REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

CRIMINAL APPEAL NO. 33 OF 2020

SIMON MACHARIA WAMBUI A*lias* **MACHAA A***lias*

RICHARD MAINA MAKARI..APPELLANT

VERSUS

REPUBLIC..RESPONDENT

*(Being an appeal against conviction passed by Hon E. Michieka, Principal Magistrate at Mavoko Law Courts in **Criminal Case 400 of 2016** vide judgement delivered on 21.2.2020 and sentence passed on 7.5.2020 by Hon B. Kasavuli PM)*

BETWEEN

REPUBLIC..PROSECUTOR

VERSUS

RICHARD MAINA MAKARI.. ACCUSED

JUDGEMENT

1. This is an appeal that was lodged herein on **23.8.2018** by the Appellant, **SIMON MACHARIA WAMBUI** alias **MACHAA** alias **RICHARD MAINA MAKARI**, against the conviction and sentence imposed by the Senior Principal Magistrate, **Hon. E. Michieka**, in Mavoko Senior Principal Magistrate's **Criminal Case No. 400 of 2016**. The Appellant in the trial court faced four counts. In respect of the 1st count, he had been charged with the offence of Robbery with violence contrary to section 296(2) of the Penal Code. It was alleged that the appellant on the 25th day of May 2016 at Horizon Cargo premises in Athi River Sub-county, Machakos County jointly with others not before court while armed with dangerous weapons namely pangas, knives, Rungus and bolt cutters 30 inch robbed **Lukes Wakhisi Wekhanya** of two fire extinguishers, serial numbers CE 1266 and CE 0062, one 12 Kg gas cylinder serial number 001763 and one printer copy machine make HP Serial Number CNJ8F3YK9X all valued at Kshs 35,000/- and at the time of such robbery used actual violence to the said **Lukes Wakhisi Wekhanya.**

2. In respect of the 2nd count he faced the charge of robbery with violence contrary to section 296(2) of the Penal Code. It was alleged that the appellant on the 25th day of May 2016 at Horizon Cargo premises in Athi River Sub-county, Machakos County jointly with others not before court while armed with dangerous weapons namely pangas, knives, Rungus and bolt cutters 30 inch robbed **Kelly Muriithi** of cash Kshs 2,000/- and immediately before the time of such robbery assaulted the said **Kelly Muriithi**.

3. In respect of the 3rd count, he faced the charge of willingly and unlawfully giving false information on 26.5.2016 to No 99501 PC George Karanja at Divisional Criminal Investigations Office in Athi River sub-county within Machakos County that his name was Simon Macharia Wambui alias Machaa, a fact he knew to be false.

4. In respect of the 4th count, he faced the charge of being in possession of an identity card belonging to another person contrary to section 14(1) of the Registration of Persons Act CAP 107 Laws of Kenya. It was alleged that the appellant on the 25th May, 2016 at Horizon Cargo premises in Athi River Sub-County within Machakos County was found in possession of an identity card S/No [….], ID No [….] in the names of **Tirkolo Parsaloi**.

5. The Appellant, having denied the allegations against him before the lower court, was taken through the trial process and a judgment was

subsequently rendered by the learned trial magistrate on 21.2.2020**.** The Appellant was found guilty in respect of all the four counts and was convicted thereof. He was sentenced to serve 20 years' imprisonment in respect of each of the 1st and 2nd counts. In respect of count 3 and 4 he was sentenced to serve 6 months' imprisonment each. The sentences were to run concurrently. Being aggrieved by his conviction and sentence, the Appellant, preferred this appeal that challenged the decision of the trial court on the following grounds and as supplemented:

> ***a) The prosecution case against the appellant was not proved beyond any reasonable doubt;***
>
> ***b) His conviction on 4 counts was erroneous and invalid;***
>
> ***c) That the charge of robbery with violence was a defective charge hence he deserved an acquittal as he was erroneously charged;***
>
> ***d) That the appellant's defence of alibi was dismissed.***
>
> **e)** ***That the period spent in remand was not considered under section 333(2) of the Criminal Procedure Code*****.**
>
> ***f) That he was not accorded the right to recall witnesses.***

