



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITUI**

**CRIMINAL APPEAL NO. 74 OF 2018**

**SUTI WAMBUA MUNYAO....APPELLANT**

**-VERSUS-**

**REPUBLIC..... RESPONDENT**

**JUDGEMENT**

1. The appellant Suti Wambua Munyao was charged with two counts of robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code.

2. In **Count I** the particulars were that on the 20<sup>th</sup> day of August 2017 at Kasoyani village in Mutomo Sub-County with others not before court while being armed with dangerous weapon namely pangas and rungu robbed Joseph Kitheka Musyoka Kshs.276,000/-, one motorcycle reg. No. KMCP 568H make Skygo valued at Kshs.45,000/- and one jacket valued at Kshs.1,500/- all valued at Kshs.322,500/- and immediately before the time of such robbery wounded the said Joseph Kitheka Musyoka.

3. In **Count II** the particulars were that on the same date and place, the appellant with others robbed Linet Mueni Kyoyo of her Itel mobile phone valued at Kshs.5,000/- and immediately before the time of such robbery used actual violence to the said Linet Mueni Kyoyo.

4. He denied the charge and matter went into full trial. After full hearing the appellant was found guilty, convicted and sentenced to life imprisonment after court considered his mitigations.

5. Being aggrieved by the decision above the appellant lodged instant appeal and set up 5 grounds-

**1. That the trial magistrate erred both in law and facts by convicting him in this case without considering that the charges in the case were duplex (defective).**

**2. That the trial magistrate erred both in law and facts by convicting him relying on the fact that he serve life sentence being a lesser form of attribution sentence without considering that there is no difference between death sentence and life sentence whereby in all capital offences it was pronounced unconstitutional by the Supreme Court.**

**3. That the trial magistrate erred both in law and facts by convicting him relying on the recovered exhibit mobile phone without considering that this was just an upload from a person who wanted to rescue himself from this serious case and upload this burden upon appellants' shoulders.**

**4. That the trial magistrate erred both in law and facts by convicting him relying on the identification parade conducted by police officers without considering that the complainants were at first shown him by police officers before the identification parade was conducted.**

**5. That the trial magistrate erred both in law and facts by convicting me rejecting his defence which was strong enough to beat the prosecution's evidence.**

6. The parties were directed to canvass appeal via submissions.

**THE APPELLANT'S SUBMISSIONS**

7. Appellant submit that the trial court erred by relying on the recovered mobile phone which was allegedly stolen and was not in his

possession.

8. The trial court also erred in law and facts by relying on the identification parade whereby the parade form was not produced before the court also where the standing orders of conducting identification parades were violated.

9. One of violations was disclosed by testimony of PW2 the second complainant who told court that she was shown the suspects by the police before conduct of the parade.

10. The trial court also did not consider his defence which was strong enough to supplant the prosecution's evidence since the even trial court did not talk about it in its judgement.

#### RESPONDENT'S SUBMISSIONS:

11. Respondent submitted that it was PW1's evidence on record that he had sold animals previous day over Ksh.200,000/-. On the 18<sup>th</sup> at 8pm there was an attack.

12. The attackers entered. They had torches. They were struggle between 1<sup>st</sup> attacker and PW1. PW1 escaped via window. He went to a neighbour's place. He did not know the attacker. 2 more attackers were in the sitting room. He saw 2 in the dining room. The touch light from others illuminated person he struggled with. He saw him.

13. His Wife lost phone during attack. It was recovered from person who was one of attackers. Other items taken motorbike reg. No. KMCP 568H, Kshs.276,000/-. The arrested person had a phone. Appellant was identified on parade. Motorcycle was recovered abandoned on the way. Logbook was produced. P3 form showing injuries. The phone was identified.

14. PW3 identified appellant. PW3 gave evidence and PW4 minor gave unsworn evidence and other witnesses testimonies. The case was based on identification and the possession of stolen phone. The conviction and sentence were merited.

#### EVIDENCE TENDERED

15. The prosecution's case was that on the night of 19th and 20th August 2017 (the complainants however spoke of the night of 18th and 19th August 2017) three men broke into the complainants' house. The complainants were a couple and were at the time asleep in the house. Two of the three men entered the bedroom one after the other.

16. The first man was holding a stick and a torch with its light on. Joseph, the first complainant woke up from the bed and got hold of and struggled with the first man. They both fell down. As they rose up a second man got into the bedroom armed with a panga. He cut Joseph with it thrice as the first man held him firmly from behind.

