REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO.32 OF 2013

DAVID OTIATO.....................APPELLANT

VERSUS

REPUBLIC........................RESPONDENT

(Appeal from original conviction and sentence in Criminal Case No.886 of 2012 at Vihiga Principal Magistrate's Court (Hon. G.A. Mmasi PM) dated 24th December, 2012.)

JUDGMENT

1. This is an appeal from conviction and sentence against the judgment of the **Principal Magistrate G.A. Mmasi** delivered on 24th December, 2012, in the Senior Principal Magistrate's Court at Vihiga. The appellant together with another who was acquitted, had been charged before that court with the offence of robbery with violence contrary to **section 295** as read with **section 296(2)** of the Penal Code. Particulars of the offence stated that on the 4th day of October, 2012 at **Magui Sub-location in Vihiga County** with another before court while armed with dangerous weapons namely, knives, robbed **G. S., Kshs.50,000/-** and immediately after such robbery threatened to use actual violence to the said **G. S**.

2. The appellant pleaded not guilty to the charge and after a full trial in which the prosecution called a total of seven witnesses, and the appellant's defence, the trial magistrate found the appellant guilty, convicted him and sentenced him to suffer death.

The appellant being dissatisfied with the conviction and sentence, lodged this appeal and raised seven grounds of appeal, namely:-

> **1. THAT the learned magistrate erred in law and fact in placing reliance on the evidence of PW1.**
>
> **2. THAT the learned magistrate erred in law in failing to comply with Article 49(1)(f)(I) and (II) of the Constitution.**
>
> **3. THAT the learned magistrate erred in law in failing to appreciate the contradictions in the prosecution evidence;**
>
> **4. THAT the learned magistrate erred in law in not appreciating that the appellant was not found with any stolen property;**
>
> **5. THAT the learned magistrate erred in law and fact by failing to comply with section 324 as read with section 329 of the Criminal Procedure Code;**

6. THAT the learned magistrate erred in law and fact in failing to note that no proper investigations were conducted in respect of this case; and

7. THAT the learned magistrate erred in law in rejecting the appellant's defence of alibi.

3. At the hearing of this appeal the appellant was in person while **Mr Oroni** appeared for the respondent. The appellant relied on his written submissions while **Mr Oroni** submitted orally. The appellant submitted that his trial did not conform with Article 50 of the Constitution in that he was unrepresented and did not understand the process of trial. He further submitted that during the trial, especially when PW3, PW5 and PW6 testified, there was no interpretation, which prejudiced his case as the language used was not recorded. The appellant again submitted that the offence of robbery with violence was not proved as required since PW1 was the only eye witness. The appellant argued that the evidence of PW1 did not show that the two people who allegedly committed the offence were together and had common intention especially taking into account that they were on a public road. The appellant has also taken issue with the evidence of PW2, saying, that the witness never mentioned the knife and that the would be witnesses at the scene were not called to testify.

4. The appellant submitted that there were masons at the alleged scene and were also arrested, but later released yet they were not called as witnesses. According to him, these were crucial witnesses and should have been called to testify. He blamed the trial court for not drawing adverse inferences on the failure by the prosecution to call these witnesses.

5. Lastly, the appellant argued that this being a chase and arrest case, there was no evidence that the person who committed robbery was the same person arrested thirty (30) minutes later. According to the appellant, the complainant did not pursue the assailant without losing sight of him until his apprehension. And when arrested, the appellant did not have the stolen items hence there was no evidence that he was the robber.

6. **Mr Oroni,** on his part, opposed the appeal and supported the conviction and sentence. According to learned counsel, PW1 was attacked at about 10 am by the appellant who stole Kshs.50,000/- and two phones. PW2 heard the screams and saw the appellant retreating holding a knife. The appellant threatened to stab PW2 when PW2 witness attempted to restrain him. Learned counsel submitted that the incident took place in broad daylight and the appellant was arrested and charged. The learned counsel concluded by urging the court to find that the prosecution had proved its case before the trial court as required, uphold the conviction and affirm the sentence.