6. Accordingly, the Appellant prayed that appeal do succeed in its entirety.

7. In his written submissions, the appellant submitted that he was not properly identified as the perpetrator of the offence of robbery. The appellant placed reliance on the case of **Karanja & Others v R (2004) 2 KLR 140**. According to the appellant, no exhibit was found in his possession. Reliance was placed on the case of **Mwangi v R (1974) EA 105**. It was pointed out that the trial magistrate continued taking the evidence of Pw7 and Pw8 in the absence of the appellant hence he did not have the opportunity to cross examine the investigating officer. It was submitted that the charge sheet had a duplex charge as it indicated that the appellant was charged under section 295 and 296(2) of the Penal code. Reliance was placed on the case of **Simon Materu Munialo v R (2007) eKLR** and **Jason Akumu Yongo v R (1983) eKLR.** The appellant urged the court to hold that the charge sheet was defective. The appellant took issue with the trial magistrate's disbelief in the employment letter that the appellant tendered as Dexh 1 that was indicative that he was an employee of ESL Limited. It was his argument that his arrest was based on circumstantial evidence. The appellant assailed the trial magistrate for hearing the evidence of Pw7 (the doctor) and Pw8 (the investigating officer) in the absence of the appellant who did not have an opportunity to cross examine the said witnesses. It was pointed out that the charge sheet had 3 counts and not 4 and yet the appellant was convicted of 4 counts. The appellant urged the court to set him at liberty.

8. The appeal was opposed by the State. Counsel submitted that the appellant's conviction was proper as the testimony if Pw1 and Pw4 placed the appellant at the scene of crime; that the doctrine of recent possession applied to the appellant as he was arrested with stolen items from the complainant hence he was part of the gang that was involved in the robbery.

9. It was submitted that the sentence meted on the appellant was appropriate and the court was urged to uphold the conviction and sentence.

10. I have given careful consideration to the appeal and taken into account the written submissions made herein. I am mindful that, in a first appeal such as this, the court is under obligation to reconsider the evidence adduced before the lower court and come to its own conclusions thereon. In **Okeno v Republic [1972] EA 32,** the Court of Appeal for East Africa expressed this principle thus:

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses..."***

11. The prosecution called a total of 9 witnesses before the lower court in proof of the particulars of the charges in respect of the names of the appellant as substituted on 8.9.2016 without any objection from the appellant. **PW1, Wekhanya Nakisi,** a former guard at Horizon Cargo testified that on 25.5.2016, while at work at 11.40 pm he heard a dog barking then he saw six people armed with pangas, clubs, knives and a metal cutter. He recalled how the gang of six entered the compound, slapped him and tied his legs and hands, and then located and brought his co-worker called Muriithi then they cut padlocks. He testified that the gang removed two fire extinguishers, gas cylinder, printer and photocopy machine. However, after a co-worker set off the alarm, the gang fled. He recounted how he was able to see the appellant as one of the gang members and the one who broke his arrows. He was able to identify to the court the broken arrow, the cutter, the cut padlock, the stolen fire extinguisher, the photocopying machine and the gas cylinder. He told the court that the appellant did not assault him. On cross examination, he testified that the appellant was the one who tied him up and on reexamination, he told the court that the attack took about five minutes.

12. **Pw2, Joseph Mongela** told the court that on the material day he was alerted by an alarm at the scene of the robbery. He told the court that he rushed to the scene where he found the police as well as a printer machine in a trench. He testified that there was an ID card in the names of Tikolo that was recovered from the appellant and further that a guard called Mureithi had been hit on the waist. He was able to identify to court the broken padlocks, a gas cylinder and 2 fire extinguishers that he had seen at the scene. On cross examination, he testified that on the material day he arrived when the appellant had been arrested away from the crime scene and that the exhibits were found beside him.

13. **Pw3**, **Robert Mugeni** told the court that on 26.5.2016 he was informed by Mureithi, a driver that he had been attacked and injured and

that one of the attackers had been caught. He told the court that he went to the scene where he noted that there was a missing printer and a fire extinguisher as well as a gas cylinder that he was able to identify. On cross examination, he told the court that he managed Horizon Cargo but however he did not witness the robbery.

