REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO. 24 OF 2010

DANIEL CHACHA MONTAGO ……. APPELLANT

-VERSUS-

REPUBLIC ……. RESPONDENT

JUDGMENT

(Being an Appeal from the original sentence and conviction of the Senior Resident Magistrate Hon. Mr. R. Ndururi at Kehancha in Criminal Case No. 815 of 2009, delivered on 4th February, 2010)

Daniel Chacha Mondago, the appellant was charged before the Senior Resident Magistrate's court at Kehancha with the offence of robbery with violence contrary to section 296 (2) of the **Penal Code**. The allegations made against him were that on 23rd April, 2009 at Ikerege market (Mbamu Mbamu Bar) in Kuria West District within Nyanza Province he jointly with others not before the court whilst armed with swords and metal bars robbed **Hellen Boke** of cash Kshs. 8,000/= and at or immediately before or immediately after the time of such robbery wounded **Joshua Subera** on the left hand and leg. The appellant pleaded not guilty to the charge and he was tried.

Briefly the prosecution's case was that the appellant went to Mbamu Mbamu bar at Ikerege Market owned by **Nyamohanga Monanka Charles** (PW2). As it was being closed at about 10.30p.m. he grabbed Kshs. 8,000/= from **Hellen Boke** who was a bar maid therein and ran away. **Hellen Boke** raised an alarm and **John Swagi Subena** (PW1) who was the manager in the bar went to her assistance. He pursued the appellant albeit unsuccessfully. Nonetheless the appellant returned with two other people, **Marwa Motabu** and **Wandwi Mwita** armed with a metal bar. When PW1 asked him why he had snatched the money from **Hellen Boke**, he hit him with the metal bar. **Marwa Motabu** and **Wandwi Mwita** also assaulted him forcing him to escape into the counter of the bar. In the process he instructed **Hellen Boke** to telephone the owner of the bar, **Nyamohanga Monanka Charles**, (PW2). The appellant and his accomplices then left the bar. The following day, PW1 went for treatment at Kehancha District hospital and also reported the incident at Kehancha Police Station, where he was issued with a P3 form. The same was completed at the same hospital. Meanwhile, the appellant disappeared and was arrested about one month later. PW1 knew the appellant and his accomplices very well as they all came from Ikerege. He also stated that the lights were still on in the bar, and he was therefore able to easily identify the appellant and his cohorts.

Francis Kyalo (PW3) then attached to Kehancha Police Station received from PW1 the complaint with regard to the incident on 24th April, 2009. He issued PW1 with a P3 form which was completed at Kehancha District Hospital and then returned to him. He commenced investigations but later learnt that

Hellen Boke, a Tanzanian citizen had been threatened and had fled back to her country. He was therefore unable to trace her to testify. He subsequently issued an order for the arrest of the appellant to PW1 for execution by Ikerege A. P Camp. One month later, the same was executed, the appellant was arrested and brought to Kehancha Police Station. He was then charged with the offence.

The appellant gave unsworn testimony in his defence and called no witnesses. He stated that he was arrested on 31st May, 2009 at 2.00p.m. He was taken to Ikerege AP Camp, thereafter to Kehancha Police Station and was subsequently charged with the offence.

After careful evaluation of the evidence on record, the learned magistrate was convinced beyond all reasonable doubts that the appellant while armed with an iron bar and in the company of two others, did snatch Kshs. 8,000/= from the said **Hellen Boke** and immediately after the said robbery assaulted PW1 and injured him. In other words, the appellant had committed the offence charged. He proceeded to convict the appellant, whereupon he sentenced him to death in accordance with the law.

The appellant was aggrieved by the conviction and sentence aforesaid. He therefore lodged the instant appeal through **Messrs Nyamori Nyasimi & Co. Advocates**. Seven grounds were advanced in faulting the decision of the learned magistrate to with:-

"1. The said Judgment, conviction and sentence of the appellant was based on a defective charge.

2. The trial magistrate erred in law and fact by relying on evidence which did not support the charge against the appellant to convict him.

3. The trial magistrate's judgment, conviction and sentence of the appellant were (sic) against the weight of evidence on record which was contradictory in material particulars and unreliable.

4. The trial magistrate erred in law and fact by finding the appellant guilty when the prosecution had clearly failed to prove her case against the appellant beyond reasonable doubt.

5. The trial magistrate erred in law and fact by misdirecting himself on material particulars of evidence thereby arriving at a wrong finding.