7. I have considered this appeal, submissions by both sides and also perused the record. This being a first appeal, it is the duty of this court to re-evaluate the evidence afresh, analyse it itself and draw its own conclusions on whether or not the judgment of the trial court should stand, of course bearing in mind that it neither saw nor heard the witnesses testify and give due allowance for that. (see **Okeno v Republic** [1972] EA 32). In the case of **David Njuguna Wairiu v Republic** [2010] eKLR the Court of Appeal relying on **Okeno v Republic** (supra) stated:-

> **"The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusion on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusion as those of the lower court. It may rehash those conclusions."**

8. In order to fulfil that duty, I now embark on finding out what evidence was before the trial court.

9. PW1, **G. S.** testified that on 4th October, 2012 at about 10 am she was heading to the M-Pesa shop at Magui when she met the appellant with another man. She was carrying two cell phones, Nokia 1110 and 1100 and a safaricom paper bag containing Kshs.50,000/-. The appellant who was armed with a knife slapped her on the left cheek, robbed her the money and mobile phones, and started running away. PW1 screamed while pursuing the appellant. The appellant picked a stone and hulled it at someone who was

infront of him. At that point people came out and pursued the appellant, who entered a building under construction and hid inside. Police officers also joined, entered the house and arrested the appellant from the house. PW1 identified him and he was taken to the AP post and on interrogation, he led the police to the construction site and Kshs.27,000/- in 1000 and 200 denominations was recovered.

10. PW2, **Kennedy Kigalo Chumba**, testified that on the material day, 4th October, 2012 at about 10.00a.m while going about his duties at his employer's home, he heard screams and rushed to the gate. He saw two men running away, one carrying a paper bag, while being pursued by a lady who was shouting "pesa pesa" implying her money had been taken. PW2 attempted to get hold of one of them but was threatened with a knife forcing him to retreat. He continued pursuing the men and other villagers joined in the pursuit. One suspect disappeared into a river, but they pursued the other one upto a building under construction. They searched and found the appellant hiding near a drum. Administration police officers who had joined them took him to their post for interrogation. The appellant was taken back to the building and after a search, money (Kshs.27,000/-) was recovered in 1000 and 200 denominations.

11. **PW3, Nickson Balusi jumba**, told the court that on that day while on his way from his brother's home at Magui, he met the complainant. After a short while he heard screams and saw his brother pursuing two people while the complainant was screaming that she had been robbed by the two people. AP officers joined the chase and we ended up in a building under construction and found the appellant hiding next to a water drum. The appellant was taken to the APs camp, and later a search at the construction site led to a recovery of Kshs.27,000/-.

12. On his part, PW4 **Samson Mboge Boyi**, told the court that PW1 was an employee in his M-Pesa shop. That on 4th October, 2012, PW1 called and informed him that she had been robbed of money. This was part of the money the witness had withdrawn from a bank. He proceeded to the scene and after a search the appellant was arrested while hiding in a house under construction. He was question by AP officers and after further interrogation of the workers, money (Kshs.27,000/-) was recovered in that building.

13. PW5, **G. M.**, told the court that on 4th October, 2012, at about 10 am she heard screams. PW1 and PW3 informed her that they had been robbed and the robber disappeared into her building under construction. She then saw other people coming from the building with the appellant whom PW1 identified as the person who had robbed her. The appellant and her masons who were working on her house were taken to the AP's camp and questioned. Meanwhile, the search in the building recovered a paper bag hidden in sand. She called two other ladies and on counting the money, they found (Kshs.27,000/-) she later handed over the money to the AP officers.

14. PW6, **No.2008121240 AP Jared Ogoma**, testified that on 4th October, 2012 he was with his colleague APC **Anna Gorret**, when they met people chasing 2 suspects who were said to have stolen Kshs.50,000/- from them. They joined the chase which took them to a building under construction, and after a search they found the appellant hiding behind a drum. He had covered himself with cement wrappers while holding a knife. PW1 identified the man as the one who had robbed her. The appellant was taken to the APs camp for further interrogation. At the camp the appellant told them that he had given money to one of the workers in the building to hide it. They went back to the scene and found PW5 with Kshs.27,000/- which she had recovered hidden in the sand. The appellant was handed over to the police together with the money and the knife.

15. PW7, **No.79934 P.C. Jonathan Lagat**, told the court that on 4th October 2012 at about 4 pm while at Vihiga Police Station he received the appellant and another person from APC Onkongo, also handed over to him was Kshs.27,000/- in cash, and a knife. The money handed over to him was Kshs.8,000/- in 1000 denomination notes and Kshs.19,000/- in 200 denomination notes. They produced the knife as PEx1 and the money as PEx2. After recording statements from witnesses he charged the appellant and his colleague.

