REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 170 OF 2011

EPHANTUS KAMAU ..... APPELLANT

VERSUS

REPUBLIC …..... RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 127 OF 2013

SAMMY MULEMI KOECH …..... APPELLANT

VERSUS

REPUBLIC …..... RESPONDENT

(Coram: Hon. Fred A. Ochieng and Hon. G. W. Ngenye – Macharia, JJ.)

(Being an appeal from the original conviction and sentence contained in the Judgment of Hon. A. Alego (Senior Resident Magistrate) in Eldoret Chief Magistrate's Criminal Case No. 5235 of 2010 delivered on 15th August, 2011)

JUDGMENT

The Appellants, Ephantus Kamau and Sammy Mulemi Koech were jointly charged with the offence of robbery with violence contrary to Section 295 as read with Section 296 (2) of the Penal Code.

The particulars of the offence were that on the 15th day of October, 2010 at Huruma Estate in Uasin Gishu District within the Rift Valley Province, jointly with others not before court while armed with dangerous or offensive weapons namely rungus robbed Richard Owino of his motor cycle registration number KMCH 917Y make TVS Star Engine number OF 5H91555776 valued at Kshs. 85,000/= and immediately after the time of such robbery used actual violence on the said Richard Owino.

For purposes of this Judgment, Ephantus Kamau, who was the 1st accused shall be referred to as the 1st Appellant while Sammy Mulemi Koech who was the 2nd accused shall be referred to as the 2nd Appellant.

The Appellants have appealed both against the conviction and the sentence. The 1st Appellant has raised the following grounds of appeal:-

"*1. That the learned Magistrate erred in law and fact by grossly misdirecting herself on the identification of the Appellant amongst a crowd of about 50 members of the public.*

2. That the learned Magistrate erred in law and fact by misdirecting herself on the reliance on the evidence of a single witness without any corroboration.

3. That the learned Magistrate erred in law and fact by failing to consider the entire evidence, evaluating it and drawing a just and fair conclusions.

4. That the learned Magistrate erred in law by concluding that the charges against the Appellant had been proved beyond any reasonable doubt as required by the law.

5. That the learned Magistrate erred in law and fact by failing to consider the evidence of the Appellant.

6. That the learned Magistrate erred in law and fact by failing to consider the Appellant's mitigation before passing the sentence."

The 2nd Appellant on the other hand raised the following grounds of appeal:-

"*1. That the learned trial Magistrate failed in law by convicting on prosecution case in which the substance of the charge and every element thereof was not stated and explained to me as stated in the law.*

2. That the learned trial Magistrate erred in both law and facts by convicting me on prosecution case which was not proved beyond reasonable doubt as required by law.

3. That the learned Magistrate erred in both law and fact by directing herself that I was positively identified before court without considering that dock identification is worthless unless preceeded with or by properly conducted identification parade.

4. That the trial Magistrate erred in law and fact by relying on evidence of single witness without any other independent or supporting evidence.

5. That the trial Magistrate erred in both law and fact by misdirecting herself that I was positively identified without considering the distance of the source of light, observation and if there was anything that impaired the alleged observation."

The appeal was canvassed before us on 27th March, 2014. Both Appellants relied on their own written submissions.

After perusing the grounds of appeal and the Appellants' submissions, we conclude that they raise the following issues for consideration.

(a) Was the charge was defective.

(b) Was the plea was also defective, that is to say, was it taken in a proper manner.

(c) Were the Appellants properly identified.

(d) Did the trial court rely on the evidence of a single identifying witness that was not corroborated.

(e) Was the case proved beyond all reasonable doubts.

DEFECTIVE CHARGE SHEET

The 1st Appellant submitted that the charge was not properly framed. According to him, the charge was framed both under Section 295 and 296 (2) of the Penal Code as opposed only under Section 296 (2) which spells out the ingredients of the offence of a charge of robbery with violence.

In reply, Mr. Mulati submitted that Section 295 defines the offence of robbery. He stated that the charge cannot be rendered defective merely by citing that section alongside Section 296 (2).

Section 295 of the Penal Code defines the offence of simple robbery while Section 296 (2) particularizes the ingredients that aggravates it to robbery with violence. The particularization is qualified by the word '***if***', so that '***if***' the attacker is in the company of another person, or is armed with a dangerous weapon or offensive weapon, or beats, strikes or threatens to use or uses actual personal violence before, during or after the robbery, the offence is aggravated (enhanced) to robbery with violence.

In the case of **JOSEPH ONYANGO OWUOR -VS- REPUBLIC CRIMINAL APPEAL NO. 253 OF 2008 (2010) e KLR**, the Court stated that Section 295 of the Penal Code is merely a definition section and that ***"Section 296 (1) and 296 (2) of the Penal Code deal with specific degrees of the offence of robbery and have been framed as such."***

In **JOSEPH NJUGUNA MWAURA AND OTHERS -VS- REPUBLIC COURT OF APPEAL CRIMINAL APPEAL NO. 5 OF 2008 (2013) e KLR**, the court agreed that this was the correct position of the law. It further however noted that ***"it would not be correct to frame a charge for the offence of robbery with violence under Section 295 and 295 (2) as this would amount to a duplex charge."***

It is our view that the instant case does not present a duplex charge, as it contained only one count, which statement reads as ***"robbery with violence"***. So from the moment the 1st Appellant took the plea, he was seized of the knowledge that he was facing the charge of robbery with violence and not one of simple robbery. Furthermore, the particulars of the charge as spelt out were those of robbery with violence and not simple robbery. Therefore, the charge was not defective.

