**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CRIMINAL APPEAL NO 120 OF 2011**

**LOWDEN OBIERO NGALA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(An appeal from conviction and sentence by A. Lorot (SRM) in Kapsabet SPMCRC No. 444 of 2011)***

**JUDGMENT**

1. **LOWDEN OBIERO NGALA** (the appellant was convicted on a charge of robbery with violence contrary to section 295 as read with section 296 of the Penal Code, the particulars being that on 28/02/2011 at 3.00am within **KAPSABET** township, in **NANDI** county together with another, while jointly armed with a panga robbed **VICTOR KITAZI NAFTALI** of his bag, 2 T-shirts, one pair of long trousers, a shirt, a jumper, a pair of brown timberland TM shoes, a vest, underpants, wallet, cash Kshs. 400, ATM card, K-Rep, Equity Bank ATM cards, all valued at Kshs. 7300/-.

2. He was also convicted on a second charge of being in possession of suspected stolen property contrary to section 323 of the Penal Code as read with section 36 of the same. The particulars were that on the same date and place, he was found in possession of five long trousers, three t-shirts, ten jackets, two pairs of shoes, two bags, one short, one coat, one dress, one shirt and a vest, all reasonably believed to have been stolen or unlawfully obtained.

3. He denied both charges, and after a trial in which 6 witnesses testified in support of the prosecution case, and the appellant and his co-accused were the only defence witnesses, he was convicted on both counts and sentenced to death on the 1st count, and 7 years on the second count. However, the sentence on count II was stayed in view of the death sentence.

4. The evidence presented at the trial was that VICTOR NAFTALI (PW1) who sells inner-pants at Kapsabet market had travelled from Mombasa where he had gone to attend a religious meeting, and arrived in Kapsabet on 28/2/211 at 3.00am. He alighted next to KENU offices near the Kapsabet stadium, then went to the main road to look for a motorcycle taxi which would take him to his residence. There was none at that ungodly hour, and he spotted two people dressed in long coats, whom he assumed were watchmen coming from work. As they got near him, he asked whether they were going towards the showground as he was afraid to walk alone.

5. After their confirmation, he joined them, and told them about the Mombasa meeting. However, when they got to a path near the prison, one of them moved ahead of him and drew out what looked like a long panga, and raised it. They ordered him to surrender all the money he had, and they took away Kshs 400/- plus his wallet which had his documents. One of them took away his bag which had his personal effects including his timberland shoes. They hit him on the face, he fell down and fainted.

6. When he came to, he went home, and informed his neighbour THOMAS ALUDA (PW2) about the incident. He was eventually rushed to hospital where he was admitted- this was confirmed by PW2. While still in hospital, two people were brought in at about midday, having been beaten and apprehended by members of the public who found them with PW2's stolen pair of shoes. There was an attempt to alter the colour of the shoes from a light tan to black using dye. Police had also recovered PW1's jumper with the writings "Chicago Bulls", 2 T-shirts, charcoal and the other embossed lit monkeys endurance". He identified the recovered items in court during the trial.

7. Although the incident took place under the cover of darkness, PW1 explained that having been in the darkness for a while, his eyes had become accustomed to the environment and was able to make out that his attackers were men of almost equal stature with him, but what persuaded him that the appellant was among his attackers, was the recovery of his property from him.

8. PW2 confirmed that when PW2 woke him up to report his ordeal, he noted that his clothes were blood stained. **SILAS RUTO (PW1**), a clinical officer at Kapsabet Hospital examined PW2 and confirmed he had injuries and was treated. Later he got word that the appellant's co-accused had gone to dye a pair of shoes which had been given to him by the appellant. **MOHAMMED MUSUMBA** (PW3), a shoe-shiner cum cobbler was the one who was approached by the co-accused, with a request to dye the shoes from a light tan to black.

9. It was the appellant's co-accused who led members of the public to the appellant, and to his hideout where some of PW2's stolen property was recovered. An irate mob set upon the two men with all manner of assault but they were saved by police who rushed to the scene. PW5 **(PC LOYARA MCKENZIE)** was one of the police officers who rescued the appellant from lynching and accompanied him and the mob to the appellant's hide-out from where the further recoveries were made. He interrogated the appellant who was not able to give a satisfactory account for the recovered items, which the officer suspected to be stolen property.

10. In his defence the appellant claimed he had been making bricks during the day, and had just gone to the river to take a bath, when he was confronted by an angry mob. They assaulted hi claiming he was a thief, and when he regained his senses, he was in hospital and handcuffed.

11. The trial court in its judgment noted that although the victim did not identify his attackers, it was the recovery of the Timberland shoes, and the quick recovery of several other items belonging to PW2 from the appellant's hideout, that persuaded him that the appellant was the robber and also had in his possession other stolen articles.