16. At the close of the prosecution case, the trial magistrate found the appellant to have a case to answer

and placed him on his defence. Appellant gave unsworn testimony. He told the court that on 4th October, 2012 he was at Magada stage when his friend called him saying he had been arrested and taken to Mulele AP camp. When he went to check on him, he was arrested and put together with a person he did not know. He was not told the reason for his arrest but instead, he was charged in court with the offence of robbery with violence. His friend was released, allegedly, upon paying a bribe of Kshs.10,000/- which money he did not have. He denied committing the offence he faced before the trial court.

17. After considering the evidence on record, the learned trial magistrate stated in her judgment:-

> **"The court has considered the evidence adduced by the prosecution witnesses and the defence of the accused person. It is evident that the robbery took place during the day at 10.00 am in broad daylight and the complainant vividly saw the accused as he daringly robbed her of the two mobile phones and cash Kshs.50,000/- (~Fifty thousand shillings only). It is in evidence that the accused was armed with a knife which was produced in court as exhibit. He threatened to stab the complainant with the knife after robbing her and when she was pursuing him as the accused was running away with the money, the evidence on record a adduced by the prosecution witnesses is well corroborated such that the accused's defence cannot penetrate (sic) the overwhelming evidence on record."**

18. The learned trial magistrate then concluded that the prosecution had proved its case beyond reasonable doubt and convicted the appellant as charged.

19. The appellant has attacked the learned trial magistrate's decision arguing that there was undue reliance on the evidence of PW1 which he submitted was inconclusive. PW1 told the court that she was walking along the road when she was attacked. The incident took place at about 10 am in mid morning. She raised an alarm and people joined in the chase which ended up with the arrest of the appellant in a building under construction. That evidence is similar to that of PW2 and PW3 who also joined the chase. Infact PW3 says he saw the people being pursued and the appellant was arrested in the building under construction. PW4 confirmed that he had given money to the complainant and when he received the report of robbery, he went to the scene and was present when the appellant was arrested. This is what he told the court:-

> **"The suspect was recovered (sic) from the incomplete house. We found him hiding in a certain room covered with cement wrappers. The person we found is the 1st accused in the dock he was questioned by Administration Police Officers he said he gave the money to the masons."**

20. PW5, the owner of the building was also present when the appellant was arrested. She saw people come out of her building with him. PW5 is also the one who recovered the money. The appellant did not say that he was a mason or was an employee of PW5. The money did not belong to PW5 but was recovered in that building. The AP officer PW6 joined in the chase and arrested the appellant who was identified by PW1 as the person who robbed her.

21. It is not true as claimed by the appellant, that the trial magistrate over relied on the evidence of PW1. It was not only the evidence of PW1 which placed the appellant at the scene, but all the witnesses who testified before the trial court. The appellant was found hiding. Why would he hide in broad daylight and cover himself with cement wrappers in a building he was not working on, if he was not running away from somebody? The argument by the appellant does not hold water.

22. The appellant has also complained that his defence was not considered, and that the learned magistrate erred in rejecting his defence of **alibi**. In his defence, the appellant said he was called by a friend he did not name, and when he went to see him at the Administration officers' camp, he was arrested and charged in court with an offence he knew nothing about. This evidence does not agree with that of the prosecution witnesses. The person arrested at the scene (building) where money was recovered, was none other than the appellant. I do not see how the appellant would have just been arrested for going to see a friend at the AP's camp and charged. He did not say that he was arrested and

taken to the building. He did not deny that he was the person arrested on that morning in the said building. I find that the trial magistrate was right in rejecting the appellant's defence.

23. The appellant has also raised a complaint that the learned trial magistrate did not consider the fact that he was not arrested with any money in his possession. As already pointed out, the appellant was pursued by members of the public to a building where he was arrested while hiding. He was identified by the complainant as the person who had robbed her. When he was arrested, he was found with a knife which he threatened the complainant and PW2 with. Money was later recovered hidden in the same building. I do not think the chain was broken to the extent that his would be a mistaken identity. His complaint is not well founded. In any case, money was recovered in the building in which he was hiding.