17. Joseph managed to free himself from the grip of the first man and got hold of the second man whom he pushed backwards to the sitting room. In the sitting room he found the third man with a stick.

18. At the sitting room Joseph dodged the two men and escaped from the house through the door to seek help from a neighbour. Linet the second complainant was left inside the house with the intruders.

19. The first man who had been left in the bedroom demanded to be shown where money was. Linet showed him a jacket and a trouser in which Joseph had kept Kshs.200,000/- and 76,000/= respectively. The man took all the money in the jacket and the jacket was well.

20. After he started assaulting Linet with a stick demanding for more money, Linet told him there was no other money in the house. In response the man pulled her from the bed and dragged her to the sitting room. The robbers also took away two mobile phones, motorcycle ignition key from a table in the bedroom, and a motorcycle from outside as they left.

21. Thereafter Joseph who had escaped from the house came back accompanied by his aunt one Mwikali who is also their neighbour. He was full of blood. He entered the bedroom, confirmed that the robbers had made away with his money, his phone and his wife's phone, but as he came out he collapsed on the corridor. He was taken to Mutomo Mission Hospital the same night by a number of his neighbours who had come to their rescue. He was admitted there for some days.

22. The same neighbours on returning back from hospital recovered the motorcycle which had been stolen from the complainants abandoned not very far from their home. In the morning Linet too went for treatment at the same hospital. The matter was reported to police and investigations begun.

23. In January 2018 one Job Kitonga Neti was found by Cpl. Uka and others in possession of an Itel mobile phone which was believed to have been stolen from the complainants during the material incident. Cpl. Uka had for some time been tracking the phone using telecommunication network.

24. Job explained that the phone was given to him by Suti (the appellant) on 22/8/2017 to hold as security for the repayment of 200/- which he had lent to Suti. Joseph identified the phone as his wife's.

25. His wife too positively identified the same. Suti was thereafter arrested and it is the prosecution's case that Suti was identified positively at an identification parade by Joseph as one of the people who robbed them hence the charges before court.

26. In his defence Suti denied involvement in the commission of the offence and argued in essence that there was malpractice in the conduct of the identification parade.

#### ISSUES, ANALYSIS AND DETERMINATION

27. After going through the evidence on record and the rendered submissions I find the issues are; **whether the charges were duplex thus defective? If in negative, whether the appellant was positively identified as one of the robbers in in the material night? Whether the appellant was arrest while in possession of the stolen phone? Was appellants defence considered? Whether the life sentence awarded is unconstitutional and illegal?**

28. On the first issue, the law is, duplicity is a term of art. A duplex charge is one which charges more than one offence in the same count. In *Pope v. R (1960) EA 132, 138 Sir Alastair Forbes V-P* observed that, **“it is well established that a count which charges two offences is bad for duplicity and that a conviction under it cannot stand - Cherere v. R (1955) 22 EACA 478.”**

29. The complaint of duplex herein is what is commonly referred to multiple charges rather than duplicity in the technical sense. See *Ochieng v. Republic (1985) KLR 252*.

30. I have perused the two counts in the charge sheet and I confirm same disclose each a separate offence of robbery with violence. They are just two separate counts but no duplicity is disclosed in terms of meaning of the word.

31. The next issue is whether the appellant was among the people who violently robbed the complainants? With regard to identification of the culprits, Joseph who is the first complainant told the court that the man who cut him with a panga approached him from the front as the man who had a torch held him from behind.

32. The torch was still on and was held behind him, over his head. Joseph told the court that it was with the help of this torch light that he was able to master the facial looks of the man who cut him with a panga.

33. He further told the court that it was with the mastery of his facial looks that he was able to identify the appellant in an identification parade which was conducted at Mutomo Police Station.

34. PW1, C.I Kiprono Melly who conducted the identification parade confirmed that the appellant was identified by the first complainant during the exercise by touching. He also asserted that the parade was conducted in strict compliance with the laid down procedures.

35. That at no time was the complainant allowed to see the suspect before the exercise as was alleged by the appellant in cross examination. He also produced in evidence a report of identification parade as Pexh 9. He explained that the parade was conducted on 18/1/2018 and not on 18/1/2017 as indicated on the second page thereof.

