



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NO.114 OF 2014**

**PAUL SHIRESHI MUYAYANO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara Cr. Case No. 2073 of 2013 delivered by Hon.C. A. Ocharo on 5<sup>th</sup> September, 2014).*

**JUDGMENT**

**Background.**

Paul Shileshi Muyayana was charged with the offence of robbery with violence contrary to **Section 295 as read with Section 296(2) of the Penal Code**. The particulars of the offence were that on 7<sup>th</sup> day of May 2013 at Kayole in Embakasi District within Nairobi County, jointly with others not before court and being armed with a dangerous weapon namely a knife you robbed Kemson Murithi Mutembei of a mobile phone valued at Kshs. 6000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Kemson Murithi Mutembei.

The appellant was found guilty and convicted accordingly. He was sentenced to suffer death. He was dissatisfied with both the conviction and the sentence and preferred this appeal. In his amended grounds of appeal filed on 25<sup>th</sup> June, 2016, he was dissatisfied that the elements of the offence of robbery with violence were not proved, that **Section 200(3) of the Criminal Procedure Code** was not complied with, that crucial witness did not testify, that the evidence adduced was at variance with the charge, that the trial court relied on evidence of PW1 and 2 who were coached witnesses, that the trial court shifted the burden of proof upon him and that the case was not proved beyond a reasonable doubt.

**Submissions.**

The appeal was canvassed before me on 27<sup>th</sup> June, 2016. The appellant was in person and he relied on written submission filed on 27<sup>th</sup> June, 2016. The Respondent was represented by learned State Counsel Ms. Akuja who made oral submissions. In his written submissions, the appellant faulted the manner in which the learned trial magistrate upheld that he was identified as the robber. In particular, he pointed out that although PW1 who was the complainant testified that he identified him, the evidence of PW2 was hearsay evidence. In that case, he submitted that there was a contradiction in the evidence of the two witnesses. He also faulted the evidence of the two witnesses with regard to the manner of his arrest. He stated that according to PW1, he was arrested when he was walking near a bus stop while PW2 testified

that the police found the Appellant at her shop and arrested him.

On failure to call crucial witnesses, he pointed out to the failure of the investigating or arresting officer to testify who would have been crucial witnesses to confirm whether or not a robbery had taken place.

He also contended that the charge sheet was defective in that the evidence adduced did not support the same. He submitted that the value of the stolen mobile phone was shown in the charge sheet as Kshs. 6000/= while the purchase receipt adduced in court indicated that it was bought at Kshs. 2,500/=. This, he submitted, was fatal to the prosecution's case. He also faulted the fact that the charge sheet was drawn both under **Sections 295 and 296(2) of the Penal Code** which made it a duplex.

The appellant further submitted that the prosecution's case was fatal for non-compliance with **Section 200(3) of the Criminal Procedure Code**. He submitted that the trial was initially heard by Hon. E. Nyongesa who was succeeded by Hon. C. A. Ocharo. When the latter took over the conduct of the trial, he did not explain to the Appellant the implication of **Section 200(3) of the Criminal Procedure Code** which was that the Appellant had a choice of either requesting the matter to start afresh or to recall any of the witnesses who had testified. This then meant that the Appellant's right to a fair trial was contravened. He urged the court to allow the appeal and set him free.

Learned State Counsel Ms. Akuja opposed the appeal. She submitted that PW1 gave a candid account of what transpired on the fateful night of the robbery. It was about 9.00 pm and PW1 was in his house when he heard some people outside call out his name and asking his neighbours where he was. He opened his door and he identified the appellant as Paul who was accompanied by two other people. The appellant pushed him into the house, he brushed out a knife which looked like a panga and dared him not to shout as they intended to kill him. He then told him that they would postpone the killing if he gave them all the money he had. The robbers then ransacked his house and in the process the appellant took away his mobile phone. PW2 who was s girlfriend to PW1 reiterated what PW1 had told him had transpired on the material night. She was also present when the Appellant was arrested.

