REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 27 OF 2019

STEPHEN KAMBO.....1ST APPELLANT

JACOB NYAYO.....2ND APPELLANT

VERSUS

REPUBLIC.....PROSECUTION

JUDGMENT

1. The appellants were charged with the offense of **robbery with violence contrary to section 295 as read together with section 296 (2) of the penal code**. The particulars are on the 16th day of January 2018 at Sewage Area Rhonda Estate within Nakuru County jointly with another not before court while armed with crude weapons namely knives they robbed **Peter Chirchir Kipngeno** of Laptop Make HP Valued at Kshs. 40,000/= mobile phone make infinix valued at 13,000/= electric iron box valued at 1,500/= and cash 70/= totaling to Kshs 54,570/= and at the time of such robbery threatened to use actual violence to the said **Peter Chirchir Kipngeno.**

2. Both accused persons pleaded not guilty and the prosecution called 4 witnesses.

3. PW1 testified that he was from work at 8.50 pm when at sewage area he was attacked by two men, one held his hand while the other punched him. He said they took away his infinix phone, Kshs 70/=, a laptop, and an iron box and they threatened to kill him. Later he saw 1st appellant with his colleague. He informed the police who arrested him. 1st appellant took them to where 2nd appellant was. The laptop and charger were recovered from the house.

4. PW2 **PC Nyakundi** testified that the complainant reported on 24th January 2018 having seen the people who had robbed him. PW1 identified the appellants to the police. The appellants took the police to a house where the laptop and a charger were recovered.

5. PW3 **AP Willis Mburu** testified he arrested the appellants after getting the information from good Samaritans.

6. PW4 **CPL Michael Kabuto** the investigating police officer testified the complainant was robbed at 5.00 pm at Sewage. After 9 days he saw the appellants and informed the police who apprehended the appellants. The appellants were interrogated by the police and they directed the police to the house where they kept the laptop. PW1 identified the laptop as his and was also able to identify the appellants as the persons who robbed him.

7. On defence, the apellants stated that they were arrested at their workplace on 24th January 2018, taken to the police station, interrogated, and beaten up for not indicating who had robbed PW1. They denied knowledge of the events of 16th January 2018.

8. By judgment delivered on on 8th April 2018, the trial court jointly convicted the appellants and sentenced them 15 years imprisonment.

9. It is upon the said conviction and sentence that the appellants filed this appeal on the following grounds:-

i. THAT, the learned trial magistrate erred in law by convicting the appellants on a defective charge sheet under a section 295 as read with section 296 (2) of the penal code;the charge was, therefore “duplicitous” and could not support a conviction the appellant in law was to be charged only under section 296(2) of the penal code.

ii. THAT, the learned trial magistrate made a great misdirection to the court by holding that the offence of robbery with violence could be proved against the appellant through flimsy circumstantial evidence of recovered items being one laptop make HP and a charger exhibit ii and iii but failed to note that, the recovery was void, and the items recovered were not fully identified by pw1 to

the required standards required in a criminal case.

iii. THAT, the learned trial magistrate erred in law and fact by failing to note that the ingredients of the offence of robbery were not all proved as against the appellant to the beyond prove, that of prove beyond reasonable doubts; prove of identification was essential and the evidence of PW1 was required to be taken with a lot of caution being evidence of a single identifying witness at difficult circumstances a warning was required before conviction, this was not done.

iv. THAT, the learned trial magistrate erred in law and fact by misdirecting the circumstances of the arrest of the appellant from his place of work and connecting him to this purported robbery which he had no knowledge of.

v. THAT, the learned trial magistrate erred in law and fact by failing to resolve the glaring contradictions in the evidence of the prosecution witness " testimonies'' which left myriad glaring grounds in the prosecution case in favor of the appellant.

vi. THAT, the learned trial magistrate misdirected himself by failing to appreciate the fact that in law, the onus was on the prosecution to first prove its case against the appellant beyond any iota of doubt before evaluating the appellant's defense to the charges and not vice versa.

vii. Reason wherefore, the court was urged to allow the application and quash the conviction and set aside the sentence.

