REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEALS NOs. 238 AND 239 OF 2014

AMOS NYANDOHA OTAHA.....1ST APPELLANT

PATRICK MWEMA.....2ND APPELLANT

versus

REPUBLIC.....RESPONDENT

(An appeal against the original conviction and sentence of D.G. Karani, PM

in Criminal Case No. 200 of 2012 delivered on 4th December 2014

in the Principal Magistrate's Court at Kithimani)

JUDGMENT

The 1st and 2nd Appellants were charged with **three counts** of the offence of **robbery with violence contrary to section 296(2) of the Penal Code.** The particulars of the offence on count I were that ***on the 27th day of January 2012 at Full Gospel Church at Matuu Town in Yatta District within Machakos County, jointly with others not before court they robbed Stephen Kithuma of a brief case containing 3 bibles and a mobile phone make Nokia all valued at Kshs. 10,000/=, and immediately before or immediately after the time of such robbery killed the said Stephen Kithuma.***

On count II the particulars were that ***on the 27th day of January 2012 at Full Gospel Church at Matuu Town in Yatta District within Machakos County, jointly with others not before court they robbed Jane Kithuma of Kshs. 700/=, and immediately before or immediately after the time of such robbery threatened to use violence against the said Jane Kithuma.***

On count III the particulars were that ***on the 27th day of January 2012 at Full Gospel Church at Matuu Town in Yatta District within Machakos County, jointly with others not before court they robbed Brian Musyoka Mulwa of Kshs. 250/=, and immediately before or immediately after the time of such robbery beat the said Brian Musyoka Mulwa.***

The Appellants were first arraigned in the trial court on 12th March 2012 where they both pleaded not guilty to the charges against them. They were tried, convicted of the charges of robbery with violence and sentenced to death. The sentences for Count II and III of the offence were suspended.

The Appellants are aggrieved by the judgment of the trial magistrate and have preferred this appeal

against their conviction and sentence. The appeals of the 1st and 2nd Appellants were consolidated to be heard and determined together at the hearing held on 23rd July 2015. The 1st and 2nd Appellants relied on Petitions of Appeal they filed in court dated 11th December 2014 and 17th December 2014 respectively. They also availed to the Court supplementary grounds of appeal and written submissions during the hearing of the appeals.

The main grounds of appeal for the 1st Appellant are that the trial magistrate erred by relying on the evidence of his co-accused which was not corroborated and by relying on circumstantial evidence; that the trial magistrate erred by relying on the allegation that the 1st Appellant handled the stolen handset; that the trial magistrate erred by putting the 1st Appellant on his defence where there was no evidence, thereby contravening section 210 of the Criminal Procedure Code; that the trial magistrate relied on a duplex charge, and that the trial magistrate erred by failing to consider his defence.

The grounds of appeal raised by the 2nd Appellant were that the trial magistrate erred by relying on evidence of tracking of the stolen phone without involving witnesses from the service provider; that the trial magistrate erred by overlooking the first report made by the complainant at the police station which report did not identify the Appellant; that his conviction was based on an exhibited statement which did not amount to a confession; that the trial magistrate erred by relying on the allegation that the 2nd Appellant used the stolen handset; that the trial magistrate contravened section 210 of the Criminal Procedure Code by putting him on his defence when there was no evidence; that the trial magistrate relied on a duplex charge, and that the trial magistrate erred by failing to consider his defence.

Mr. Mamba for the State opposed the appeal and submitted that it was PW1's testimony that he was asleep in his house in the church compound when he heard a bang. He woke up and a bright light was directed to his face and he was held by the neck whereupon the suspects demanded for money. Further, that he was dragged and taken to the compound of PW2 where he was ordered to say he had been bitten by a snake.

PW2 responded by opening the door and that the pastor, Peter Kithuma then demanded to know what they wanted. PW2 who was the wife to the said pastor was then ordered into the bedroom, and that the accused took a briefcase containing three bibles. Mr. Mamba further submitted that after the incident was reported to the police, they were able to track the stolen mobile phone to the 1st Appellant with assistance from Safaricom network.

