



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL APPEAL NO. 3 (C) OF 2015

PROSPER ALOIS JOHN.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(An appeal on a conviction and sentence from the original judgement in

Criminal Case No. 334 of 2011 before Hon. Okuche (PM) dated 26/9/2014)

JUDGEMENT

PROSPER ALOIS JOHN, appellant herein had been charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code (Cap 63) of the Laws of Kenya at Kajiado Chief Magistrate Court in a trial presided over by Hon. Okuche (Principal Magistrate). The appellant denied the charge necessitating a trial where the prosecution called a total of five (5) witnesses. At the conclusion of the trial the learned trial magistrate appraised the evidence and found the appellant guilty of the offence, convicted and sentenced him to suffer death on 26/9/2014. Being aggrieved with the decision of the trial court on conviction and sentence the appellant has appealed to this court. The case for the prosecution at the trial was that on 13/3/2011 at Rombo Masaai Reserve the complainant PW1 was walking to his house when he was confronted by the appellant, attacked, robbed of cash 8000, mobile phone Nokia model 1110 valued at Ksh.4000 and at or immediately before or immediately after the time of such robbery used actual violence to the said Kareka Kiteko. The complainant PW1 raised an alarm on being attacked which attracted the attention of PW2 and PW4.

PW2 testified that he responded to the distress call from the complainant homestead and on arrival found PW1 has sustained injuries from assailant. It was also confirmed that PW1 was robbed of his property being cash and a mobile phone. PW2 and PW4 testified at the trial that on 14/3/2011 they began to search for the appellant who was suspected to have committed the offence. According to their testimony the appellant was discovered sleeping at a river bank covering himself with the complainant's jacket which was blood stained. The appellant on noticing he was being followed started to run away to avoid being arrested by members of the public who included PW2 and PW4. According to PW2 and PW4 testimony in hot pursuit appellant was cornered when he ran towards Mama Muli's house.

In a quick search and under the direction of the appellant they managed to recover the complainant's jacket and a panga allegedly used in the course of the robbery by the appellant. The appellant PW1 was taken to Ndarara Health Centre and later Loitokitok for treatment. The doctor PW3 testified on behalf of his colleague who examined the complainant and filled the p3 which was tendered as exhibit 1 under section 77 of the Evidence Act Cap 80. The examination conducted on the complainant PW1 confirmed

that he sustained cut on the back, head, left face, hand and elbow. The investigations of the case were carried out by PW5. At the trial he took the court through the role he played in recording the statement from witnesses, receipt of the recovered exhibits, panga and jacket which he presented as exhibit 2 and 3 in support of the prosecution case.

The appellant in his defence denied the charge of robbery against the complainant. In his chronology of events he described how he worked for the complainant PW1 as a casual labourer at agreed salary of Ksh.5000. pursuant to the agreement, appellant executed his duties with the complainant for six months with no payment of his dues. According to his further testimony the complainant kept on postponing in making payments seeking more time whenever a demand was made to settle. The appellant described his arrest as one constituting three men in two motorcycles who took him to Ndarara's AP Camp where he was placed in custody and later transferred to Loitokitok Police Station. He was later charged with the offence he did not commit. It is against this background the appellant was convicted and sentenced to death.

The grounds of appeal are that:

- 1. That the learned trial magistrate erred in law and facts in failing to appreciate that the circumstances at identification by the complainant PW1 was not favourable for a positive identification.**
- 2. That the learned trial magistrate erred in law and facts in failing to appreciate that the prosecution had failed to prove its case to standard required in law, that is prove beyond reasonable doubt.**
- 3. That the trial learned magistrate erred in law and facts in shifting the burden of proof from the prosecution to the appellant contrary to the law.**
- 4. That the trial learned magistrate erred in law and facts in failing to appreciate that critical witnesses were never called by the prosecution thus the case remain unproved.**
- 5. That the learned trial magistrate erred in law and facts failing to take into account and or consider the appellant's plausible defence.**
- 6. That the learned trial magistrate erred in law and facts by convicting the appellant whereas no arms indicated on particulars of the charges or whether the appellant was in company of another within the meaning of section 296 (2) of Penal Code thus the charge was incurable defective.**
- 7. That the learned trial magistrate erred in law and facts in failing to appreciate that the appellant's constitutional right to a fair trial as enshrined under Article 50 (2) (c) (J) (e) and Article 159 (2) (a) (b) at constitution were flouted and violated.**