14. **Pw4, Muriithi** told the court that he was a driver and that he informed Pw3, his boss of an attack. He recalled that on the material day, he was in a car at the scene when one of a gang of five people ordered him out of the car and hit him with a bold cutter then they tied his hands. He testified that one of the gang members took Kshs 2,000/- from his pocket and, later he noted that the gang had run away. It was his testimony that he was injured and that he went to Shalom Hospital where he was treated and issued with a P3 form as well as a treatment note. On cross examination, he testified that an ID written Tikolo was recovered from the appellant. He testified that he was woken from his sleep when he was in the car and that the appellant was one of the persons who tied him. He also recalled that the appellant was arrested at Wambimbi Inn.

15. **Pw5, Pc Danwin Mureithi** attached to SGA testified that on 25.5.2016 he was at work when he was alerted of an alarm at Horizon in Athi River. He recalled shooting in the air and he approached a trench that was about 30 metres from Horizon Cargo where he found the appellant lying down with his hands up; that beside him was a knife, a bolt cutter. He testified that the appellant claimed that his name was Simon Macharia; that an ID with a name Tikolo Parsoloi was recovered from him. He told the court that there was a fire extinguisher and a gas cylinder as well as two padlocks that was found outside.

16. **Pw6, Robert Mutai** of SGA testified that he was in a standby vehicle on the material day when he was alerted by an alarm and so he rushed to the scene. He told the court that he was driven to Horizon Cargo where he was informed that there were thieves who had entered a trench and he approached the trench where he found the appellant who had a knife and a bolt cutter near him. He testified that he noted that there was a fence that had been cut twice and that there were broken padlocks as well as two fire extinguishers near the fence. He told the court that there was a printer outside as well as a gas cylinder. On cross examination, he testified that the appellant was found in a bush hiding and that the items recovered were recorded in the OB.

17. On 21.1.2019, it appeared from the court record that the court was on transfer and that the appellant was informed of his rights under section 200 of the CPC. He elected that the case was to start denovo but however the prosecution objected as the matter was an old one; some of the witnesses could not be located and that the court was urged to let the matter proceed from where it had stopped. On 11.2.2019, the appellant sought that the matter do start de novo but however the prosecution objected to the same as to them, the appellant would suffer no prejudice. The court directed that the matter was to proceed from where it had stopped and a hearing date was given as 26.3.2019.

18. The evidence of the remaining witnesses was taken by Hon E, Michieka on 2.7.2019 in which the appellant was present. **Winnie Musembi** a clinical officer at Athi River Clinic testified of an examination that was conducted on Keli Ireri Muriithi on 9.6.2016 who had a history of assault using fists and a rungu. It was testified that the victim was seen 13 days after the assault and a P3 form was filled and tendered as Exh 11(b). The appellant did not cross examine the witness.

19. **Pc George Karanja,** the investigating officer testified that a report of robbery had been made by Robert Njagi. He told the court that he proceeded to the scene and found that there were three containers that were used as an office and which had been broken into; he told the court that he found a HP Printer Serial No CWJ8F3YK9X that had been stolen. It was his testimony that fire extinguishers and a 12 kg gas cylinder had been stolen from the containers; that the gas cylinder and fire extinguishers were outside the container. He told the court that at the police station, the arresting officer handed to him two broken arrows (Exh 1), two padlocks (Exh 4a-b), one knife (Exh5), two wires (Exh 2), mobile phone ITEL IMEI No 357259073243983 (Exh 12), ID card Serial No [….] ID NO. [….] belonging to Tikolo (Exh 9). It was his testimony that the appellant when recording his statement stated that his name was Samuel Macharia Wambui; that his ID number was 23325225 and phone number 0732737008. He testified that the said phone number was registered under the name Peter Njoka and that the ID number and the one used to register the line did not tally. He told the court that he wrote to the registrar of persons and a report was prepared wherein it was pointed out that the ID number given by the appellant did not bear the photograph of the appellant. It was his testimony that the appellant's fingerprints were taken and it was discovered that his name was Richard Maina Makali of ID [….] and that the photograph that appeared was his. The witness told the court that the appellant was charged with the offence of giving false information and being in possession of an ID that did not belong to him. Tendered in court as exhibits were 2 broken arrows (Exh 1), 2 padlocks (Exh 4a-b), 1 knife (Exh5), 2 wires (Exh 2), mobile phone ITEL IMEI No 357259073243983 (Exh 12), ID card Serial No [….] ID NO. [….] belonging to Tikolo (Exh 9). Also tendered in court was a printer (Exh 7), Gas cylinder (Exh 8) The Certificate of incorporation plus CR 12 of Horizon Cargo (Exh10), P3 form (Exh11), report from the registrar of persons (Exh 13) and the fingerprint imprint (Exh14). There was no cross examination from the appellant. After the close of the prosecution case, the appellant applied that Pw7 and Pw8 be recalled but however the request was declined. The court found that a *primafacie* case had been established against the appellant and who was put on his defence.