DEFECTIVE PLEA

It was the 2nd Appellant's submissions that a charge should be read to an accused person in a language he understands and thereafter his reply is recorded.

According to Mr. Mulati, after the charge was read, each of the Appellants replied;

"It is not true."

That implied that they were responding to the statement of the offence as contained in the charge, reasoned Mr. Mulati.

This issue drives us to consider what constitutes the proper procedure of taking a plea.

Section 207 (1), (2) and (3) of the Criminal Procedure Code read as follows:-

*"**207. (1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement;***

(2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:

Provided that after conviction and before passing sentence of making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.

(3) If the accused person does not admit the truth of the charge,

the court shall proceed to hear the case as hereinafter provided."

In effect, if the accused does not admit the truth of the charge, the court ought to record the reply the accused gives, denying the charge and its elements. Thereafter the court enters/records a plea of not guilty and proceeds to give a hearing date.

In the case, the proceedings were recorded as follows:-

"Coram: A. Onginjo – SPM

Prosecutor: I.P Khaemba

Court Clerk: Evelyne

Interpretation: English/Kiswahili

Accused 1 – Not true

Accused 2 – Not true

Court: Plea of not guilty for both

Order: Mention 4.11.10 in remand. Hearing 29/11/10 in Court 4 …."

We then ask ourselves; ***"what were the accused persons pleading to?"***

It is clear that the proper procedure for taking a plea as summarized in Section 207 (1), (2) and (3) and as we have expounded upon, was not followed. It was not enough that the trial court merely entered the reply that was given by the Appellants, without indicating, on the record what they were responding to. The learned Magistrate ought to have indicated on the record that the charge had been read to them and all its elements explained to the accused persons in a language which they understood after which they had responded, '***it is not true***'. That omission was a gross error.

The proper taking of a plea is the genesis and core foundation of a fair trial. It informs an accused person of what he is charged with. It informs him of the elements constituting the charge. Before this information is given to him, he is not in a position to make an informed decision by either affirming or denying the content of the charge.

The fact that the trial court failed to record in the court file that the charge was read and explained to them, vitiated the Appellants' fundamental rights to fair trial as envisaged by Article 50 (2) (b), which is the right ***"to be informed of the charge, with sufficient detail to answer it."*** It is then trite that the trial ought not to have commenced.

We do therefore agree with the 2nd Appellant that the failure by the trial court to inform him of the charge facing him with sufficient details of it, was a violation of his constitutional rights.

Bearing this in mind, we now proceed to consider whether or not a retrial should be ordered. We therefore proceed to consider the principles governing a retrial.

In the case of **EKIMAT -VS- REPUBLIC (2005) 1 KLR, 1982**, the Court of Appeal sitting in

Eldoret held that;

"A retrial should not be ordered unless the court is of the opinion that on a consideration of the admission 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."

And in **OPICHO -VS- REPUBLIC (2009) KLR, 369**, the Court of Appeal sitting in Nakuru held that;

"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 insufficiency of evidence or for purpose of enabling the prosecution to fill 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 a retrial should only be made where the interests of justice require it."

The circumstances under which a retrial should be ordered call for an evaluation of the prosecution's evidence to determine whether the prosecution had or had not led sufficient evidence which could have resulted in a conviction, if the error made by the trial court had not occurred.

We have carefully re-evaluated the evidence on record. Our considered view is that the evidence on record is more probable than not to lead to a conviction.

The Appellants appear to have been arrested at the scene of crime, shortly after the complainant was robbed of his motor-cycle. The assailants crashed after hitting a bump, resulting in damage to the motor-cycle.

Members of the public arrested the assailants, and escorted them, together with the motor-cycle to the police station.

At the time of arrest, it would appear that the complainant did identify both his attackers and the motor-cycle which they stole from him.

We note that the offence the Appellants were charged with is very serious, that is why the penalty under the law is also stiff. The offence was committed in the year 2010, four years down the line. Judgment was delivered on 15th of August, 2011. The Appellants have been in jail for only three years against a death penalty. In this respect, we do not think that any prejudice or injustice will be occasioned to them if a retrial is ordered. Besides, as held in the case of **EKIMAT -VS- REPUBLIC** (Supra), given the seriousness of the offence and the strong evidence on record, the interest of justice would be served through an order for retrial.

In the end, we quash the conviction and set aside the death penalty. We order that both Appellants be escorted by the Officer in charge of Baharini Police Post through the O.C.S, Eldoret Police Station for drafting of a fresh charge. Thereafter, the Appellants will be escorted before the Chief Magistrate's Court in Eldoret for taking of plea not later than the 29th September, 2014. A hearing date shall be allocated on a priority basis and the trial expedited, given that this is a retrial.

It is so ordered.

DATED and **DELIVERED** at **ELDORET** this 25th day of September, 2014.

FRED A. OCHIENG

JUDGE

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

1st Appellant present in person

2nd Appellant present in person

Mr. Mulati for the Respondent