SUBMISSIONS ON APPEAL:

At the hearing the appellant submitted that the prosecution failed to prove the offence of robbery with violence beyond reasonable doubt. In respect of the ingredients of the offence the appellant submitted that there was no mention of him armed with dangerous weapon, the injuries given in evidence were inconsistent with what the p3 conformed to have been occasioned. The appellant further contended that the charge sheet was defective for failure to mention existence of a panga during the robbery and that complainant was robbed of a jacket. In support of this ground of appeal appellant placed reliance on the principles in the case of **Erick Macharia & Others v Republic [2014] KLR, Suleiman Juma alias Tom v Republic [20013] KLR.**

On the question of identification, the appellant submitted that the evidence by PW1 on how he recognized him during the robbery was weak and erroneous. He contended that there was no positive voice

identification nor any identification parade conducted to exhibit to the trial court that it was free from mistake or error. The appellant further submitted that the prosecution failed to call Mama Muli as a witness to confirm that indeed he was chased and caught up at her homestead by PW2 and PW4. He cited the cases of **Francis Kariuki & Others v Republic [2001] KLR, Bukenya & Others v Uganda EA 68 of 1972**. The appellant further submitted that in his defence he raised an alibi defence which the trial court did not consider nor apply in reaching a determination to place him at the scene of the crime. In support of this ground he relied in the case of **Kimotho v Republic [1984] KLR**.

Finally the appellant contended that the trial magistrate violated Article 50 (2) (c) (j) of the Constitution on his rights to a fair trial. The gist of the violation according to the appellant being the absence of information on the witnesses who testified against him. In essence he argued that the trial court did not accord him the opportunity to have the statements by the witnesses in advance prior to the trial. He cited the case of **Thomas P.G. Chomondely v Republic [2008] KLR**. The appellant urged this court to allow the appeal on both conviction and sentence.

THE RESPONDENT SUBMISSIONS:

Mr. Akula the learned prosecution counsel submitted and opined that the ingredients of the offence of robbery contrary to section 296 (2) of the Penal Code were proved beyond reasonable doubt. He submitted that the evidence by the prosecution witnesses PW1 – PW5 confirm and support that assertion of discharge of the burden of proof against the appellant. He referred to the case of **Daniel Mariani v Republic [2013] eKLR** on the proposition that the prosecution needs to only prove one of the three elements of the offence under section 296 (2) of the Penal Code for it to sustain a conviction.

As regards the dictions of recent possession Mr. Akula learned prosecution counsel for the respondent submitted that the jacket belonging to the complainant was positively identified. The jacket was recovered with the appellant during the arrest by PW2 and PW3 and admitted in evidence as the property of the complainant. He cited the cases of **Elizabeth Gachanja & 7 Others v Republic [2011] KLR, Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v Republic Cr. Appeal No 272 of 2005 (UR), Daniel Mugo Kimunge v Republic [2015] eKLR** for the principles on the doctrine of recent possession. Mr. Akula urged the court to find that the principles specified in the authorities referred apply to the facts of this case as against the appellant. Mr. Akula learned prosecution counsel for the respondent submitted that the appellant was positively identified by PW1 during the robbery, that the evidence on identification was corroborated with the recovery of jacket by PW2 and PW4. The jacket was proved to belong to the complainant. In support of the submissions on identification learned counsel referred to the following cases **Maitanyi v Republic [1986] KLR 198, Choge v Republic Cr. Appeal No. 69 of 1984**. Mr. Akula further drew the attention of the court on the provisions of Article 50 (2) (j) on the rights to a fair trial for the appellant (accused) to be provided with adequate facilities, time and be informed in advance of the evidence the prosecution intends to rely at the trial. Learned counsel contended that from the record there is no doubt that the trial court did not violate any of the provisions of Article 50 (2) (c) (j) of the Constitution. Mr. Akula urged this court to affirm the judgement of the trial court on both conviction and sentence.