20. In his defence, the appellant gave sworn evidence that on 25.5.2016 he was on night duty and at 11 pm he heard people screaming in the neighbouring premises hence he went to investigate only to hear gunshots forcing him to hide in a bush. He told the court that he was accused of being a robber and was taken to Athi River Police station and charged. He denied commission of the offence and tendered in court his letter of employment dated 2.5.2016 that was marked for identification as DMFI 1. On cross examination, he testified that he hid in the bush when he heard gunshots for fear of his life and he told the court that nothing was recovered from him.

21. The trial court found that Pw1 and Pw4 were able to identify the gang. The court found that Pw4 was assaulted; that Pw1 to Pw6 identified the appellant; that he was arrested at the scene after the robbery and was in possession of recently stolen property and was identified by Pw1 as one of the robbers and therefore his identification was proper. The trial court found that the ingredients of the 1st, 2nd, 3rd and 4th counts were proven and found the appellant guilty as charged. It was this decision that prompted the instant appeal.

22. From the foregoing summary of the evidence adduced before the lower court, the pertinent questions to pose in this appeal, grounded on the Appellant's grounds of appeal are:

> ***[a]*** *Whether sufficient evidence was adduced before the lower court to prove the ingredients of the offence of robbery with violence to the requisite standard;*

[b] Whether the trial court went into error in failing to consider the appellant's defence.

[c] Whether there were procedural infractions in the trial regarding the propriety of the charge sheet, the refusal to allow recall of witnesses as sought by the appellant and whether the same could vitiate the trial.

[d] Whether the time spent in remand was considered and what orders may the court make.

23. Having looked at the provisions of section 295 as read with section 296(2) of the Penal code, it can be elicited that in a case of robbery with violence, the prosecution must prove beyond reasonable doubt that:

(i) There was theft of property;

(ii) There was violence involved;

(iii) There was a threat to use a deadly weapon or actual use of it; and

(iv) *The appellant took part in the robbery*.

24. I shall address myself to the elements of the offence in performing the duty of the 1st appellate court. As to whether there was theft of property, there is evidence of Pw1, Pw2, Pw4, Pw5, Pw6 and Pw8 that several items went missing on account of a robbery that was reported to have occurred on 25.5.2016. I have not seen an inventory of the lost items but however the evidence of Pw1, Pw2, Pw4, Pw5, Pw6 as well as the exhibits that were tendered by the investigating officer who testified as Pw8 prove the element of asportation of property from one location to another. In these circumstances, I find as a fact that the prosecution has proved beyond reasonable doubt that theft was committed on 25.5.2016 to the prejudice of Horizon Cargo.

25. As to whether or not there was violence, Pw1 testified that he was involved in a struggle with the appellant who tied him up; Pw4 told the court that he was also a victim of violence and the P3 form as well as the evidence of Pw4 speak to this element. There is no evidence of injuries sustained by Pw1 but there is evidence that he was distressed and fearful; on the part of Pw4, there is evidence of injuries classified as harm in the P3 form dated 9.6.2016 that was tendered without any objection on the part of the appellant. It is my considered opinion that there were acts of the appellant and his gang members upon Pw1 and Pw4 that amounted to violence within the meaning of section 295 of the Penal Code and I see no reason to disbelieve Pw1 and Pw4's evidence. I am satisfied that they told the court the truth. I find that the second ingredient of the offence has been proved beyond reasonable doubt.