24. The appellant has also complained that the trial magistrate erred in failing to appreciate that there were contradictions in the prosecution's case. I have evaluated the evidence myself and of course there are a few contradictions especially on the amount recovered. Whereas some witnesses said Kshs.37,000/- was recovered, others said it was Kshs.27,000/-. However, PW5, the owner of the building, and the person who recovered the money, told the court that she recovered Kshs.27,000/- in 1000 and 200 denominations. This was consistent with the evidence of PW1 that the money was in 1000 and 200 denominations. She told the court that Kshs.50,000/- was robbed from her but 27,000/- was recovered.

25. In any trial there are bound to be contradictions, but the court should weigh the effect of such contradictions and determine whether they are such that they would cause prejudice to the accused person (appellant in this case.) In the case of **<u>Joseph Maina Mwangi v Republic</u>**, [2000] eKLR, the Court of Appeal stated:-

> **"In any trial, there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of the Criminal Procedure Code viz whether such discrepancies are such as to cause prejudice to the appellant or they are in consequential to the conviction and sentence."**

The same point was considered in the case of **<u>Njuki & 4 others v Republic</u>** [2002] KLR 771 where the Court of Appeal again stated:-

> **"Where discrepancies in the evidence do not affect an otherwise proved case against an accused a court is entitled to ignore those discrepancies."**

And in the case of **<u>Vincent Kasyula Kingo v Republic</u>**, **<u>Criminal Appeal No.98 of 2014</u>**, the Court of Appeal again stated that a trial court has a duty to reconcile discrepancies where any is alleged to exist and where there is failure to do so, an appellate court has an obligation to reconcile them and determine whether they go to the root of the prosecution case or not.

26. I have evaluated the evidence and considered the alleged contradictions or discrepancies. Although the learned magistrate never addressed them in her judgment, I do not find the discrepancies material such that they could have affected the conviction or sentence herein. The contradictions or discrepancies can be ignored without causing any prejudice to the appellant. The fact, for instance, of how much money was recovered does not affect the fact of robbery with violence, conviction or sentence of the appellant in this appeal.

27. Another complaint by the appellant is that the trial magistrate did not comply with **Article 49(1)(f)(i) & (ii)** of the Constitution. The Article cited by the appellant provides:-

> **49(1) "An arrested person has the right –**
>
> **(f) to be brought before a court as soon as reasonably possible but not later than**
>
> > **(i) twenty four hours after being arrested; or**

(ii) if the twenty four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day."

28. According to the charge sheet, the appellant was arrested on 4th October, 2012. This was also confirmed by prosecution witnesses. The appellant in his own defence told the court that he was arrested on 4th October, 2012. From the record, the appellant was charged in court on 5th December, 2012, the next day after his arrest. I do not find any violation of the appellant's constitutional right to be produced in court within twenty four hours after arrest as required by the **Constitution**. Further more, I have noted from the record, that the appellant was granted bond which is allowed under the **Constitution**. I do not therefore find substance in his argument that **Article 49(1)(f)** was violated.

29. The appellant further submitted that he was taken through the trial blindly without legal representation as enshrined in **Article 50** of the **Constitution**. **Article 50(2)(h)** provides that an accused person has a right to a fair trial which includes the right to have an advocate assigned to him by the State at the State's expense, **if substantial** injustice would otherwise result and to be informed of this right promptly.

30. It is true, according to the record, that the appellant was unrepresented throughout the trial. His trial concluded on 21st January 2013 when he was sentenced. Although **Article 50(2)(h)** provides for legal representation at State's expense where **substantial injustice** was likely to occur without such representation, courts have held that legal representation at the State's expense, can only be achieved progressively. **The Constitution** also placed an obligation on Parliament to enact a legislation to facilitate attainment of the right to legal representation which was not achieved until May 2016.

31. On this issue of legal representation, the Court of Appeal in the case of **Dvid Njoroge Macharia v Republic**, **Criminal Appeal No.497 of 2007**, observed:-

> **"Under the new Constitution, State funded legal representation is a right in certain instances, Article 50(2)(h) provides that an accused shall have an advocate assigned to him by the State and at State expense, if substantial injustice would otherwise result. Substantial injustice is not defined under the Constitution. However, provisions of international conventions that Kenya is signatory to are applicable by virtue of Article 2(6). Therefore provisions of the ICCPR and the commentaries by Human Rights Committee may provide instances where legal aid is mandatory. We are of the considered view, that in addition to situations where "substantial injustice would otherwise result," persons accused of capital offences where penalty is loss of life have the right to legal representation at State expense."** (emphasis)