Being the first appellate court I am expected to subject the evidence adduced at the trial court to a fresh evaluation and analysis while bearing in mind that I neither saw nor heard any of the witnesses for the prosecution or the defence. In scrutinizing the evidence this court is required to make a determination of its own on the matter. These principles are ably stipulated in the Court of Appeal cases of **Okeno v Republic [1972] EA 32, Nganga Kahiga alias Peter Nganga Kahiga v Republic Cr. Appeal No. 272 of 2007**.

I have considered the charge of robbery, under section 296 (2) of the Penal Code, the submissions made by the appellant in support of the grounds of appeal, the case for the prosecution and evidence on record together with the arguments advanced in response to the appeal by the respondent's senior prosecution counsel. It is appropriate to deal with the appeal following the order it was argued and submitted by the appellant.

GROUND 1 – Defective charge

Covering grounds in the memorandum of appeal the appellant was convicted of robbery with violence under section 296 (2) of the Penal Code states in pertinent part that the existence of any of three sets of circumstances specified if proved will constitute the offence in the said section as:

- 1. If the offender is armed with any dangerous or offensive weapon or instrument, or;**
- 2. If he is in company with one or more other person or persons; or**
- 3. If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.**

The issue on what constitutes the offence of robbery with violence contrary to section 296 (2) has been litigated severally in our Kenyan courts including the Court of Appeal in settling the jurisprudence around the conflict between section 295, 296 (1) and 296 (2) of the Penal Code. In the case of **of Ganzi & 2 Others v Republic [2005] 1KLR 52** the court settled the issue under section 296 (2) by stating that the offence is complete when anyone of the three set of circumstances has been proved beyond reasonable doubt. In the same court the issue came up on the case of **Simon Materu v Republic [2007] eKLR** whether the charge sheet citing only section 296 (2) of the Penal Code was sufficient. The court held as follows:

“The ingredients that the appellant 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 the 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 Joseph Onyango Owuor & Cliff Ochieng Oduor v Republic [2010] eKLR Cr. Appeal No. 353 of 2008 the appellants raised the issue that the section 296 (2) is defective because it does not create the offence.

The Court of Appeal pronounced itself thus:

“Mr. Musumba submitted that unless the afore-quoted subsection 296 is read with section 295 of the Penal Code, the reliance on section 296 (2) above without more will not disclose the commission of an offence. Section 295 of the Penal Code defines the offence of robbery. Section 296 (1) and 296 (2) of the Penal Code have a common marginal note namely punishment of robbery. In this county marginal notes areas a general rule, read together with the section. By the ejusden (SIC) generis rule, section 296 (1) and 296 (2) have to be read together. Section 296 (1) above provides that a person who commits a felony of robbery is liable to imprisonment for fourteen years. So that when dealing with the offence under section 296 (2) of the Penal Code, one has to read the statement to the aggravated circumstances of the offence or the robbery provided for under section 296 (1) of the Penal Code.”

The appellant impugned the charge under section 296 (2) for reasons that the essential elements of the offence were missing as crafted by the prosecution. The appellant specifically contends that the prosecution failed to present sufficient evidence showing that he was armed with a dangerous weapon and used it in the robbery incident. The appellant argued that the word panga was not included in the particulars of the charge but was introduced as part of the case. Testimony of PW1, PW2, PW3 and PW4 that variance made the charge against him defective.

Mr. Akula argued that the proved facts show that the offence under section 296 (2) of the Penal Code was committed by the appellant. There is no anomaly according to Mr. Akula to constitute a defective charge as submitted by the appellant. The investigating officer PW5 testified that the panga produced as exhibit was used in the incident of robbery involving PW1. Based on that testimony the trial magistrate concluded the conviction of robbery with violence was supported by sufficient evidence.

In evaluation the charge sheet I am in agreement with the appellant submissions that he was not charged of being armed with a panga or dangerous weapon on the material day when the offence was allegedly committed. There was no evidence that the appellant ever used or threatened to use the panga before or after such robbery. The introduction of the panga was therefore an afterthought. The description of it had been omitted in the initial information. The complainant alleged that he suffered cut wounds but absolutely ignored to describe the probable weapon used to inflict injuries. The evidence of PW1, PW2, PW4 and PW5 does not support the ingredient of the offence that the appellant was a member or in company with one or other persons not before court to have participated in the robbery. There was no evidence presented at the trial to show that the appellant was armed with a panga or any other dangerous weapon which in so armed struck the complainant. It is clear from the record that the introduction of the panga was a qualifying factor to bring the offence within the provisions of section 296 (2) of the Penal Code. The respondent's reliance on the case of **Daniel Mariani v Republic (Supra)** is therefore misplaced.