It was also submitted by the State that the phone receipts produced as exhibits showed that the phone belonged to the deceased. Further, that PW7, the doctor who examined the deceased Stephen Kithuma, said that the post-mortem indicated that he was hit to death. The counsel for the State concluded that the evidence showed a direct link of the offence to the Appellants.

We shall at this stage give a brief summary of the evidence adduced before the trial court, which is as follows. The prosecution called nine witnesses. PW1 was Ryan Musyoka. He stated that he was an evangelist with Matuu Gospel church, and on the material day at 4.00 a.m. he was in the church premises sleeping. He woke up to light shining on his face and there were two men who held him by the neck and ordered him not to scream. One of them held him as the other ransacked the house. They demanded for money and he said he had only 150/=. All the while he said they were hitting him. They then dragged him outside at knife point and ordered him to direct them where they kept money in the church. He said that they were in military fatigue.

PW1 testified that the assailants ransacked the church offices where they were joined by another man armed with shears referred to as 'corporal'. He was taken to the pastor's house and ordered to wake him up and tell him he had a snake bite. The pastor opened the door and he was pushed inside where they demanded for money. The 'corporal' hit him on the head with shears and he fell down. The wife of the pastor heard the commotion and came to check it out. They were then pushed her into the bedroom. After the robbers left he said that he went to check on the pastor and found him bleeding on the floor. They called out for help and the pastor was rushed to Matuu District Hospital where the wound was stitched.

The pastor later died while undergoing treatment at Kenyatta National Hospital.

PW2 was Jane Maluva Kithuma. She stated that on 27.1.2012 at about 4.30 a.m., she was asleep with her husband in the house located in the Matuu Full Gospel church premises. Further, that her husband was woken up by PW 1 and he went to open the door. She then followed to see what was happening when she encountered three people pushing her husband and PW 1 into the room. She said that they were dressed in military fatigues. They asked for money and searched the house then left. Meanwhile she said the husband was taken to the sitting room where he was hit on the head. They found him bleeding and could not talk. He was rushed to Matuu District hospital then referred to Kenyatta National Hospital where he succumbed to death. She produced receipts proving purchase of the stolen mobile phone. She also identified the briefcase containing the stolen bibles and the said bibles.

PW3 was Moses Nzeki who said that on 9.12.12 at about 1.00 p.m he had passed through his uncle's shamba where he found a briefcase. He reported the matter to his uncle and led him to the briefcase. His uncle reported the matter to the police and he was later called to record a statement. PW 4 was Onesmus Nduva Kieti the uncle to PW3, who confirmed he had been shown the said briefcase and had reported the matter to the police. He had also recorded a statement.

PW5, one Sgt. Sereguta Mutuma, testified that he was seconded to Safaricom Ltd in the fraud department. He testified that he received a request on 3/3/2012 from the investigating officer for a printout data for phone S/No. 354258040221059. He said that the investigating officer wanted to find out the number in use on that phone which was established to be No. 0725458092. Further, he produced a print out of the account of the said phone number. It showed that the number was used in the handset on 9.4.2012 that the phone S/No. 354258040221059 and sim card were used from 10.00 a.m-20.00 hours.

PW6, C.I Dorcas Nyagaa of Matuu Police station traffic department, produced statements made by the two Appellants and produced them in evidence. PW7 was Dr. Rose Jalang'o who testified that she had conducted a post-mortem on the body of Stephen Kithuma on 2.2.12 at Bishop Okoye Funeral Home. She testified that there were bloodstains on the nostrils and temporal borne fracture on the skull. She produced the post-mortem report in evidence.

PW8 was Supt. Mwangi Wanderi was the D.C.I.O Kangundo at the time of the incident. He stated that on 9.3.2012 at about 8.00 a.m. he went to Matuu sub-station where he came across the file of the deceased Pst. Stephen Kithuma had been killed in a robbery incident. Further, that among the documents he recovered was a printout from Safaricom with details of the stolen phone. He contacted Safaricom after realizing that the phone had been used on cell no 0725458092 on 9/2/2012, and that he was able to trace the phone to the 1st Appellant at Mathare where the 1st Appellant was arrested on 9/3/2012.