12. The appellant was dissatisfied with the outcome and filed this appeal setting out amended grounds as

a) The charges were duplex

b) The appellant was not connected to the case

c) The trial court failed to take note of his defence

d) The sentence was harsh and excessive

13. At the hearing of the appeal, the appellant submitted that the charge on count 1 was duplex, and so incurably defective as the charge sheet included the section defining the offence, and he should have been charged under section 296 (2). That this defect went to the root of the case, and cannot be cured by section 382 of the Criminal Procedure Code, as the two section cited created two separate offences with different penalties thus making it unfair for the appellant to even prepare his defence so the only remedy available is to declare a mistrial and set him free. In support of these submissions, the appellant cites the cases of ***Ibrahim Mathenge v R Cr Appeal No 222 of 2014 and Joseph Onyango v R [2010] eKLR***

14. The appellant also submits that the sentences were harsh and manifestly excessive, and the trial court did not take his mitigation into account. He urges this court to adopt the emerging jurisprudence set by the Supreme Court regarding the mandatory nature of sentences in the case of **Francis Karioko Muruatetu & Anor v R [2017] eKLR**, and reconsider an alternative determinate sentence.

15. The appellant also argues that the evidence did not link him to the offence, and he was convicted on mere suspicion.

16. On the duplex charge, Miss Okok on behalf of the DPP concedes that the charge is indeed duplex, but argues that this not an incurable defect and that **section 382 of the Criminal Procedure Code** actually offers a reprieve. She urges this court to be guided by the decision in **Paul Katana Njuguna v r [2016] eKLR** where the Court of Appeal found that the test to be applied is whether a failure of justice has occurred, and whether the accused has been prejudiced.

17. Counsel submits that the appellant was left in no doubt from the beginning to the end of the prosecution, as to the charge he was facing. That he suffered no confusion as to the nature of the charge he was facing, and fully cross-examined the witnesses, and raised no complaint at the trial.

18. That although there was no evidence on identification, the appellant was linked to the offence through the doctrine of recent possession.

19. Miss Okok concedes that the sentence is harsh especially taking into account that the value of the stolen items, and they were recovered. She does not object to a review of the sentence

20. **Analysis and Determination**

**Duplicity of charge:** From the onset, there is no doubt that the charge was duplex as the appellant was charged under both sections 295 and 296 (2) of the Penal Code. Indeed, although section 295 defines the offence of robbery or what is commonly known in legal circles as simple robbery, and also creates the offence and spells out the elements constituting the offence. Section 296 (2) creates the offence of robbery with violence and provides the sentence.

21. Various judicial pronouncements on the issue including the case of **Paul Katana Njuguna (supra) citing Cherere s/o Gakuli v R [1955] 622 EACA** have set out clearly that:

"*the test still remains as to whether or not a failure of justice has occurred"*

I have examined the evidence presented and even the questions raised by the appellant during cross-examination, and I am of the view that from the time the first prosecution witness testified regarding the injuries inflicted on the complainant, to the point at which the complainant narrated his ordeal, and the eventual arrest and arraignment in court, there was no room for doubt as to the nature of the offence, and there could have been no confusion or prejudice caused to the appellant. I am thus in agreement with the DPP that the defect is curable under section 382 of the Criminal Procedure Code which provides that:

**Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:**

**Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.**

**Evidence:** The incident took place in the wee hours of the morning when darkness still enveloped the surroundings. The complainant confirmed that he could not make out the identity of his attackers although he could see the outline of their structure. The trial court properly noted that what linked the appellant to the offence was the recovery of the shoes. And the other items belonging to the victim so soon after the incident. Indeed, in his defence, the appellant offered no explanation as to how he got to possess them. The trial court properly analysed the evidence, applied the legal doctrine of recent possession and the conviction was safe and I uphold it.

22. **Harsh Sentence?** The appellant was sentenced to death plus another 7 year suspended on account of the death penalty. In light of the emerging jurisprudence from the Supreme Court decision in the Muruatetu case, I take into consideration the value of the property, the fact that the same was recovered, so the appellant did not benefit from his mischief.

23. One of the mitigating factors that should be addressed on its own is the time served. Currently, the 2016 Judiciary of Kenya Sentencing Policy Guidelines have collated the principles of law to guide courts in the exercise of their discretion, in a bid to achieve transparency and consistency as practically possible.

24. The guidelines have provided principles underpinning sentencing which include inter alia;

a) Proportionality

b) Equality/Consistency

c) Accountability

Bearing all these factors in mind including the period that the appellant spent in remand while awaiting trial, he is just a few months shy of completing ten years in prison. I consider that to be adequate punishment. Consequently, I set aside both the death sentence and the 7-year sentence imposed and reduce the sentence to the period already served. The appellant shall be at at liberty forthwith unless otherwise lawfully held.

**DELIVERED AND DATED THIS 10TH DAY OF MARCH 2021 AT ELDORET**

**H. A. OMONDI**

**JUDGE**