The legal issue is whether the charge of robbery with violence of which the particulars are an integral part had been proved as required by law at the trial court. The particulars of the offence in this case are variance with those established at the trial. In the case of **State of Uganda v Wagara [1964] EA 366 at 268 Sir Udo Odoma C.J of Uganda** commenting on the fact that the evidence led at the trial disclosed particulars other than those alleged in the charge stated:

“In the absence of any amendment the prosecution is bound by the particulars in the charge.”

The trial magistrate was mandated to invoke the provisions of section 214 (1) of Criminal Procedure Code which provides as follows:

“Where at any stage of trial before the close of the case for the prosecution it appears to the court that the charge is defective, either in substance or in form the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge as the court thinks necessary to meet the circumstances of the case.”

In the instant case there was no application for amendment of the charge to include better particulars as being armed with a panga. The prosecution proceeded to call witnesses on this face and went further to cause the panga to be admitted as an exhibit in support of the charge when it was one of the particulars of the offence. I find therefore that there was non-compliance with section 214 by the prosecution and the learned trial magistrate failed to notice the omission and provide the leadership in managing the admission of evidence on non-existence fact in the charge sheet.

The appellant was said to have robbed the complainant of cash Ksh.8,000, a Nokia mobile phone valued at Ksh.4,000. According to the prosecution witnesses PW2 and PW4 they responded to a distress alarm by the complainant. The response as stated in their testimony was immediate and prompt. It was further their evidence that the appellant was arrested soon thereafter he committed the offence. It will be noted that PW2 and PW4 never arrested the appellant of being in possession of cash Ksh.8,000 or any such monies or Nokia mobile phone allegedly stolen from the complainant. The proximity as to time when the robbery took place and the arrest of the appellant was so close that he could not have had the opportunity to dispose off the cash or the mobile phone. The learned trial magistrate misdirected himself in law in making a finding on a fact which was not part of what the prosecution sees to proof from the onset.

The rational between the charge and the evidence by the prosecution witnesses is eminent rendering only for it to be salvaged through an amendment under section 24 of the Criminal Procedure Code. The

discrepancy on the panga and jacket as forming the particulars of the offence were so glaring that the failure by the prosecutor or the court not to deal with it at the earliest opportunity occasioned prejudice and miscarriage of justice. That error, omission and or irregularity is not curable under section 382 of the Criminal Procedure Code.

It is trite that under section 296 (2) of the Penal Code the prosecution must lead evidence to prove beyond reasonable doubt that the appellant was on 13/3/2011 at Rombo Wildlife Reserve was a member of or was armed with a dangerous weapon or with a panga and or immediately before or after used actual violence against the complainant. Secondly, the prosecution had a duty to prove that the appellant with another not before court on 13/3/2011 robbed the complainant of his mobile phone Nokia, cash Ksh.8,000 and at the time of the robbery occasioned actual violence against the complainant. Thirdly, that the complainant was at the time of the robbery actually beaten and wounded by the appellant.

In view of the impeachment I have raised to the impugned judgement of the trial court any one of the above set of circumstances have not been proved beyond reasonable doubt. In my view given the gravity of the offence the discrepancy was so glaring that a miscarriage of justice occurred in the process. This ground renders the charge under section 296 (2) defective and not proved to the required legal standard of beyond reasonable doubt.

GROUND 2 – Identification/doctrine of recent recognition evidence

The appellant submitted and impeached the trial court evidence on recognition. The appellant contended that the conditions prevailing at the time were not favourable for a positive identification to take place. He further challenged the evidence based on the strength of the sources of light recorded as moonlight. The voice recognition was not described to the trial court as what features PW1 used to distinguish from other voices. Mr. Akula for the respondent relied on the testimony of PW1 who prior to the robbery knew the appellant. Mr. Akula further contended that besides evidence on recognition the doctrine of recent possession is applicable in this case.