26. This leads me to the issue of whether or not there was use of an offensive weapon or a threat to use it. A deadly weapon is defined in section 89 (4) of the Penal Code as any article made or adapted for use for causing injury to the person, or intended by the person having it in his possession or under his control for such use. From the prosecution evidence, the exhibits tendered in court speak to the use of offensive weapons. In addition, the evidence of the nature of damage that was occasioned at the scene for example the broken padlocks and the cut fence are sufficient proof that the assailants were armed. From the prosecution evidence, there is no proof of injury occasioned on Pw1, however there is proof of injury on Pw4. In this regard, I find that this ingredient of the offence has not been proved beyond reasonable doubt in respect of Pw1 but has been proven in respect of Pw4.

27. As to whether the appellant took part in the robbery, the whole issue hinges on the question of identification made by Pw1 and Pw4 as well as the circumstantial evidence of Pw2, Pw3, Pw5, Pw6 and Pw8.

28. I will start with direct identification evidence as contained in the testimony of Pw1 and Pw4. Pw1 and Pw4 saw the appellant on the material night. Their evidence brings into focus the issue of visual identification. In determining the correctness of visual identification, I have taken into account the following factors:

(i) The length of time the appellant was under observation;

(ii) The distance between Pw1 and Pw4 and the appellant;

(iii) The lighting conditions at the time; and

(iv) The familiarity of Pw1 and Pw4 with the appellant.

29. **In Donald Atemia Sipendi v R (2019) eKLR** where Justice Mativo observed that in evaluating the accuracy of identification testimony, the court should also consider such factors as:-

a) *What were the lighting conditions under which the witness made his/her observation?*

b) What was the distance between the witness and the perpetrator?

c) Did the witness have an unobstructed view of the perpetrator?

d) Did the witness have an opportunity to see and remember the facial features, body size, hair, skin, color, and clothing of the perpetrator?

e) For what period of time did the witness actually observe the perpetrator?

f) During that time, in what direction were the witness and the perpetrator facing, and where was the witness's attention directed?

g) Did the witness have a particular reason to look at and remember the perpetrator?

h) Did the perpetrator have distinctive features that a witness would be likely to notice and remember?

i) Did the witness have an opportunity to give a description of the perpetrator? If so, to what extent did it match or not match the accused, as the court finds the accused's appearance to have been on the day in question?

j) What was the mental, physical, and emotional state of the witness before, during, and after the observation?

k) To what extent, if any, did that condition affect the witness's ability to observe and accurately remember the perpetrator?

30. As regards the length of time the appellant was under observation, I find it was more than a fleeting glance. Pw1 told the court that he saw the appellant face to face when he was tying him up; Pw4 told the court that the appellant was the one who tied him up while his companions hit him on the face with a bolt cutter and both witnesses state that there was a struggle between them and the appellant and this is enough time for Pw1 and Pw4 to have noticed the appellant as their attacker. As for the distance between them, they were close enough when they were engaged in a struggle. As to the familiarity of Pw1 and Pw4 with the appellant, there was nothing. The appellant told the court nothing that was of assistance to controvert the evidence of the prosecution witnesses. He imputed that he was startled by the gunshots and he went into hiding then he found himself being arrested for robbery. In my view, his evidence did not dislodge that of the prosecution as there was identification made under favourable conditions. The appellant admitted being at the scene but denied having committed the robbery; I am of the view that Pw1 and Pw4 had no doubt in the identity of the appellant as the person who robbed their employer's properties. Their identification of the appellant was thus not in error. Further, the appellant was found hiding in a bush nearby and that next to him were some of the stolen items as well as the weapons. He was thus arrested at the scene of crime and was therefore one of the robbers.

31. The appellant in his evidence did not raise the defence of alibi but has now assailed the trial magistrate for dismissing his defence. The law on alibi is now well settled. It is that a person who puts forward an alibi as an answer to a charge does not assume any burden of proving it. The burden remains on the prosecution to disprove it. If evidence adduced in support of an alibi raises a reasonable doubt as to the guilt of an accused person it is sufficient to secure an acquittal. (see **Leonard Aniseth v. Republic (1963) EA 206**).

