REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO.271 OF 2011

NEMES MAMBO MWAURA …….APPELLANT

VERSUS

REPUBLIC ……..RESPONDENT

(Being an appeal from the judgment of the Hon. C. Oluoch (Mrs.) (Senior Resident Magistrate) in Kiambu Chief Magistrate's Criminal Case No.1565 of 2010

delivered on 14th October, 2011)

JUDGMENT

The Appellant herein was charged with the offence of Robbery with Violence contrary to Section 296(2) of the Penal Code.

Particulars of the offence were that on the 1st May, 2010 at Kiratina stage, Kanunga in Kiambu district within Central Province, jointly with others not before court robbed Dominic MwauraThuo of his phone make I-phone and twin-sim card valued at Kshs.6,000/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Dominic Mwaura.

In a judgment of the trial court dated the 14th of October 2011, he was found guilty, convicted and sentenced to death.

He was dissatisfied with both the conviction and sentence and preferred this appeal. In an Amended Memorandum of Grounds of Appeal he raised the following issues:-

1. **That the learned trial magistrate erred in law and fact in failing to consider that the offence he was charged with had not been proved against the appellant beyond reasonable doubts.**
2. **That the learned trial magistrate erred in law and fact in convicting the appellant while relying on identification/recognition evidence by PW1 and PW2 whereas the circumstances favouring a positive identification were not in existence.**
3. **That the learned trial magistrate erred in law and fact in relying on evidence of PW1 Dominic Mwaura and PW2 John Chege Bakari when the same was inconsistent and unbelievable in material particulars.**
4. **That the learned trial magistrate erred in law and facts in failing to give, inter alia, points for determination, the decision thereon and reasons for the decision made contrary to the clear provision of Section 169 of the Criminal Procedure Code.**
5. **That the learned trial magistrate erred in law and fact by failing to consider and/or failed to take into account and/or failed to give reasons why she disregarded the appellant's defence.**

The appeal was canvassed before us on the 17th of March, 2015. The appellant who was in person relied on written submissions annexed to the amended grounds of appeal. In summary the written submissions raised the following issues:-

One, that after the amendment of the charge sheet, the learned trial magistrate did not comply with Section 214 of the Criminal Procedure Code. Specifically he argued that after the substitution of the charge sheet he was not called upon to elect to recall or cross-examine the witnesses who had already testified.

Two, that he was not properly identified. In this regard he submitted that PW1 testified that he was attacked from behind as he was going home in the company of PW2 and in this regard could not properly have seen the person who had attacked him because it was dark. Further, PW2's evidence was inconsistent with PW1's in respect of how he was identified.

Three, that the case was not proved beyond reasonable doubts.

In addition, the appellant made very brief oral submissions in which he stated that PW1 in his first report to the police did not give a proper description of the person who had attacked him on the night of the incident. He pocked holes in the inconsistency of PW1's evidence in that in his evidence in court he had indicated that he had physically identified the appellant and given his physical features to the police. To the contrary, under the Occurrence Book in which the first report was made, there was indication that the complainant did not describe the physical features of the attacker and all he had told the police was that a phone had been snatched from him.

Learned State Counsel Miss Nyaucho opposed the appeal and submitted as follows:-

One, that the ingredients of offence of Robbery with Violence had been proved.That on the material date the complainant who testified as PW1 was walking home while talking on his mobile phone (I-phone) when the appellant and another man appeared. The appellant slapped PW1 and robbed him of his phone in the presence of PW2. PW2 witnessed the robbery. The fact that PW1 was with another man is indicative that the elements of Robbery with Violence were proved.

Two, that the appellant was properly identified by way of recognition since he was known to PW1 and 2 before the date of the incident. PW1 told the court that he gave the name and description of the appellant in the first report to the police and he described him as a man who had a mark on his face.

Three,that the sentence meted against the appellant was lawful.

She urged the court to dismiss the appeal.

We have crystallized the issues for determination as follows:-

Firstly, whether the court complied with **Section 214** of the Criminal Procedure Code after the charge sheet was amended and substituted.

Secondly, whether the appellant was properly identified.

Thirdly, whether the prosecution's evidence was sufficient and corroborative as to found a case against the appellant.

Fourthly, whether this appeal should succeed.