The questions raised in this appeal are whether the contradictions were such that the findings of facts at the trial court were rendered unreliable. In this case the complainant reliably identified the appellant as the one who attacked and robbed him of the mobile phone and cash 8000. The appellant was apparently arrested in the morning lying next to a river bank. The prosecution witnesses never recovered the mobile phone nor the cash 8000 but a jacket belonging to the complainant. That evidence of the jacket has been disregarded for failure to be included in the particulars of the charge.

The courts in Kenya have held severally that identification is almost worthless without an earlier identification parade. See **Owen Kimotho v Republic Cr. Appeal No. 93 of 1983**. The complainant in this case at the trial was a single identifying witness whose evidence the court was required to test with the greatest care before relying on it. The record has no description and clothes worn by the appellant during the attack. Where is the evidence and description of the property stolen from the complainant on the material day? How come that the appellant was found lying next to a river bank was not in possession of cash Ksh.8,000 or any money or the Nokia mobile phone stolen from the complainant. What were the circumstances of disposal explained by the prosecution to have occurred between the robbery and the arrest of the appellant. The prosecution did not answer this question in the affirmative from the sequence of events leading to the arrest of the accused.

This appeal raises the issue of identification as a ground to impeach the conviction of the appellant. On Identification, this issue has been widely discussed and revisited by several superior courts both within our jurisdiction and England. In the classic case of **Republic v Turnbull [1976] 3 ALLER 549 at pg 552 Lord Widgery CJ** stated inter alia as follows:

“Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

The need for caution was reiterated by the Court of Appeal in the case of Abdalla bin Wendo v Republic 20 EACA 166 at pg 169 thus:

“Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lesser the need for testing with greatest care the evidence of a single witness respecting identification especially which is know that conditions favouring correct identification were difficult.

In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testing of a single witness can safely be accepted, as free from the possibility of error.”

According to prosecution evidence they relied on the testimony of PW1 to identify the appellant. The robbery occurred in the night on or about 7 pm. The victim of the robbery PW1 was allegedly attacked by the appellant. We are not told how long the complainant stayed with the appellant. The complainant PW1 stated to have used moonlight as a source of light. The police did not seem to have subjected the identification evidence to an identification parade. The prosecution in addition relied on recovery of the jacket and the panga to proof identification of the appellant as the offender of the robbery. However this court has already taken issue with that evidence and described it as being unreliable to be used against the appellant. The key consideration being that it did not form part of the initial particulars of the charge against the appellant.

In summary I am satisfied that the evidence of PW1 that he identified the appellant is not free from error or mistake and the same should have been ignored by the learned trial magistrate. If one removes evidence on identification, that of the panga and the jacket there is no anchor upon which the case from the prosecution against the appellant can stand. This ground on identification by the appellant therefore succeeds.

What is intriguing from the prosecution case in respect of the doctrine of recent possession of the jacket stolen from the complainant? Indeed I have reiterated elsewhere that the jacket was not one of the properties stolen from the complainant on the night of 13/3/2011. The evidence rightly accepted by the trial court was misplaced in view that the complainant (PW1) did not report to the police about the loss.

In the circumstances there is lack of chain of evidence supporting the complainant’s assertion on what he was robbed of and the alleged property jacket found with the appellant. There is therefore doubt in absence of recovery of the stolen properties whether PW1 properly and sufficiently recognized the appellant as the person who robbed him of his mobile phone and cash 8000. Where is the evidence to prove existence of a mobile phone and cash Ksh.8,000 at the time of the robbery?

I find none proved as required under section 107 (1) of the Evidence Act Cap 80 of the Laws of Kenya.

It is fair to infer that the prosecution did not prove beyond reasonable doubt that the appellant was guilty of robbery which includes the theft of the mobile phone and cash 8000. The Court of Appeal in the case of Nganga Kahiga (Supra) has stated clearly on what constitutes the elements necessary to establish the doctrine of recent possession:

“It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words there must be positive proof:

- 1. That the property was found with the suspect.**
- 2. That the property is positively the property of the complainant.**
- 3. That the property was stolen from the complainant.**

4. That the property was recently stolen from the complainant.”

Applying these principles to the instant case one can categorically confirm that PW1 identified the jacket before the trial court. The million dollar questions which the complainant failed to answer are; when was the jacket stolen in absence of a report to the police on 13/3/2011 or 14/3/2011? How did the appellant come to be in possession of the jacket in view of the fact it was not one of the items stolen during the robbery? How long ago was the jacket stolen from the complainant given the discrepancy noticed between the charge and the evidence? There are no answers from the prosecution to this questions.