32. In the case of **Wazir Singh & Another v R (1939) 6 EACA 145,** the court of Appeal for East Africa observed that " *if a person is accused of anything and he had a defence of alibi, he should bring forward the alibi as soon as he can because firstly, if he does not bring it forward until months afterwards, there is naturally a doubt as to whether he has not been preparing it in the interval and secondly if he brings it forward at the earliest possible moment it will give the prosecution opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped*". According to the evidence as per the record of the trial court, the appellant did not set up the defence of alibi and only told the court that he hid in a bush after hearing gunshots then he was arrested. I wonder why the appellant during the trial did not set up the defence of alibi and in an attempt to have a second bite at the cherry pops up the said defence at the appeal stage and claims that it was not considered. This is made rather late in the day and is not of any use to the appellant since the opportunity to test and interrogate such an alibi is not available as it was not presented to the trial court for consideration. The trial court duly considered the appellant's evidence and found that it did not shake that of the prosecution. Hence, the appellant's ground that his defence was dismissed must fail.

33. In the instant case, if for arguments sake I were to consider the defence of alibi, I find that the same would not absolve the appellant of culpability. The prosecution adduced evidence proving that the appellant was among the robbers and the perpetrator of the unlawful actions. In this case, the prosecution's evidence largely rests on the accounts of Pw1 and Pw4 that placed the appellant at the scene of the crime. The appellant even admitted being at the scene. I have examined closely the identification evidence of Pw1 and Pw4 and the circumstantial evidence of Pw2, Pw3, Pw5 and Pw6 and found it to be free from the possibility of mistake or error and therefore I reject the appellant's claim to a defence of alibi. I am satisfied that there was cogent and consistent evidence which proved that the appellant was one of the robbers and who was placed at the scene of crime.

34. The appellant has challenged the charge sheet for being defective. Section 134 of the Criminal Procedure Code provides as follows: -

> ***"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."***

35. According to the appellant, the defectiveness was that he was charged under the section that provides for the elements of robbery with violence and yet there is another section that provides for the offence of robbery (Section 295) that was not included in the charge sheet. I see no reason to agree with the appellant that the charge sheet was defective because when I look at the charge sheet i find that it set out the elements of the offence; the evidence on record was substantively in tandem with what was indicated in the charge sheet and as a result the court was able to make a finding that the appellant had a case to answer. The appellant was present during trial, heard all the evidence against him and thereafter tendered his defence evidence and in my view there was no defect in the charge sheet as to go to the merits of the case or as to vitiate the trial. I find that the appellant suffered no prejudice at all.

36. The appellant has challenged the dismissal of his quest to have the matter start denovo after the trial magistrate went on transfer. Section 200 of the CPC provides in material part that:

"*200. (1) Subject to sub-section (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may-*

(a) deliver a judgment that has been written and signed but not delivered by his predecessor; or

(b) where judgment has not been written and signed by predecessor, act on the evidence recorded by that predecessor, or re-summon the witnesses and recommence the trial.

(2) …..

(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and re-heard and the succeeding magistrate shall inform the accused person of that right.

(4) ….."

37. The Court of Appeal at Nakuru in **Peter Karobia Ndegwa v Republic[1985] eKLR** rendered itself on section 200 as follows:

"*Section 200 is not to be invoked where, as seemingly in the instant case, such a half-heard trial is a short one, it could be conveniently started de novo because the prosecution witnesses are still available locally, and passage of time when the trial first commenced and another magistrate taking over almost midway, is so short so as not to cause or produce any accountable loss of memory on their part, whether actual, presumed or pretended, to the prejudice of either the prosecution or the accused.*

No rule of natural justice, no rule of statutory protection, no rule of evidence, and no rule of common sense is to be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject. He is the most sacrosanct individual in the system of our legal administration.