Ms. Akuja conceded that the investigating officer did not testify but was quick to add that the same did not render the prosecution's case fatal. She urged the court to take into account that the investigating officer was severally summoned to testify but did not honour the court summons which forced the prosecution to close their case prematurely. She submitted that this did not prejudice the Appellant or the entire trial as the evidence of PW1 was sufficient to found a conviction. She referred the court to two cases which held that the failure to call the investigating officer was not prejudicial to a trial. These are, **Horwar Shikanga alia Kadogo & Another vs Republic (2001)eKLR** and **Aden Dahir Nuno vs Republic (2015) eKLR**.

### **Evidence.**

This being first appellate court, I have to re-evaluate the evidence on record and come up with my own conclusion and inferences. **See Njoroge v Republic (1987) KLR, 19.**

Only two prosecution witnesses testified. PW1 who was the complainant was a wholesale supplier in Kayole. On 7<sup>th</sup> May, 2013 at about 9.30 pm he was alone in his house sleeping. His house was on the first floor of the building. He heard people calling out his name, Muriithi, twice and again the name 'Kem', twice. The people then asked a lady outside whether she knew his house. She directed them to his house. He then decided to open the door to find out what was happening. That is when he saw the appellant, one Paul at the door. The electric light in the house was on and was therefore able to identify him. He was accompanied by other people whom he only knew physically but not by name. The appellant warned him not to scream. He brandished a knife at him which had been hidden on his waist. The knife was long and bore the size of a panga. The appellant told him they would kill him but would postpone the death if he produced all the money that he had. He told them that he did not have money. That is when the Appellant took away his phone but told him that they would return on the following day. The mobile phone was valued at 2,500/= and he adduced a purchase receipt in court. Before the robbers left they ransacked the entire house but did not get any money. On the following morning, he informed both his

boss and his girlfriend, Salome who accompanied him to Matopeni Police Station to report. He took the police where the Appellant lived and was arrested. The police also recovered his mobile phone which he identified in court.

PW2, Salome Wambui was a girlfriend to PW1. Her testimony was that on 7<sup>th</sup> May, 2013 at about 8 am, she was at her place of work in Kayole where she operated a shop. PW1 visited her and informed her what had transpired on the previous night. She testified that one of the robbers was a person known to her. After the description, she realized that it was a cousin to her sister's husband. She was referring to the Appellant. Her evidence was that the appellant was arrested at her shop and she was able to identify him in court.

No other Prosecution witness testified but the record shows that the investigating officer had severally been informed about the case but was unavailable to attend court. He was also served with summons but nevertheless did not testify. After evaluating the evidence of the two witnesses, the trial court found that a prima facie case had been established to put the appellant to defence. The court also explained to the appellant his choice of giving defence and the manner in which he was required to tender it pursuant to the provisions of Section 211 of the Criminal Procedure Code. The appellant opted to remain silent. In her judgment, the learned trial magistrate found that the appellant had been properly identified as one of the robbers who attacked PW1 and robbed him of his mobile phone and accordingly convicted him.

### **Determination.**

It is now the onerous duty of this court to determine whether the case was proved beyond a reasonable doubt. It is however important to first address the legal issues raised by the appellant. First was the contention that **Section 200(3) of the Criminal Procedure Code** was not complied with. The same provides as follows:

***“Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.”***

The requirement under this provision is that when a succeeding magistrate takes over the conduct of a trial, he/she must explain to the accused person of his right to choose to demand that any of the witnesses who had testified be resummoned and reheard. Depending on the circumstances prevailing in the case, the magistrate may or may not accede to the demand of the accused. What is mandatory is that the magistrate must inform an accused person of that requirement. The proceedings in the instant case show that the evidence of PW1 and 2 was heard by Hon. Otieno, Ag. PM. Thereafter, the matter was severally mentioned before other magistrates until the 17<sup>th</sup> March, 2014 when Hon. C. A. Ochora PM took over the conduct of the trial. She set the hearing for 3<sup>rd</sup> April, 2014. The record clearly shows that on this date, she explained to the Appellant the requirement under **Section 200(3)** of the Criminal Procedure Code. It is recorded that the appellant indicated that he wished the case to proceed from where it had reached. In that regard, there was no contravention of the provisions as Hon. C. A. Ochora is the magistrate who concluded the trial.