36. Further evidence linking the appellant to the offences was given by PW5 Job Kitonga Neti, that on the 22/8/2017, Suti Munyao who was known to him pledged with him a black phone, an Itel in make as security for the repayment of Kshs.200/- which he had lend to him.

37. Suti did not settle the loan on the agreed date and after sometime Job started using the phone. In early January 2018, police found him with it and recovered the phone from him. He explained to them that it is Suti who had given him the phone under the circumstances alluded to hereinabove. The phone was positively identified by the second complainant as hers.

38. In his defence Suti claimed in essence that upon arrest the police questioned him over a phone which he had allegedly sold to a certain boy. He told the police that he knew nothing about the phone. Thereafter the boy to whom he had allegedly sold the phone came to the police station. According to Suti, the boy was unknown to him. Suti further claimed that before the commencement of the identification parade which was conducted by C.I Melly (PW11) he was exposed to the first complainant.

39. In this case it is clear that the subject incident took place at night inside the complainants' house. The only source of light which has been alluded to by the complainants is a torch which the first man to enter the bedroom had.

40. In those circumstances the trial court had to satisfy itself with caution that the first complainant was able to identify the appellant as one of the robbers. The genesis of this requirement is traceable to the case of *Abdullah Bin Wendo & Anor vs Republic [1953] 20 EACA 166*, in which it was reiterated by the then Court of Appeal for Eastern African as follows:-

**“Subject to well-known exceptions it is trite law that a fact may be provided by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favoring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which the judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness can safely be accepted as free from the possibility of error.”**

41. In advancement of this requirement the Court of Appeal in the case of *Maitanya vs Republic [1986] KLR 198* held:-

**“It must be emphasized that what is being tested is primarily the impression received by the single witness at the time of the incident. Of course, if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness, so the chances of a true impression being received improve. That may sound too obvious to be**

**said, but the strange fact is that many witnesses do not properly identify another person in daylight. It is atleast essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping test the evidence with greatest care. It is not careful test if none of these matters are known because they were not inquired into.”**

42. Whereas Joseph told the court that he had mastered the looks of the person who cut him with a panga before the robbery, his wife Linet and who is the second complainant told the court that she did not identify nor master the looks of any of the robbers. In those circumstances the only evidence of identification at scene was from a single witness Joseph.

43. The trial court considered that the man who had a panga entered the bedroom after the first man who had a torch and that Joseph spotted him as he rose up from the floor where he and the first man had felt each other. When Joseph and the first man rose up, the first man held him from behind still holding the torch over his head. At the same time the man with the panga advanced directly towards Joseph from the front.

44. In those circumstances trial court was convinced that the beam of light from the torch which was held over the head of Joseph by the first man shone directly on the face of the man who had a panga.

45. The trial court also considered that when Joseph freed himself from the first man, he got hold of the man who had a panga and pushed him backwards to the sitting room. Joseph was categorical that the man who had the panga is the appellant in this case.

46. His evidence is further corroborated by the fact that two days after the incident, the appellant had in his possession a phone belonging to the second complainant being one of the items which were stolen on the same date and time from the same house which Joseph shared with the second complainant. Likewise, Joseph was also able to positively identify the appellant in an identification parade.

47. The trial court considered the defence by the appellant that PW5 to whom he had pledged the phone was unknown to him but in its view that was an afterthought because when PW5 testified in court he was very categorical that the appellant was very well known to him for they used to attend various markets together.

48. Despite this evidence the appellant did not ask PW5 any question in cross examination to show that his evidence was untruthful. I have evaluated same evidence and I agree with trial court finding.

49. I too found the complaint by the appellant that he was exposed to the first complainant before commencement of the identification to be an afterthought as appellant did not deny that he signed parade report form which he signing implied his satisfaction with the exercise.

50. Thus the court finds no merit in the appeal on conviction and same is dismissed and conviction upheld. On sentence of life imprisonment, the court notes that the appellant was a first offender thus the circumstances of the commission of offence, injuries sustained and properties stolen would not justify life sentence.

51. The court therefore makes the following orders;

**i. The appeal on conviction is dismissed and conviction is upheld.**

**ii. The appeal in sentence is allowed to the extent that the life imprisonment is substituted with sentence of 20 years imprisonment for each count to run concurrently from the date of arrest.**

**DATED, SIGNED AND DELIVERED AT KITUI THIS 17<sup>TH</sup> DAY OF JANUARY, 2020.**

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**C. KARIUKI**

**JUDGE**