6. The trial of the appellant was a violation of the appellant's constitutional rights hence null and void.

7. The sentence was manifestly excessive in the circumstances of the case..".

When the appeal came before us for hearing on 19th January, 2011, **Mr. Mutuku**, learned senior principal state counsel conceded to the same on the grounds that the charge was defective, it was unprocedurally amended, complainant never testified and therefore the appellant's conviction rested on hearsay evidence.

Mr. Nyasimi, learned counsel for the appellant concurred with what had fallen from the lips of the learned senior principal state counsel.

This was indeed a sad and unfortunate case where the appellant was convicted and sentenced to death through a faulty trial. He was convicted in the absence of the evidence of the complainant, **Hellen Boke** from whom the money allegedly was stolen and who indeed had not even lodged a complaint over the incident with the police. PW1 who claimed to be the complainant was really not the proper complainant as no money was stolen from him. He merely complained as a proxy for **Hellen Boke**. However there is no place in our criminal justice system for a proxy complainant. Had the case been one of assault causing actual bodily harm contrary to section 251 of the **Penal Code** as previously charged, then and only then would PW1 have been the proper complainant. Of course we are aware that in a robbery with violence charge, the prosecution must prove any of the following as against the offender;- that he

- Was armed with dangerous or offensive weapon or instrument; or

- Was in the company of one or more other person or persons; or

- If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence ***to any person*** (emphasis ours).

None of the above ingredients were met in the circumstances of this case. When he snatched the money, the appellant was alone and was unarmed nor did he visit any violence to anybody. It was only when he came around for the second time that he was in the company of others then he visited violence on PW1. By then the act of stealing was complete. Had **Hellen Boke** been the complainant then the violence visited upon PW1 in the process would perhaps have formed one of the ingredients of violence as he would have been any person upon whom violence was visited upon during the robbery. However **Hellen Boke** did not complain.

Besides the foregoing, the learned magistrate during the trial committed a litany of procedural irregularities and omissions. First and foremost, the charge was defective. The particulars of the charge indicates two complainants which is not permissible. It is irregular to have two complainants in one count. The particulars in the charge sheet refer to **Hellen Boke** having lost Kshs. 8,000/= to the robbers and **Joshua Subena** being wounded on the left hand and leg respectively in the process. Each of the two complainants should have had their separate charges preferred against the appellant. The charge was thus duplex. It is a requirement of law and practice that a charge should not suffer from duplicity; that is to say, no one count of the indictment should charge the prisoner with having committed two or more separate offences. See **Archbold J. F pleadings, Evidence and practice in criminal cases, 5th Edition, 1962 at page 53**. Yet this is what happened here!

Further the charge sheet was unprocedurally amended twice, that is on 15th September, 2009 and 14th December, 2009. The 1st amendment aforesaid was after PW1 had testified and stood down. The amendment was to prefer the instant capital charge. However when PW1 was recalled he continued with his evidence from where he had left instead of starting ***denovo***. The 2nd amendment was with regard to the date when the offence was committed.

All these amendments were carried out in violation of the mandatory provisions of section 214 of the **Criminal Procedure Code**. It is not in doubt that the trial court has power or jurisdiction to order an amendment to the charge sheet at any stage of trial before the close of the prosecution case. Where that happens, the trial court is under duty or obligation to call upon the accused to plead to the altered charge, and to permit the accused, if he so requests, to re-examine and recall witnesses. It is a mandatory requirement that the trial court must not only comply with, but it shall record that it has so complied. The record must show that following the amendment or alteration of the charge sheet, the court explained to the accused his right to recall and or re-examine the witnesses who had testified or to have the case start ***denovo***. See **Yongo –vs- Republic (1983) KLR 319**. Unfortunately, in this case, though the magistrate recorded that he had complied with section 214 of the **Criminal Procedure Code** and that the amended charge sheet was read to the appellant, he did not record that the requirement under the second proviso, namely the appellant's right to recall the witnesses, was also complied with.

Indeed all that happened is that PW1 merely resumed his testimony from where he had left before he was stood down. This is a case where the court should have informed the appellant of his right to have the witness testify ***Denovo*** in view of the amendment enhancing the charge from the initial one of stealing from a person and assault causing actual bodily harm to robbery with violence. We cannot say that this failure to observe the mandatory provisions of law did not occasion prejudice to the appellant in the circumstances of the case.

In the upshot, we are of the view that the learned state counsel was right in conceding to the appeal on those grounds. The appeal is therefore allowed, conviction quashed and sentence imposed set aside. The appellant shall forthwith be set at liberty unless otherwise lawfully held.

Judgment dated, signed and **delivered** at Kisii this 7th day of March, 2011.

ASIKE-MAKHANDIA
JUDGE

RUTH NEKOYE SITATI
JUDGE