The other issue raised was that the charge was defective as it was drawn both under **Section 295** as read with **Section 296(2) of the Penal Code**. I entirely agree with the Appellant in this respect because each of the provisions define and provide for a distinct offence. Section 295 defines the offence of robbery whereas **Section 296(2)** defines the offence of robbery with violence (aggravated robbery). The appellant having been charged with the offence of robbery with violence means that the charge ought to have been drawn from **Section 296(2) of CPC**. In the case of **Simon Materu Munialu v Republic Criminal Appeal No. 302 of 2005 (2007) eKLR**, it was held:

***“The ingredients that the appellants and for that matter any suspect before the Court on a charge of robbery with violence in which more than one person takes part or where dangerous or offensive weapons are used or where a victim is wounded or threatened with actual bodily***

***harm or occasioned actual bodily harm 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 only a punishment section but it also incorporates the ingredients for that offence which attracts 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 137 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.”***  
(Emphasis added).

I find that, in line with the above reasoning, that it was erroneous to draft the charges under Section 295 as read with Section 296(2). The question would be whether or not the error was fatal to the prosecution’s case. In the case of ***Joseph Njuguna Mwaura & 2 others v Republic Cr. Appeal No. 5 of 2008 (2013) eKLR***, the Court of Appeal stated that;

***“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.***’

From the fore going ,the test is also whether the charge having been drawn under the two provisions prejudiced the Appellant. From the outset, it is clear that the appellant was charged with robbery with violence. The elements outlined in the particulars of the offence constituted those of the offence of robbery with violence. The appellant therefore pleaded to one charge of robbery with violence and not any other. Both the statement of the offence and its particulars were stated in unambiguous manner. Ultimately, the appellant was not prejudiced and his contention cannot found a ground to nullify the trial. The same is curable under Section 382 Of the Criminal Procedure Code.

I will now delve into whether the charge was proved beyond a reasonable doubt. Suffice it to say, the only identifying witness was PW1 who was also the victim. He was candid that he knew the appellant who lived around where he also lived and that when he reported to the police, he gave the police his name as Paul. The learned magistrate did warn herself of convicting the appellant based on the evidence of a single identifying witness. Be that as it may, it was important to note that neither the arresting nor the investigating officer testified. Any of them would have erased doubt that indeed a report of the robbery had been made. The failure to include their testimonies meant that it was not conclusive first, that a robbery occurred and two, even if there was a robbery, the Appellant was one of the robbers. Therefore, in as much as PW1 may have identified the appellant as one of the robbers, the failure to call the vital witnesses entirely crashed the prosecution’s case.

I align myself with the observations of the Court of Appeal in ***Horward Shikanga alias Kadogo & Another (Supra)*** that the failure to call an investigating officer may not necessarily be fatal to prosecution’s case. In my view however, this finding must be evaluated on a case to case basis. Where

the evidence of the investigating Officer is the only evidence that would corroborate the existence of an offence and other material information necessary to seal a case, the failure to call such evidence must be found as fatal to the prosecution's case. This scenario obtains in the present case in which case I must conclude in the favour of the Appellant.

There is no doubt from the evidence of PW1 that all the elements of the offence of robbery with violence were satisfied. The robbers who allegedly attacked him were more than one in number, were armed with a dangerous weapon, namely a knife and stole from him a mobile phone. But for the lack of sufficient evidence to corroborate these elements, I find that the prosecution's case was not proved to the required standard in establishing that the Appellant was a culprit.

In the end, I find that the case was not proved beyond a reasonable doubt. I quash the conviction, I set aside death sentence. I order that the Appellant and is hereby forthwith set free unless otherwise lawfully held.

**DATED and DELIVERED** in Nairobi this **21<sup>st</sup> day** of **JULY, 2016**

**G.W. NGENYE-MACHARIA**

**JUDGE**

***In the presence of:***

1. Applicant in person
2. Miss Wario for the Respondent