REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 20 OF 2012

PAUL KARURU NGATIA .... APPELLANT

VERSUS

REPUBLIC …………………………….................... RESPONDENT

(From the original conviction and sentence in criminal case No.515 of 2012 of the Senior Principal Magistrate's Court at Kigumo by Hon. S.Mbungi – Senior Principal Magistrate)

JUDGMENT

The appellant, **PAUL KARURU NGATIA**, was charged with the offence of robbery contrary to section 295 as read with section 296 (2) of the Penal Code.

The particulars of the offence were that on 23rd April 2012 at Maragua Ridge, within Murang'a County, jointly with others not before court, while armed with a hoe and iron bars, robbed **FRANCIS MUGORO MUNGAI** of cash Kshs.22,000 and other valuables all valued at Kshs.44,600/= and at or immediately before or immediately after the time of the said robbery used actual violence to the said **FRANCIS MUGORO MUNGAI.**

He was sentenced to death.

He now appeals against both conviction and sentence.

The appellant was in person. He raised four grounds of appeal as follows:

1. That the learned magistrate erred in law and in fact by convicting him on a duplex charge.

2. That the learned magistrate erred in law and in fact by relying on insufficient evidence of recent possession.

3. That the learned magistrate erred in law and in fact by convicting him without calling material witnesses.

4. That the learned magistrate erred in law and in fact by shifting the burden of proof to the appellant.

The state opposed the appeal through M/s. Joyce Gacheru, the learned counsel.

Briefly the facts of the prosecution case are as follows:

In his defence the appellant denied any involvement in the offence.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO Vs. REPUBLIC 1972 EA 32.**

A charge is said to be duplex if it contains two or more distinct offences. This kind of a charge would render the trial to be declared a nullity if not corrected before the hearing commence. The principle behind the rule against duplex charges is fair trial.

An accused ought to know with certainty the charge he is answering to. In the instant case section 295 of the Penal Code merely defines the offence of robbery generally and does not create any offence. The offence is created under section 296(2) of the Penal Code. In my view, the inclusion of section 295 is unnecessary but harmless. However, the court of appeal (a bench of five) is of a different view. In the case of **JOSEPH NJUGUNA MWAURA & 2 OTHERS V REPUBLIC [2013] eKLR the court said:**

> **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 bound by this decision of the superior court. I will not therefore address the other grounds raised. I am making an order for retrial at Kigumo Law courts before any other Magistrate other than Hon. S. Mbungi.

The appellant to be escorted to Kigumo Law courts on 24th August 2016 for plea taking.

DATED at MURANG'A this 19th day of August 2016

KIARIE WAWERU KIARIE

JUDGE