It could be also argued that the statutory and time honoured formula that the trial magistrate being the best person to do so, he should himself see, hear, assess and gauge the demeanour and credibility of witnesses. It has been and will be so in the other cases that will follow. In this case, however, the second magistrate did not himself see and hear all the prosecution witnesses even though he said that he carefully "observed" the evidence given by the prosecution witnesses. He therefore was not in a position to assess the personal credibility and demeanour of all the witnesses in the case. A fatal vacuum in this case, in our opinion. The succeeding magistrate was as helpful as he could possible make himself. He acted in an attempt to dispatch justice speedily. We appreciate his motive very much. The sweetness of justice lies in the swift conclusion of litigation."

38. In the case of **Abdi Adam Mohammed v Republic [2017] eKLR** the court held that:

"*It must, however be remembered that it is the demand by the accused persons to re-summon witnesses, in circumstances that make such demands impossible to grant, particularly in situations where the witnesses cannot be traced or are confirmed dead that has been the single-most challenge to trial courts. To ameliorate this, some of the considerations developed through practice to be borne in mind before invoking Section 200 include, whether it is convenient to commence the trial de novo, how far has the trial reached, availability of witnesses who had already testified, possible loss of memory by the witnesses, the time that had lapsed since the commencement of the trial and the prejudice likely to be suffered by either the prosecution or the accused. See Joseph Kamau Gichuki v. R CR. Appeal No. 523 of 2010, cited in Nyabutu & Another v. R, (2009) KLR 409, where the Court stressed that;*

"*By dint of section 200(1) (b) of the Criminal Procedure Code a succeeding judge may act on the evidence recorded wholly by his predecessor. However, Section 200 aforesaid is a provision of the law which is to be used very sparingly and only in cases where the exigencies of the circumstances, not only are likely but will defeat the ends of justice if a succeeding judge does not, or is not allowed to adopt and continue a criminal trial started by a predecessor owing to the latter becoming unavailable to complete the trial. See Ndegwa v. R. (1985) KLR 535. In this case the trial judge passed on after having fully recorded evidence from 7 witnesses and from the two appellants and had in fact summed up to the assessors. The trial, moreover, was not a short one but a protracted one which had taken over five years to conclude. The passage of time militated against the trial being started de novo. Though prosecution witnesses might have been available locally, re-hearing might have prejudiced the prosecution, and possibly also, the appellant because of accountable loss of memory on the part of either the prosecution witnesses or the appellants. Musinga, J. in our view acted in an attempt to dispatch justice speedily and cannot be faulted because the law permitted him to do so. It cannot be lost in mind that public policy demands that justice be swiftly concluded*."

37. It is desirable that in any good system of administration of justice there is a concept that the 'one who decides must hear', meaning thereby that one and the same person must hear and decide, and that hearing and deciding functions should not be bifurcated. That a person who hears must decide and that divided responsibility is destructive of the concept of a fair hearing. If one person hears and another decides like in this present case, then personal hearing becomes an empty formality. See **Automotive Tyre Manufacturers Association v designated Authority [2011] 2 SCC 258(paras 83 and 84).**

38. Section 200(4) of the Criminal Procedure Code Act provides that "***Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial***."

39. In this regard, I have considered **Section 200 of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*** and the grounds

stated by the prosecution to deny recall of witnesses being that of availability of the witnesses as well as the conduct of the appellant during the trial. I see no prejudice that the appellant suffered in not being granted a denovo hearing. In addition, I note his dishonesty in alleging that the evidence of Pw7 and Pw8 were taken in his absence yet the record speaks to the fact that he was present during the trial and he refused to cross examine the said witnesses only to emerge at the stage of appeal and purport to challenge the taking of Pw7 and Pw8's evidence.

40. In view of the foregoing analysis I find that there is no merit on the grounds of procedural infractions that have been raised by the appellant. I therefore find that the conviction arrived at by the learned trial magistrate was safe and I see no reason to interfere with it.

41. With regard to sentence, I agree that section 333(2) of the Criminal Procedure Code obligates the court to take into account the time that the appellant spent in custody. His sentence ought to run from the date of his arrest.