After interrogation, the 1st Appellant led PW8 to the 2nd Appellant, who on seeing them disappeared through the backdoor of his kiosk. PW8 testified that the 2nd Appellant was later arrested as he boarded a bus to Matuu. PW8 confirmed that the phone S/No. 354258040221059 had been used till 9.2.2012 and he produced the said phone as an exhibit.

The investigating officer P.C. Edwin Metto was PW 9, and he produced the bibles and briefcase in evidence. He also produced the Nokia mobile phone with a sim card, a receipt of purchase of the said phone and a post-mortem report.

At the close of the prosecution's case, the trial court found that the Appellants had a case to answer and complied with section 211 in this respect. Both Appellants gave sworn evidence and did not call any witnesses. The 1st Appellant stated on 27.1.2012 he was carrying out his duties as a water vendor. Further, that on 9.3.2012 he went to work but closed his kiosk because the water ran out. He later went to visit his brother and as he went on an errand he met his arrest. He claimed no knowledge of the offence. He stated that the 2nd Appellant had given him the phone on 9/2/2013 and he did not know where it was from. Further, that he only used it for a day and returned it to the 2nd Appellant.

The 2nd Appellant on his part testified that on 27.1.2012 he went to his duties as a kiosk operator in Nairobi. Later on, he heard that the 1st Appellant had been arrested in connection to a phone. He went to the Pangani police station where he was arrested. He claimed that the phone he had given the 1st Appellant had been sold to him by a person called 'Mrefu' on 15/11/2011, and that the 1st Appellant had used the phone for one month. Further, that the phone found with the 1st Appellant was not the one stolen from the deceased.

We have considered the arguments made by the Appellants and the State. Our duty as the first appellate court is to re-evaluate the evidence and draw independent conclusions as held in **Okeno v Republic (1972) E.A. 32**. However, we are alive to the fact that we do not have the advantages enjoyed by the trial court of seeing and hearing the witnesses, as was observed in **Soki v Republic (2004) 2 KLR** 21 and **Kimeu v/s Republic (2003) 1 KLR 756.**

We find that the grounds of appeal put relied upon by the Appellants raise three main issues for determination. The first is whether the charge against the Appellants was defective; the second is if the 1st and 2nd Appellants were properly charged, whether there was sufficient evidence to convict the said Appellants for the offences of robbery with violence; and the last issue is whether there was non-compliance by the trial Court with section 210 of the Criminal Procedure Code.

On the first issue both Appellants argued that they were convicted on a duplex charge, in that they were charged with three charges of robbery with violence contrary to section 295 as read together with section 296(2) of the Penal Code. They submitted that it was wrong to frame a charge of robbery with violence under the two sections of law, and that there were charged with two offences in one charge sheet under the two sections. They relied on the Court of Appeal decision in **Joseph Njuguna Mwaura and Others vs R, (2013) eKLR** in this respect.

We are minded that the rule against duplicity provides that the prosecution must not allege the commission of two or more offences in a single charge in a charge-sheet. Such a charge is sometimes said to be 'duplex' or 'duplicitous'. The rule stems from two important principles: firstly, as a matter of fairness, a person charged with a criminal offence is entitled to know the crime that they are alleged to have committed, so they can either prepare and present the appropriate defence.

Secondly, the court hearing the charge must also know what is alleged so that it can determine the relevant evidence, consider any possible defences and determine the appropriate punishment in the event of a conviction. We in this regard also note that the law on the framing of charges requires clarity in the charge sheet as stated in various provisions. Section 134 of the Criminal Procedure Code provides that:

> **"Every charge or information shall contain, and shall be 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."**

Section 135 of the said Code in addition provides as follows:

> **"(1) Any offences, whether felonies or misdeanours, may be charged together in the same charge or information if the offences charged are founded on the same facts, or are part of a series of offences of the same or a similar character.**
>
> **(2) Where more than one offence is charged in a charge or information, a description of each offences so charged shall be set out in a separate paragraph of the charge or information called a count.**
>
> **(3) Where, before trial, or at any stage of a trial, the court is of the opinion that a person accused may be embarrassed in his defence by reason of being charged with more than one offence in the same charge or information, or that for any other reason it is desirable to**

direct that the person be tried separately for any one or more offences charged in a charge or information, the court may order a separate trial of any count or counts of that charge or information."