10. The state through state counsel **Ms.Rita Rotich** opposed this appeal and submitted that the appellants were positively identified by PW1 as having robbed him and that they were armed with knives and threatened to kill him.

APPELLANT'S SUBMISSIONS

11. The appellants submitted that the charge was defective as the charges were duplex and therefore fatally defective. They submitted that **Section 295** under which the charges are framed is a general definition and provides for the simple felony of robbery by a person but create no punishment; that the punishment for the simple felony of robbery by a person is created under **section 296 (1) of the penal code** which provides for a sentence of imprisonment of fourteen years for such a person.

12. They further submitted that where the character of the robbery includes the following ingredients namely that, the person is armed or that the person is in company with one or more persons, or that he uses actual violence to another person, then the charge is robbery with violence under **section 296 (2) of the penal code** which is a capital offence, not a felony and the punishment provided is a sentence of death.

13. They submitted that the duplicity cannot be cured under **section 382 of the criminal procedure code** and cited the case of **Ibrahim Mathenge vs Rep: CR App no. 222 of 2014** where the court as follows:-

> **" The duplex charge was a fundamental breach which goes to the root of the appellant's conviction and it's not the sort of irregularity curable under section 382 of the criminal procedure code"**

14. The appellants further submitted that the circumstantial evidence of proving the lost items was not properly proved by the prosecution. The items produced before the court as evidence were not recovered from the accused, PW1 also indicated that before court that no item was recovered from the appellants during the arrest.

15. The appellants submitted that the case against the appellants was not proved as no one proved the house belonged to the appellants and PW1 failed to prove the items belonged to him by use of receipts or marks of identification;and further,the prosecution failed to produce an inventory of the property recovered, as per **Section 57 of the National Police Service Act**.

16. The appellants further submitted that the offence is alleged to have ocuured at 8.50 pm in the night and there is no source of light the appellants enabling PW1 and PW2 to positively identify the appellants. Further that PW1 failed to give a clear account of what transpired and what role each appellant played at the time of the alleged robbery.

17. The appellants further submitted that their arrest was not connected to the robbery; that 1st appellant was arrested for having other court cases. Futher that the Statement of PW1 is contradictory as it is not clear when he was attacked; in cross-examination, he said he was attacked at 6.30p.m and other instances he said he was attacked at 8.30 pm and he did not mention a knife while PW4 told the court the appellant surrounded PW1 and drew knives.

18. The appellants submitted that the prosecution failed to prove its case and the court failed to consider the appellant's evidence and urged this court to allow the appeal, quash the conviction, and set aside the sentence.

ANALYSIS AND DETERMINATION

19. This being the first appellate court. I am expected to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis .This I do while bearing in mind that I never had the opportunity to hear the witnesses and observe their demeanour. The principles that apply in the first appellate court are set out in the case of **OKENO VS REPUBLIC [1972] EA 32** where it was stated as follows:-

> **"The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [1957] EA 570.) 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 conclusions; 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, (See Peters v. Sunday Post, [1958] EA 424.)"

20. I have established the issues for determination are:

a. Whether the charge sheet was defective?

b. Whether the appellants were positively identified

c. Whether evidence was adduced linking the appellants to complainat items.

(i) **Whether the charge sheet was defective**?

21. The appellants submitted that the charge was duplicitous for citing **Section 295 and 296 (2) of the Penal code**. Section 295 is a definition section; it contains the ingredients of robbery with violence and the issues of **section 295 and 296** were set out in the Court of Appeal in **Johana Ndungu v Republic [1996] eKLR** The Court stated:

"In order to appreciate properly as to what acts constitute an offence under section 296 (2) one must consider the sub-section in conjunction with s.295 of the Penal Code. The essential ingredient of robbery under section 295 is the use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery is pre-supposed in the three sets of circumstances prescribed in s.296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:

1. If the offender is armed with any dangerous or offensive weapon or instrument, or

2. If he is in company with one or more other person or persons, or

3. If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes, or uses any other violence to any person.

22. Further, in the case of **Joseph Onyango Owuor & Cliff Ochieng Oduor vs R [2010] eKLR (Criminal Appeal No 353 of 2008*)*** The Court stated as follows:-

"Mr. Musomba submitted that unless the afore quoted sub-section (section 296) is read with section 295 of the Penal Code, then reliance on section 296(2), above, without more will not disclose the commission of an offence. Section 295 of the Penal Code defines the offence of robbery. Section 296(1) and 292(2) of the Penal Code, have a common marginal note, namely "punishment of robbery". ..

23. Section 295, does not deal with the degree of violence being merely a definition section… **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.**

24. The charge sheet herein read as follows:-

"Stephen Kambo and Jacob Nyayo were charged with the offense of robbery with violence contrary to section 295 as read together with section 296 (2) of the penal code. on the 16th day of January 2018 at Sewage Area Rhonda Estate within Nakuru County jointly with another not before the court while armed with crude weapons namely knives robbed Peter Chirchir Kipngeno of Laptop Make HP Valued at Kshs. 40,000/= mobile phone make infinix valued at 13,000/= electric iron box valued at 1,500/= and cash 70/= totaling to Kshs 54,570/= and at the time of such robbery threatened to use actual violence to the said Peter Chirchir Kipngeno."

25. In the case of **Paul Katana Njuguna vs Republic [2016] eKLR** the court observed as follows:-

"In arguing the appeal, Mr. Nyaga submitted that the charge against the appellant was duplex as he was charged under both Sections 295 and 296 (2) of the Penal Code. Referring to Simon Materu Munyaru -v- Republic, [2007] eKLR, quoted in Joseph Njuguna Mwaura & 2 Others -v- Republic, [2013], eKLR, counsel submitted that it was wrong to charge the appellant with the offence of robbery under Section 295 as read with Section 296 (2), as that rendered the charge duplex and created a confusion. … In regard to the alleged defect in the charge, Mr. Omirera submitted that Section 295 of the Penal Code was simply a definition section, and although charging an accused under both Sections 295 and 296 (2) was undesirable, doing so did not amount to a fatal defect in the prosecution's case, as the same could easily be cured by invoking Section 382 of the Penal Code.

26. In the instant appeal, the theft involved the use of crude weapons. I find that quoting **section 295** in the charge sheet would not occasion an injustice. The appellants were aware of the charges facing them during the trial process, they failed to raise the issue of defective charge sheet at trial they proceeded to cross-examine the witnesses accordingly. This is a clear indication that no confusion during the trial and thus not fatally defective.It is clear from the particulars of the charge quoted above that they support the offence of robbery with violence.

(ii) whether the appellants were positively identified.

27. It was the prosecution's case that PW1 saw the appellants on the day of the robbery before the attack as they were ahead of him and 9 days later he recognized the 1st appellant and called the police to arrest him. The 1st appellant later took them, 2nd Appellant. PW1 identified the 1st appellant as one of the people who robbed him, he was the only single witness who identified the 1st appellant, the 1st appellant took the police to the 2nd appellant.

(**iii) Whether evidence was adduced linking the appellants to complainant's items.**

28. Further, on the issue of robbery with violence the laptop and the charger were recovered at the house of the appellants. PW1 identified the laptop and the charger as his. The appellants led the police to to the house where the laptop and the charger were recovered. It is therefore immaterial that there was no prove of ownership of the house where the laptop was recovered. Laptop was recovered as the appellants led the police to recovery of the items.

29. From the foregoing, I find the prosecution proved its case beyond reasonable doubt against the appellants. I will not therefore interfere with the conviction and sentence.

30. FINAL ORDERS

1) Appeal is hereby dismissed.

JUDGMENT DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 8TH DAY OF DECEMBER, 2021

……

RACHEL NGETICH

JUDGE

In the presence of:

Jenifer - Court Assistant

Rita for State