For the court to make a sound finding on the above issues, it must first re-evaluate the evidence tendered before the trial court and come up with its own finding but bear in mind that it has neither seen nor heard the witnesses. See the cases of See **OKENO –VS- REPUBLIC (1972) E.A 32, KARIUKI KARANJA –VS- REPUBLIC (1986) KLR, 190 AND PANDYA –VS- REPUBLIC (1957) E.A. 336.**

Before we re-evaluate the evidence, we think we should first address ourselves to the first issue for determination because if we find for the appellant, we may order a retrial in which case it may serve no purpose to re-evaluate the evidence on record in its entirety.

Our first issue for determination is whether after the substitution of the charge sheet the learned trial magistrate complied with Section 214 of the Criminal Procedure Code. In this respect the appellant submitted that after the substitution of the charge sheet he was not accorded an opportunity to either recall the witnesses who had testified or have them further cross examined. This takes us back to re-look at the provisions of Section 214. Specifically Sub-Section (1) (i) and (ii) apply. The same provide as follows:-

> **"214(1) Where, at an stage of a 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;**
>
> **Provided that:-**

i. **Where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;**
ii. **Where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination."**

In the instant case, the prosecution applied to amend the charge sheet under Section 214 of the Criminal Procedure Code after all his three witnesses had testified which application was granted. Thereafter the new charge was read to the appellant to which he pleaded not guilty and immediately after, the prosecutor closed his case and the trial magistrate proceeded to deliver a ruling on a case to answer under Section 210 of the Criminal Procedure Code. Effectively, the appellant was not accorded the opportunity to elect to recall the witnesses who had already testified either afresh or for further cross examination as provided under Section 215(1)(ii). This was in utter violation of the law which ultimately amounted to a mistrial which is a material defect in the entire trial. The same can only be cured through a retrial.

There exists an avalanche of case law which gives the principles to be applied where a retrial is deemed necessary. In the case of **EKIMAT –VS – REPUBLIC (2005) 1 KLR, 182** the Court of Appeal held that:-

> **"A retrial should not be ordered unless the court is of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on its particular facts and circumstances but an order for the retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person."**

Also in **OPICHO –VS- REPUBLIC (2009) KLR, 369,** the Court of Appeal held:-

> **"In general a retrial would be ordered only when the original trial was illegal or defective. It would not be ordered where the conviction was set aside because of insuffiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial. Even where a conviction was vitiated by a mistake of the trial court for which the prosecution was not to blame, it does not necessarily follow that a retrial should be ordered. Each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice required it."**

Again in**MUIRUIRI –VS - REPUBLIC (2003), KLR, 552, MWANGI –Vs – REPUBLIC (1983) KLR 522**and**FATEHALI MAJI –VS- REPUBLIC (1966) EA, 343**it was held that:-

> **"Although some factors may be considered, such as illegalities or defects in the original trial, the length of time elapsed since the arrest and arraignment of the appellant; whether mistakes leading to the quashing of the conviction were entirely the prosecution's making or not; whether on a proper consideration of the admissible or potentially admissible evidence, a conviction might result from a retrial; at the end of the day, each case must depend on its own particular facts and circumstances and an order for a retrial should only be made where the interests of justice require it."**

Upon evaluating the evidence on record it is our view that the appellant was properly identified by way of recognition. The identification was also corroborated by an eye witness who was present during the robbery that is PW2. We also are of the view that the elements of the offence of robbery with violence were proved in that the offender during the time of the robbery used actual violence against the complainant by striking him on the head. Furthermore, the complainant also lost his mobile phone during the time of the robbery. We also take into account that the offence of robbery with violence is a very serious offence which if the offender is convicted, carries the penalty of death sentence. However, we note that the appellant has been in prison since the year 2011. Since the force meted against the complainant was not so grave, which is to say that he did not sustain any bodily injuries, it is our view that he has served sufficient punishment. We do not think that a retrial will serve justice in the circumstances. Our hope is that he will hereafter reform.

In the result, this appeal partially succeeds. We quash the conviction and set aside the death sentence. We order that the appellant be and is hereby set free unless he is otherwise lawfully held.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 26th day of May, 2015.

L. KIMARU **G. W. NGENYE – MACHARIA**

JUDGE **JUDGE**

In the presence of:-

The appellant in person.

Miss Aludafor the Respondent.