REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

HCCRA NO. 38 OF 2019

MOHAMMED ALI SHABAN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of Hon. J. Wambilyanga (PM) delivered on

9th July 2019 in CM's Court in Kisumu Criminal Case No. 520 of 2016)

JUDGMENT

The Appellant, **MOHAMED ALI SHABAN** *Alias* **FAROUK**, was convicted for the offence of **Robbery with Violence** contrary to **Section 295** as read with **Section 296 (2)** of the **Penal Code**. He was then sentenced to 20 Years Imprisonment.

1. In his Amended Grounds of Appeal the Appellant raised 5 grounds, which can be summarized as follows;

(i) The Charge was fatally defective, as it was duplex.

(ii) The alleged identification was not positive.

(iii) There was no proof that the vehicle which was allegedly stolen, belonged to the complainant.

(iv) The appellant's right to a fair trial was violated.

(v) The sentence was harsh and excessive, as it was not informed by the unique facts and circumstances of the offence.

Ground 1 – Charge was Duplex

2. The Appellant faced a charge of;

"Robbery contrary to Section 295 as read with Section 296 (2) of the Penal Code."

3. It was the Appellant's submission that the charge had alleged the commission of more than one offence in a single charge sheet.

4. Therefore, it was unfair to the Appellant, as he was not able to know the particular offence he was being tried for, so that he was left unsure about how to prepare an appropriate Defence.

5. The 2 offences, according to the Appellant were of *"**robbery**"* contrary to **Section 295** of the **Penal Code**; and *"**Robbery with Violence**"* contrary to **Section 296 (2)** of the **Penal Code**.

6. Under **Section 295**, the statute defines the offence of **Robbery**: And as the Appellant observed, the said provision did not provide for the punishment that an offender could be liable for.

Ground 2 – Identification

7. The Appellant submitted that the alleged identification by the Complainant was not positive.

8. From the evidence tendered by the Complainant, the incident took place shortly after midnight.

9. The Complainant testified that he saw some flash lights being shone, when he arrived back at his house. He saw the watchman rushing towards his vehicle, and about 5 people were following the watchman.

10. But the Complainant also testified that the security lights in his compound were on at the material time.

11. During re-examination, the Complainant said that when he jumped to the left seat, the Appellant was seated next to him.

12. During cross-examination, the Appellant testified that the Appellant was holding a metal bar, which he used to hit the left side of the car. The metal bar also hit the Complainant on the head, causing him to bleed.

13. The question which the Appellant has raised concerns how the Complainant could positively identify someone in those circumstances.

14. I find that the said concern has some merit. I so find because it is odd to find persons who need to shine torch-lights when the security lights are on, at the compound where they are.

15. My said finding is further fortified by the evidence of **PW2, PC ISAAC MAMAI**. According to that police officer, when he and his colleagues had arrested the Appellant, he told the officers that;

> ***"…. his colleagues had driven the said motor-vehicle away."***

16. If the Appellant was inside the motor-vehicle, together with the Complainant, when he demanded that the Complainant must show them the cut-out; and as the car was then driven away, I fail to comprehend how the Appellant was later arrested whilst running away.

17. On his part, **PC JACK OTURI (PW3)** said that when the police officers scared the persons who were robbing a motorist near Victoria Hotel;

> ***"Some jumped off the motor-vehicle and drove off. Some ran towards Obunga Junction."***

18. I fail to understand how those who jumped off the motor-vehicle also drove off.

19. And it is also significant to note that **PW2** said the following during cross-examination;

> ***"The crime was taking place during the night. When we arrived, we could not identify anyone. It was at night."***

20. If the police officers could not identify any of the offenders, because it was night, I have reason to believe that the Complainant, who was the victim of the robbery incident, was even more unlikely to identify those who attacked him.

21. As regards the ownership of the vehicle which the robbers took away from the Complainant, there was no evidence to prove the same.

22. However, the failure to prove ownership would not, of itself, be fatal to the prosecution case. I so hold because the charge sheet did not lay claim to the Complainant being the owner of the said vehicle.

23. Secondly, one does not have to be the owner of a vehicle, before he can become the Complainant in a case of robbery. Even a person who has a task of driving a vehicle, can be robbed of it.

Right to fair trial

24. The Appellant asserted that his right to a fair trial was violated as he was detained in police custody for six days before being first arraigned in court. He said that he was arrested on 20th October 2016, but was not taken to court until 26th October 2016.

25. Pursuant to **Article 49 (1) (f)** of the **Constitution of Kenya**, an arrested person has the right to be brought before a court as soon as reasonably possible, but not later than 24 hours after being arrested.

26. On the face of the charge sheet, it is shown that the Appellant was arrested on 20th October 2016, and he was first taken to court on 26th October 2016.

27. Accordingly, I find that the Appellant's fundamental rights were violated, when he was held in custody for 5 days before he was brought to court.

Duplex Charges

28. In the case of **JOSEPH NJUGUNA MWAURA & 2 OTHERS Vs REPUBLIC [2013] eKLR** the Court of Appeal held as follows;

> ***"Sections 296 (1) and 296 (2) of the Penal Code deal with the specific degrees of the offence of robbery and have been framed as such.***
>
> ***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."***

29. The learned Judges of Appeal went further to express themselves thus;

> ***"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 property in order to steal, commits the offence of robbery.***
>
> ***It would not be correct to frame a charge for the offence of robbery with violence under Section 295 and 296 (2) of the Penal Code, as thus would amount to a duplex charge."***

30. When the Appellant was charged with the offence of robbery with violence, yet the charge sheet cited, inter alia, **Section 295** of the **Penal Code**, that meant that the ingredients of the offence of robbery had also been imported into the charge he was facing. Therefore, the charge could embarrass or prejudice the Appellant when he was being called upon to put forward his defence.

31. When a charge is duplex, that defect goes to the very root of the conviction, as the trial leading to such conviction was prejudicial to the accused person. Accordingly, the irregularity arising from a duplex charge is not curable under **Section 382** of the **Criminal Procedure Code**.

32. In the result, the appeal is allowed: I quash the conviction and set aside the sentence which had been handed down by the learned trial magistrate.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 13TH DAY OF OCTOBER 2021

FRED A. OCHIENG

JUDGE