42. Section 296(2) provides for a death sentence, however I shall not delve into the issue of sentence in view of my finding that proof of the element of use of violence was lacking in the prosecution case in respect of the first complainant on count one. I shall have recourse to section 179 of the Criminal Procedure Code Act. According to section 179 of *The Criminal Procedure Code,* when a person is charged with an offence and facts are proved which reduce it to a minor cognate offence, he or she may be convicted of the minor offence although he or she was not charged with it (see **Paipai Aribu v. Uganda [1964] 1 EA 524 and Republic v. Cheya and another [1973] 1 EA 500**). The minor offence sought to be entered must belong to the same category with the major offence. The considerations of what constitutes a minor and cognate offence were set out in **Ali Mohamed Hassani Mpanda v. Republic [1963] 1 EA 294**, where the appellant was charged together with others with obstructing police officers in the due execution of their duty contrary to s. 243 (b) of *The Penal Code Act.* The magistrate found the appellant not guilty of the offence charged but convicted him of the minor offence of assault occasioning actual bodily harm, contrary to s.241 of *The Penal Code Act*. On appeal it was considered whether the magistrate had power to substitute a conviction of the lesser offence and whether that offence must be cognate with the major offence charged. The High Court of Tanganyika held that;

> "***s. 181 of The Criminal Procedure Code (similar to section 179 of The Criminal Procedure Code) can only be applied where the minor offence is arrived at by a process of subtraction from the major charge, and where the circumstance embodied in the major charge necessarily and according to the definition of the offence imputed by that charge constitute the minor offence also, and further where the major charge gave the accused notice of all the circumstances going to constitute the minor offence of which the accused is to be convicted***."

43. Section 179 of the Criminal Procedure Code envisages a process of subtraction: the court considers all the essential ingredients of the offence charged, finds one or more not to have been proved, finds that the remaining ingredients include all the essential ingredients of a minor, cognate, offence and may then, in its discretion, convict of that offence. In the instant case, the only distinction between the offence of Robbery with violence c/s 295 as read with section 296(2) of *The Penal Code* and Robbery c/s 295 as read with section 296(1) of *The Penal Code,* is that the former requires proof of being armed with a dangerous weapon whereas the latter does not. Therefore, by a process of subtraction, the offence of Robbery c/s 295 as read with section 296(1) of *The Penal Code* is minor and cognate to that of Robbery with violence c/s c/s 295 as read with section 296(2) of *The Penal Code,* and that a person charged with the latter offence and facts are proved which reduce it to the former, he or she may be convicted of the minor offence although he or she was not charged with it. The circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by that charge constitute the minor offence also. The charge under section 295 as read with section 296(2) of *The Penal Code* gave the appellant notice of all the circumstances going to constitute the offence under section c/s 295 as read with section 296(1) for which I so convict the appellant in respect of count 1.

44. I have discounted the offence of Robbery with violence c/s 295 as read with section 296(2) of *The Penal Code,* only because of absence of a medical report to aid in classifying the weapon that was used and had the trial magistrate properly directed himself, he would have come to the same conclusion.

45. The upshot is that the appeal partly succeeds though not hinged entirely on the grounds raised by the appellant; the judgement and conviction of the trial court in respect of count 1 is quashed and the sentence is set aside. I substitute the same with a conviction for the offence of Robbery c/s 295 as read with section 296(1) of the Penal code and a sentence of 14 years' imprisonment imposed upon the appellant which commences from the date of arrest namely 26.5.2016.

46. The conviction and sentence in respect of count 2 is upheld. For the avoidance of doubt, the 20-year sentence is found not to be excessive since the trial magistrate duly took into account the appellant's mitigation and which shall run from the date of arrest of the appellant namely 26.5.2016.

47. The sentences in counts 1 and 2 as analyzed above shall run concurrently and shall commence from the date of arrest namely 26.5.2016.

48. The conviction and sentence in respect of counts 3 and 4 are upheld as there is undisputed evidence that the appellant was found in possession of an ID in the names of Tikolo and it is undisputed that he gave his names to the police as Simon Macharia Wambui whereas the evidence of Pw8 speak to his true identity. In addition, the appeal against the convictions and sentence have already been overtaken by events as the 6 months' sentence period has already lapsed having already been served by the Appellant.

It is so ordered.

Dated and delivered at Machakos this 3rd day of February, 2021.

D. K. Kemei

Judge