Coming back to the present appeals, we are guided by the decision of a five-judge bench of the Court of Appeal in **Joseph Njuguna Mwaura & 2 Others v Republic [2013] e KLR *(Criminal Appeal No 5 of 2008)*** that explained and laid to rest the reasons why charging an accused person with the offence of robbery with violence under sections 295 and 296(2) of the Penal Code would amount to a duplex charge. The said Court, while following its earlier decisions in ***Simon Materu Munialu V Republic [2007] eKLR (Criminal Appeal 302 of 2005)*** and ***Joseph Onyango Owuor & Cliff Ochieng Oduor v R [2010] eKLR (Criminal Appeal No 353 of 2008),*** stated as follows:

"Indeed, as pointed out in *Joseph Onyango Owuor & Cliff Ochieng Oduor v R (Supra)* the standard form of a charge, contained in the Second Schedule of the Criminal Procedure Code sets out the charge of robbery with violence under one provision of law, and that is section 296. We reiterate what has been stated by this Court in various cases before us: the offence of robbery with violence ought to be charged under section 296 (2) of the Penal Code. This is the section that provides the ingredients of the offence which are either the offender is armed with a dangerous weapon, is in the company of others or if he uses any personal violence to any person.

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."

We agree that this is the correct proposition of the law, particularly as s*ection 296(1) of the Penal Code provides that a person who commits the felony of simple robbery is liable to imprisonment for fourteen years. We are also of the view that this is not a defect that is curable under section 382 of the Criminal Procedure Code, as faced with the charge as framed, as there are two offences disclosed by the charge namely simple robbery and robbery with violence, which offences attract different penalties under the law.*

We are therefore not in a position to evaluate the evidence before the trial court, and to make decision on the legality of the sentence meted out by the trial court for this reason. It is also our position that there was prejudice caused to the Appellants in this regard as it would not have been clear what offence or sentence was applicable to them, and as they were unrepresented during the proceedings in the trial Court.

*It is our considered opinion that t*his ground of appeal alone is sufficient to dispose of this appeal, as it is not prudent in the circumstances to consider the remaining issues which would go into the merits of the findings of the trial court, when we have already found that the proceedings were based on a defective charge.

The only issue that remains to be considered is whether these appeals should be allowed in their entirety or a retrial ordered. The Appellants submitted in this respect that it is not the duty of this Court to rectify the errors made when charging a suspect, and that a retrial would prejudice them because they would not be compensated for the time wasted and the torture of mind caused to them.

The principles governing whether or not a retrial should be ordered were enunciated in **Fatehali Manji v Republic [1966] EA 343** by the East Africa Court of Appeal as follows:

"In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for

> **the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person.**"

In **Mwangi v Republic [1983] KLR 522** the Court of Appeal also held thus:

> **"We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result. In our view, there was evidence on record which might support the conviction of the appellant."**

There was evidence brought during the trial of the Appellants' possession of, and use of the phone handset that was stolen from the deceased person who was killed during the robbery incident that gave rise to this appeal. A retrial is therefore appropriate, despite the illegality in the original trial proceedings having arisen from the shortcomings on the part of the prosecution in the presentation of its case. This Court is in this regard persuaded by the need to balance the interests of both the Appellants and the victims of the offence that was committed.

We therefore allow the 1st and 2nd Appellants' appeals only to the extent of quashing the convictions recorded against the 1st and 2nd Appellants for the offence of robbery with violence under section 296(2) of the Penal Code, and setting aside of the death sentences imposed on them. We however order that the 1st and 2nd Appellants be re-tried, and shall remain in custody and be taken before the Kithimani Principal Magistrate's Court at the earliest possible time to plead to the appropriate charges as shall be elected by prosecution.

It is so ordered.

DATED AT MACHAKOS THIS 23RD DAY OF SEPTEMBER 2015.

P. NYAMWEYA

JUDGE

L. NJUGUNA

JUDGE