32. The court was therefore of the view that in cases, like the one the appellant faced, entitled him to legal representation at the State's expense. As stated earlier, this could not be possible until mechanisms were put in place through a legislation as contemplated by the **Constitution**. That was made clear by the Court of Appeal in the case of **Geoprge Gikundi Munge v Republic** [2015] eKLR, where the court stated:-

> **"Under the current Constitution, an accused person is entitled to legal representation at the State's expense during trial where substantial injustice would otherwise arise in the absence of such legal representation. As noted in the David Njoroge Macharia v Republic (supra), the Constitution does not set out what constitutes substantial injustice. Chapter 18 (Transitional and consequential provisions) of the current Constitution places an obligation on Parliament to enact legislation which would ensure realization of an accused person's right to a fair trial under Article 50 within four ears of the promulgation of the Constitution. It is the envisaged legislation that would set out the circumstances and parameters under which an accused person is entitled to legal representation at the State's expense. Whereas it was the intention of the framers of the Constitution that there be a right to legal representation, we appreciate that the same can only be adhered progressively:** (emphasis)

33. The court implored on Parliament to enact the envisaged legislation, and that legislation has been enacted in the form of the **legal Aid Act**, 2016 which came into force in May, 2016 and awaits

operationalisation. The appellant's constitutional right to legal representation was therefore not violated

34. The appellant again complained that witnesses' evidence namely PW3, PW5 and PW6 was not subjected to interpretation which prejudiced him in the trial. As part of the requirements of a fair trial, **Article 50(2)(m)** of the **Constitution** provides that, an accused person is entitled to have the assistance of an interpreter without payment, if he cannot understand the language used at the trial. I have perused the record and noted that the charge was read to the accused in Kiswahili, which he understood, and when called upon to plead, he replied in kiswahili. That means he understood Kiswahili. On 9th October, 2012, when an amended charge was again read to the appellant, although the language was not recorded, the appellant pleaded not guilty in kiswahili saying "**si ukweli**."

35. When PW1 testified on 23rd November, 2012, the language was not indicated, but the appellant cross examined that witness. PW2 proceeded in kiswahili, while PW3's language was not indicated, but again the appellant cross examined the witness. Pw4 proceeded in Kiswahili, PW5's language was not indicated but the appellant again cross examined that witness. PW6's language was also not indicated, but again the appellant cross examined the witness. When it came to defence case, the appellant gave evidence but his language was not recorded.

36. **Section 198** of the **Criminal Procedure Code** requires that evidence given in court in a language not understood by an accused, be interpreted to an accused person in a language understood by him or her. It provides:-

> **S 198(1) "Whenever any evidence is give in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands.**
>
> **2) ---**
>
> **3) ---**
>
> **4) The language of the high Court shall be English, and the language of a subordinate court shall be English or Kiswahili."**

Article 50(2)(m) of the **Constitution** requires that an accused should have services of an interpreter if he cannot understand the language used at the trial.

37. The importance of language in proceedings was also considered in **Diva Walo Kiyato v Republic** [1982-88] IKR 1974, by the Court of Appeal stating:-

> **"It is a fundamental right in Kenya, whatever the position elsewhere, that an accused person is entitled to the assistance of an interpreter through whom the proceedings shall be interpreted to him in a language which he understands."**

38. According to the record of the trial court, from day one of the proceedings, the appellant was engaged and fully participated in those proceedings. Some of the witnesses were recorded to have testified in Kiswahili while for those whose language was not indicated, the appellant still cross examined them. When the appellant was put on his defence his rights under **section 211** of the Criminal Procedure Code, were explained to him in Kiswahili, and immediately after, he proceeded to defend himself. There is nothing to show that the appellant never understood the proceedings which would have prejudiced him, or that section 198 of the Criminal Procedure and **Article 50(2)(m)** of the Constitution were not complied with.

39. The Court of Appeal addressed this issue and stated that it is the level of participation of the accused that will have a bearing on whether or not he understood the proceedings. In the cases of **Jackson Lelei v Republic**, **Criminal Appeal No.313 of 2005** and **Anthony Kibatha v Republic**, **Criminal Appeal No.109 of 2005** it was stated:-

“We emphasize that each case must turn on its own peculiar facts. For the court to nullify proceedings on account of lack of language used during the trial, it must be clear from the record beyond reasonable doubt that the accused did not at all understand what went on during his trial. We are not so satisfied in the circumstances of this case. In fact the converse is true that the appellants understood the proceedings, and took part in the proceedings throughout the trial.” (see <u>Said Hassan Nuno v Republic</u>, <u>Criminal Appeal No. 322 of 2006</u>).”

