



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL APPEALS NO 175 OF 2014
PETER MBUVI WANZA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(An appeal against the original conviction and sentence of D.G. Karani, PM in Criminal Case No. 368 of 2013 delivered on 26th June 2014 in the Principal Magistrate's Court at Kithimani)

JUDGMENT

The Appellant was charged with the offence of robbery with violence contrary to Section 295 as read together with section 296(2) of the Penal Code. The particulars of the offence were that on the 18th day of June 2013 at Vota village, Mamba sub-location in Yatta District within Machakos County, jointly with others and being armed with dangerous weapon namely a knife, robbed Raphael Mwololo Nzinga of a mobile phone make worth Kshs. 3,300/= and immediately before the time of such robbery used actual violence against the said Raphael Mwololo Nzinga.

The Appellant was arraigned in court on 20th June 2013 where he pleaded not guilty to the charge. He was tried, convicted of the offence and sentenced to death.

The Appellant is aggrieved by the judgement of the trial magistrate and has preferred this appeal by way of a Petition of Appeal filed in court on 30th July 2014. The Appellant also availed to the Court supplementary grounds of appeal dated 19th November 2015 and written submissions on the same during the hearing of the appeal.

The grounds of appeal relied on by the Appellant are that the trial magistrate relied on a duplex charge in convicting him; the trial magistrate erred by failing to remind the complainant that he was on oath when he was recalled to testify; and that the trial contravened the provisions of Article 50(2) of the Constitution.

The Appellant argued in his submissions that it was wrong to frame a charge of robbery with violence under two sections of the PENAL CODE as was in his case. He stated that the charge of robbery with violence ought to be charged under Section 296(2) of the Penal Code. He cited the case in **Joseph Njuguna Mwaura & Others V Republic, (2013) eKLR.**

Further, that this irregularity cannot be cured by section 382 of the Criminal Procedure Code as there was a miscarriage of justice, and that amending the charge sheet at the stage of appeal or during a retrial would prejudice him as he would not be compensated for the time wasted and torture of mind. In that regard he submitted that his right to fair trial under article 50(2) of the constitution had been violated as

he could not make a correct reply to a duplex charge.

Cliff Machogu, the learned Prosecution counsel filed submissions dated 4th February 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 framing a charge for the offence of robbery with violence under section 295 as read with 296 (2) may create a confusion, and reference was made to the Court of Appeal decision in **Joseph Njuguna Mwaura & Others V Republic (2013) eKLR**

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

I shall therefore at this stage give a brief summary of the evidence adduced before the trial court, which is as follows. The prosecution called six witnesses. PW1 was Raphael Mwololo Nzinga who testified that on 18.6.13 at 6pm, he was on his way home together with Musyoki Nzioka when the Appellant emerged from the maize plantation and ordered him to lie down. He stated that the Appellant was wielding a knife and threatened to kill him, and that a struggle ensued and he was cut on the right thumb.

PW1 further testified that the Appellant was with another person who was attacking Musyoki. He said that he lost his phone during the robbery. PW1 stated that he was able to hold the Appellant until Kioko and Pius came to the scene. They later escorted him to Kithimani police station. He identified the knife used, P3 form and blood soaked shirt produced as evidence in court.

PW 2 was James Musyoka Nzioki who stated that on 18.6.13 at 6 pm they were on their way home with PW1 when they encountered the Appellant. He stated that the Appellant produced a knife from his waistband and attempted to stab PW1 who held on to the knife. He stated that all this time he was struggling with the Appellant and some two people then joined the Appellant. PW2 stated that he started screaming and that people came in response and the two other attackers ran away. They then escorted the Appellant to Kithimani police station.

PW3 was Pius Muthe Musyoki who testified that on the material day at 6 pm he was at home when he heard screams and went to check what was happening. He stated that he saw two people running, and on arrival at the scene he found PW1 and PW2 struggling with the Appellant on the ground. He said PW1 appealed for help as he was injured. He stated that PW1 had told him that the Appellant had attacked him and that PW1 had a cut thumb and was bleeding. PW3 testified that they recovered a knife from the scene which he identified in court, and that they then escorted the Appellant to the Kithimani police station.

PW4 was Benedict Mutuku who on his part stated that on the material day at 6 pm he also heard screams and on rushing to the scene found PW1 and PW2 struggling with the Appellant. He stated that he saw the Appellant throw a knife in the grass. He also said that the complainant had said that the Appellant had two accomplices. PW4 then called the chief Ndalani Location who advised that the Appellant be escorted to Kithimani Police station.

Abdallah Kong'ani was PW5 and he testified that he is attached to Yatta police station, and that on 18.6.13 at 8 pm members of the public brought the Appellant to the police station with allegations that he had robbed the complainant. PW5 testified that the complainant had a cut on his right thumb and he stated that he had been attacked by the Appellant and two others while he was on his way home. PW5 further stated said that the complainant had knife that he said the Appellant used in the attack, which PW5 produced as an exhibit in court. PW5 stated that he referred the complainant to Matuu District hospital for treatment and later issued him with a P3 form.

PW6 was Benjamin Maingi the clinical officer who treated the complainant at the said hospital. He stated that the medical examination revealed a deep cut on the right thumb and was seen about three hours after the attack. He stated that the degree of injury was harm. He produced the P3 form in evidence.

At the close of the prosecution's case, the trial court found that the Appellant had a case to answer and put

him on his defence. The Appellant gave sworn evidence and did not call any witnesses. It was the Appellant's evidence that on 18/6/2013 he was cultivating in his *shamba* (garden) when the complainant and one Nzioki apprehended him and took him to the complainant's house and then to Kithimani Ploce Station. He claimed that this was because he did not pay Kshs 7,000/= that the complainant had given the Appellant's brother. It was the Appellant's evidence that the knife produced in Court belonged to the complainant and was taken from his home together with the shirt that was produced as an exhibit.

I have considered the arguments made by the Appellant and the Prosecution. The grounds of appeal put and relied upon by the Appellant raise two main issues for determination. The first is whether the charge against the Appellant was defective; and the second is if the Appellant were properly charged, whether there was proper and sufficient evidence to convict the said Appellant for the offences of robbery with violence.

On the first issue the Appellant relied on the Court of Appeal decision in **Joseph Njuguna Mwaura and Others vs R, (2013) eKLR** to argue that he 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.

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 misdemeanours, 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.”

Coming back to the present appeal, I am 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 *section 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.*

I cannot in the circumstances proceed with an analysis of the evidence before the trial court, and/or to make a decision on the legality of the sentence meted out by the trial court for the foregoing reasons. It is also our position 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, and as he was unrepresented during the proceedings in the trial Court.

It is my considered opinion that this ground of appeal alone is sufficient to dispose of this appeal, as 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 Appellant submitted in this respect that a retrial would prejudice him because they would not be compensated for the time wasted and the torture of mind caused to him.

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.”

There was evidence brought during the trial of the Appellant being found at the scene of the alleged crime and the knife used was also recovered from the scene. However, no evidence was brought of the phone alleged to have been stolen during the incident. An important element of robbery with violence is that it must be proved beyond reasonable doubt that there was a robbery, and therefore that an item was stolen. A retrial is therefore inappropriate in the circumstances as it may serve the purpose of addressing the gaps in the prosecution case.

I therefore allow the Appellant's appeal and quash the convictions recorded against the Appellant for the offence of robbery with violence under section 296(2) as read with section 295 of the Penal Code, and set aside of the death sentence imposed on him.

I accordingly order that the Appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

DATED AT MACHAKOS THIS 17th DAY OF MARCH 2016.

P. NYAMWEYA

JUDGE