This ground of appeal therefore succeeds.

GROUND 5 – Alibi defence

The appellant contended that he was not at the scene alleged by the prosecution. It has been held in a number of cases that the onus is on the prosecution to dislodge the alibi defence it has been raised by the defence. In the case of **Wang’ombe v Republic [1980] KLR 149 Madan J.A** as he then was held:

“The defence of alibi was put forward for the first time some months after the robbery when the appellant made his unsworn statement in court. Even in such circumstances the prosecution for the police ought to check and test the alibi wherever possibleUdo Odoma C.J also said that, it the alibi had been raised for the first time at the trial, different consideration might have arisen as regards checking and testing it.”

From the record the prosecution did not investigate the defence by the appellant. The learned trial magistrate did not labour on this issue on alibi and also the fact a report had been made to the chief on non-payment of salary by the complainant. This court wonders what weight the trial court gave to the defence raised by the appellant. The learned trial magistrate erred in law in rejecting the appellant’s defence whilst there was no evidence adduced by the prosecution to challenge it in rebuttal.

GROUND 6 – the right to a fair hearing

The appellant submitted that his fundamental right under Article 50 (2) (c) and (j) of the Constitution have been violated. Article 50 (2) provides as follows:

“Every accused person has a right to a fair trial which includes the right to

(c) to have adequate time and facilities to prepare a defence.

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.”

The issue for court’s determination is whether the trial court infringed the provisions of Article 50 (2) (c) and (j) of our Constitution. In the case of **George Ngodhe Juma & Others v Attorney General [2003] eKLR** the High Court has this to say in reference to Article 50 (2) (c):

“In general terms, it means that an accused person shall be free from difficulty or impediment, and free more or less completely from obstruction or hindrance in fighting a criminal charge made against him. He should not be denied something the result of which denial will hamper, encumber, hinder, impeach, inhibit, block, obstruct, frustrate, shackle clog, handicap, chain, filter, trammet, thwart or stale, his case and defence or lessen and bottle neck his fair attack on the prosecution case.”

In **Chomondely v Republic [2008] eKLR** the Court of Appeal held thus on Article 50 (2) (j) relying on **Republic v Strichmite [1992]** (Canadian case) held as follows:

“Our understanding of this Canadian decision is that there is a duty on the part of the

prosecuting authorities to disclose to an accused person the evidence which they intend to bring before the court in support of their charge. That duty also includes disclosing to an accused person evidence which the prosecution has in their possession but which they do not intend to use during the trial. Such evidence may, if adduced, weaken the prosecution case and strengthen that of the defence, whatever may be its nature, the prosecution is still obliged to disclose it to the defence. That duty includes during the pretrial period and during the trial itself, so that if any new information is obtained during the trial it must be disclosed.”

I have perused the record in this case on whether the trial court complied with Article 50 (c) (j). The plea was taken on 5/4/2011. The learned trial magistrate made an order for the case to be set down for hearing. The evidence in the form of witness statements and documentary exhibits to be relied by the prosecution were supplied to the accused prior to the hearing date. The appellant was given adequate and proper opportunity to challenge and question witnesses who testified at the trial. The appellant was convicted and sentenced on the basis of the evidence given in court. From the scanty submissions made by the appellant on this ground I am of the considered view that I find no material placed before me that the constitutional provisions under Article 80 (2) (1) was flouted and violated.

This ground therefore fails.

In this appeal weighing one factor after another I find it difficult in upholding the conviction of the appellant in any of the grounds contested by the respondent. Besides the defect in the charge sheet other grounds and discrepancy on the evidence have rendered the judgment of the lower court untenable. I consequently set aside the conviction and sentence of death imposed against the appellant forthwith. He is at liberty unless otherwise lawful held.

Dated, delivered in open court at Kajiado on 19th day of December, 2016.

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R. NYAKUNDI

JUDGE

Representation:

Appellant present in person

Mr. Akula Senior Prosecution Counsel

Mr. Mateli Court Assistant