The same point of the language used in the proceedings arose for consideration by the Court of Appeal in the case of **<u>Mugo & 2 others v Republic</u>**, 2008 KLR 19 where the court stated:-

“It is not every case where language was not shown which would make an appellant to successfully raise the issue of language before the court. Each case has to be decided in light of its peculiar circumstances.”

40. The issue of whether or not the appellant understood the language of proceedings before the trial court, is one of fact, and as an appellate court, considering an issue where language of proceedings was not indicated at all or in certain instances, the level of the appellant’s participation in those proceedings will show if he understood those proceedings or not. In the instant appeal, the appellant fully participated in the trial from the first day. He understood what was going on and no prejudice was caused to him. Taking guidance from the above decisions, and having perused the record of the trial court, I am satisfied that the appellant understood proceedings before the trial court as demonstrated by his level of participation in those proceedings.

41. The appellant has raised another complaint, that the prosecution evidence did not prove the offence of robbery with violence. In order for the prosecution to prove the offence of robbery with violence under **section 296(2)** of the Penal Code, one of these ingredients must exist, namely; the assailant was armed with a dangerous weapon; or was in the company of others, or used actual violence against his victim.

42. I have perused the record of the trial court, and from the evidence of PW1, the assailant was armed with a knife and slapped her at the time of executing his mission. PW1’s evidence is corroborated by that of PW2, PW3 and PW6 who arrested the appellant while holding a knife. The evidence of the witnesses also showed that the appellant was with another person who disappeared. This evidence proved the ingredients of robbery with violence that he was not only armed, but was in the company of another. The submission by the appellant that the offence was not prove is therefore without merit.

43. The appellant yet again complained that his **<u>alibi</u>** was rejected even though it had not been challenged by the prosecution. I have looked at the appellant’s defence but clearly the alleged **<u>alibi</u>** could not hold. As said earlier, the appellant was chased from the scene up to the point of his arrest. The defence of **<u>alibi</u>** could not Suffice. He was arrested by those who chased him. He did not explain how he could be arrested at the station when he was arrested at the scene while hiding. The trial court rightly rejected his **<u>alibi</u>**, when it found that the defence could not overhaul the overwhelming evidence of the prosecution.

44. The appellant has also lamented that crucial witnesses were not called. His argument is that the masons who had been arrested were not called to give evidence. The law is clear that there is no fixed number of witnesses the prosecution must call in order to prove its case. See **section 143** of the Evidence Act. Calling of witnesses is at the discretion of the prosecution and unless failure to call them was motivated or influenced by ulterior motives, the prosecution cannot be blamed especially where evidence led proved its case to the required standard. In the case of **<u>Benjamin Mbugua Gitau v Republic</u>** [2011] eKLR the Court of Appeal stated:-

“This court has stated severally that there is no particular number of witnesses who are required for proof of any fact unless the law so requires. See section 143 of the Evidence Act Cap 80 laws of Kenya. In the circumstances therefore we find that no prejudice was caused to the appellant or to the prosecution by failure to call the four boys..”

Applying the above principle to the present appeal, I find that the appellant did not suffer any prejudice

for failure by the prosecution to call the masons who were in the building under construction. The evidence by the witnesses called by the prosecution was sufficient to prove the case against the appellant to the standard required.

45. Finally, one of the appellant's grounds of appeal is that the trial court did not comply with **sections 324** and **329** of the Criminal Procedure Code. Whereas **section 324** deals with arrest of judgment, **section 329** deals with taking of evidence before sentence. I have perused the record but could not see any application made to the trial court for purposes of arresting the judgment.

Regarding **section 329**, there is only one sentence provided for in law, and whether the learned magistrate called for pre-sentence evidence, would really have not influenced sentencing. For those reasons, I do not find any merit in this ground of appeal, and the same is dismissed.

46. I have carefully considered this appeal re-evaluated the evidence and analysed it myself. I am satisfied that the prosecution proved the case against the appellant to the standard required. I have no reason to interfere with the findings of the trial court. Consequently this appeal is hereby dismissed.

Dated and delivered at Kakamega this 18th day of August, 2016.

E.C. MWITA

JUDGE