of robbery with violence and convicted under Section 215 of the Criminal Procedure Code. Therefore, this court finds that this ground of appeal lacks merits.

The Appellant further contended that the charge that formed the basis of his conviction was duplex having been drawn both under Section 295 and 296(2) of the Penal Code. I entirely agree with the Appellant as was observed by the Court of Appeal in the case of **Simon Materu Munialu vs Republic[2007] eKLR(Criminal Appeal 302 of 2005) that:**

"The ingredients that the Appellant and for that matter any suspect before the court on a charge of robbery with … is section 296(2) of the Penal Code. It is these ingredients which need to be explained to such accused person so as to enable him know the offence he is facing and prepare his case. These ingredients are not in section 295 which creates the offence of robbery. In short, section 296(2) is not a punishment section, but it also incorporates the ingredients for that offence which attracks that punishment. It would be wrong to charge an accused person facing such offence with robbery under section 295 as read with section 296(2) of the Penal Code as that would not contain the ingredients that are in section 296(2) of the Penal Code and might create confusion.

In our considered view section 137 of the Criminal Procedure Code could be complied with if an Accused is charged, as the Appellant was under section 296(2) because that section requires one to be charged under the section creating the offence and in the case of robbery with violence under section 296(2), that section creates the offence by giving it the ingredients required before one is charged under it and it also spells out the punishment. We reject that ground of appeal.

We find that, in line with the above reasoning, that it was erroneous to draft the charge under section 295 as read with section 296(2)."

The Court of Appeal also in the case of **Joseph Njuguna Mwaura & 2 others vs Republic[2013] eKLR(Crim. App. No. 5 of 2008)** delivered itself thus:

"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."

A charge is said to be duplex if it contains more than one offence in a single charge with the result being that the right of an accused person is compromised. Section 134 of the Criminal Procedure Code requires that a charge is 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.***' Despite the anomaly in citing both Sections 295 and 295, we observe that the statement of the offence and the particulars relate to the offence of robbery with violence only. Thus, the Appellant cannot be said to have been prejudiced in that all along he was charged with the offence of robbery with violence, and presented with particulars in respect of the specific offence. No prejudice was occasioned and this error is, in my view, curable under **Section 382** of the Criminal Procedure Code.

Having made the above observation, I now grapple with the question of whether the error prejudiced the Appellant. That is to say, whether the error occasioned by the duplicity was such as to cause a **'failure of justice'.** This court is of the view that the error was sufficiently mitigated by the fact that the particulars of the offence were set out in such clear and unambiguous manner that ensured that the Appellant understood that the charge he was facing was indeed of robbery with violence. That is the charge he pleaded to. Furthermore, the error is technical and is curable under Section 382 of the Criminal Procedure Code. As such, no prejudice was occasioned to him.

The Appellant also contended that he was not properly identified. In support of his submission, he cited the cases of, ***Rex vs Shabani bin Donaldi(Criminal Appeal No. 76 of 1940), Anjononi & others vs Republic[1980] KLR 59 and Cleophas Otieno Wamunga vs Republic(criminal appeal no. 20 of 1989).*** He submitted that the trial court upheld his identification by recognition whereas PW1 did not in his initial report state that it was the Appellant who robbed him. He also stated that the fact that both PW1 and PW2 admitted to the time of the robbery being ***'a bit dark'*** made his identification more dubious. He averred that the complainants were mistaken and the reliance by the trial court on his recognition by the

complainants was faulty. He contended that an identification parade was necessary given the aforementioned circumstances.

This court must first consider how the Appellant was identified. According to PW1 it was around 7.00 p.m and he was walking down a busy road in Kenya Airport Authority Quarters near Wilson Airport together with PW2 when five people appeared and held PW2 by the neck. He initially thought it was a joke but suddenly he too was held by the neck and forced down, injuring his forehead, whereupon his properties were stolen. He testified that he knew his assailants **'as they are people from that area'**. He further stated that the Appellant was actually the one who took his phone and he had been seeing him along the street with other street boys.

PW 2, the second complainant testified that the assailants got hold of her and PW1 by the neck and subsequently stole her purse and mobile phone. She was however lucky enough to wriggle free whereupon they pursued her. She stated, '**it was Somo**(Appellant)**, Njoroge, Opiyo, Babouch and another.'** She further stated that her attackers, particularly **Opiyo,** were pelting her with stones since they knew she had recognized them. They chased her all the way to the kiosks where, due to an abundance of light she **'saw them well'**.

From the testimonies of the two key witnesses who were the complainants, it can easily be ruled that the identification of the Appellant was by recognition as both witnesses are said to have known him prior to the incident. But this mode of identification can only be full proof if at the time the witnesses reported the incident to the police, they indicated they knew their attackers both by name and their physical appearances. During the cross examination of PW1 by the Appellant, he stated that he reported to the police that he knew his attackers because the attack happened between 6.40 and 7.00 pm whilst it was still daylight. The trial court had called for the investigation diary which on referring to it had been written as follows:

> ***"Attacked by two young men and inflicted injuries"***

It follows then that PW1 did not describe his attackers to the police. It was thus erroneous for the police to merely arrest the Appellant based on the fact that PW1 had said that he knew the Appellant. The trial court ought to have taken note of the fact that PW1 was attacked at a place that was his usual path and had become acquainted with the Appellant. I think, in those circumstances, there existed the possibility that he could mention the Appellant as he was a known street boy along a path he frequently used. To erase any doubt as to the identification of the Appellant, having regard to the timing of the attack, being between 6.40 and 7.00 pm, when it was doubtful whether there was sufficient light to aid in identification, an identification parade was not an option.

The same scenario obtained in respect of the evidence of PW2. According to her, the attack took place at about 7.00 pm when it was a little dark. She was categorical in cross-examination that she did not describe the Appellant when she first made a report to the police. Respectively, the only evidence that would have incriminated the Appellant was through an identification parade. The same having not been done rendered the prosecution's case a fatal blow. I accordingly hold and find that the Appellant was not properly identified as one of the attackers against both complainants.

I have no doubt in my mind that the prosecution proved all the ingredients of robbery with violence. However, it did not prove that the offence was committed by the Appellant for want of proper identification. In the result, this appeal must succeed, in any event. I quash the conviction and set aside the death penalty. I order that the Appellant be and is hereby set free unless otherwise lawfully held.

DATED and **DELIVERED** this **31st** day of **MARCH, 2016**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Appellant present in person

2. Miss Aluda for the Respondent.