REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: R. MWONGO, J

HCCR APP NO 39 OF 2017

PETER NDINDI BARASA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the judgment of Hon E. Kimilu SRM

delivered on 28th September, 2017 in Naivasha CMCR No 1954 of 2016)

JUDGMENT

Background and grounds of appeal

1. This appeal is against the conviction for robbery with violence and death sentence meted in the lower court. The alternative charge was handling stolen goods contrary to section 322(1) of the Penal Code. The particulars of the offence are that on 24th December, 2016, at Kwa Muhia estate in Naivasha, the appellant with another person not before the court whilst armed with a toy pistol robbed Kefa Onchiri Masese of Kshs 10,200/= and at the time used actual violence.

2. At the hearing of the appeal on 13th November, 2019, the appellant made oral submissions and availed amended grounds of appeal with written submissions. His submissions are founded on five grounds of appeal:

a. That the charge sheet was defective as being duplicitous;

b. That the doctrine of recent possession did not apply in his case

c. That the offence was not proved beyond reasonable doubt, and the trial court did not properly consider the defendant's defence

d. That the trial court erred in meting a mandatory death sentence disregarding mitigating circumstances

3. This being a first appeal, the court's duty is to reconsider the evidence adduced and to reach its own conclusions being careful to note that this court has not had the benefit that the trial court had of seeing the witnesses and observing their demeanour. The court must weigh the material on record, and consider it objectively and dispassionately. After such review, the court must come to its own conclusions both on the facts and on the law. (See **Okeno v R [1972] EA 32**).

4. In the lower court, the prosecution availed five witnesses and the accused gave an unsworn statement. The brief facts are as follows. On the material morning, PW1 Kefa Onchiri the complainant, was at his Mpesa shop at 5.30am, when he heard his counter door being opened. He rushed there and found someone wearing a marvin taking money from the cash-box. There was another man outside the counter area who ran away. The assailant pointed something like a gun. But PW1 managed to grab the assailant and held him tightly", shouting *"thief! Thief!"*.

5. In the scuffle the assailant's marvin fell off and PW1 recognized the man as Peter, his customer, who he had known for over a year. The assailant had grabbed Kshs 10,200/= from the shop's cash-box, which he dropped whilst trying to escape through the door. PW1 asked him: *"Peter how can you rob me"*. Just then, Stephen Kimani Maina, PW3, a good Samaritan who was passing by outside the shop, came to PW1's rescue when he heard the shouts of *"Thief! Thief!"*. By then PW1's wife, having heard the commotion, also came to see what was going on. Together, they overpowered the assailant and tied him with ropes until the police came. During the struggle, PW1's shirt was stained with black paint from the toy pistol which the accused had used, and which also stained the gloves the accused was wearing.

6. In court, PW1 identified the assailant's marvin, gloves, and toy pistol. He testified that he recognized Peter, the accused in the dock, by the fluorescent light of the shop which was on. PW3 corroborated PW1's evidence and stated that he personally came to the rescue when he heard PW1's shouts of *"Thief, Thief"* and went to help. PW3 assisted in removing the accused from the counter area to outside the shop.

7. PW1 also testified that he was injured in the scuffle. He realized his head was swollen and his ribs were in pain. He produced a P3 form, dated five days after the robbery, evidencing his injuries. The P3 form had been completed on 29th August, 2016, by PW4 Tabitha Ndungu, the clinical officer at Naivasha District Hospital. She testified that PW1 had injuries on the left side of his head, pain and tenderness on the posterior part of his chest.

8. PW2, Chief Inspector Julius Mugambi was the OCS Naivasha Tourist police station. He testified that on 24/12/2016, he received a call from PW1 that he had just been robbed by two people, one of whom they had arrested and tied. He rushed to PW1's shop with another officer, where they found members of the public milling about. He took over and handcuffed the accused and [put him in the car. He returned to the shop and on the inside of the counter, there was money scattered on the floor, which he collected. It amounted to 10,200/- and he took it away as an exhibit. He also picked a wooden toy pistol, which was wet with black paint and a glove, shoes and marvin. All these items he exhibited in court, together with PW1's stained shirt.

9. PC John Kibet, the investigating officer, testified as PW5. He explained that the accused was brought to the police station by PW2. He narrated the story told by the complainants. His investigation involved going back to the scene of the crime where he found the second glove that resembled the earlier one brought to him by CI Mugambi. He also found a second shoe. PC Kibet produced the second glove at the hearing, together with a second shoe.

Analysis and determination

Defective Charge sheet

10. The appellant's complaint here is that the charge is framed in a duplicitous manner, which he asserts is an incurable error. By this he means that instead of being charged under section 296(2) of the Penal Code which carries the ingredients of the offence, he was instead charged under section 295 – which is the definition provision – as read with section 296(2), which carries the offence.

11. The accused relied on the following authorities: **Ibrahim Mathenge v R Cr App No 222 of 2014** where the court held that a duplex charge was a fundamental breach which goes to the root of the appellant's conviction and cannot be cured under section 382 CPC; **Joseph Mwaura Njuguna & 2 Others v R [2013]eKLR** which explains why a charge under sec 295 and 296(2) amounts to a duplex charge

12. I have perused the charge sheet. It indicates the charge as follows:

> ***"Robbery with violence contrary to 295 as read with section 296(2) of the Penal Code"***

The particulars of the offence are stated as follows:

> ***"Peter Ndindi Barasa……jointly with another not before the court whicle armed with a toy pistol, robbed Kefa Onchitri Masese of cashe Kshs 10,200/=….and at the time of such robbery, used actual violence to the sais Kefa Onchitri Masese"***

13. It is instantly clear that the charge sheet is erroneous. **Section 295** under which the accused was charged is the general definition provision for the simple *felony* of robbery by a *person*. It creates no punishment. The punishment for the simple felony of robbery by a *person* is created under **section 296(1)** which provides for a sentence of imprisonment of fourteen years for such a person.

14. Contrariwise, 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 others; or that he uses actual violence to another person; then the charge is robbery with violence under **section 296(2)** – which is a capital offence not a felony – and the punishment is a sentence of death.

15. In this case, clearly there is a duplex charge. The appellant was charged with general simple robbery, but as read with the ingredients of robbery with violence. Which charge was he facing? When the accused took plea, to which charge was he answering: simple robbery with a sentence of fourteen years, or robbery with violence carrying a death penalty? To which of the two offences should he have been expected to mount his defence? A trial under such a charge can only result in injustice to the accused.

16. My understanding is that duplicity is the error committed when the charge or count on an indictment describes two different offences. Whilst an indictment may contain more than one count, each count must, however, allege only one offence, so that the defendant can know precisely what offences he or she is accused of.

17. In the case of **Joseph Mwaura Njuguna & 2 Others v R [2013] eKLR** the Court of Appeal dealt conclusively with the issue of duplex charges. The court referred to its decision in **Joseph Onyango Owuor & Cliff Ochieng Oduor v R [2010] eKLR (Criminal Appeal No 353 of 2008)** where the Court of Appeal was confronted with a similar situation where the appellants had submitted that section 296 (2) of the Penal Code does not create an offence but merely makes provision for the punishment for robbery with violence. The Court had this to say on the issue:

> ***"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". In this country marginal notes are as a general rule, read together with the section. By the ejusden (sic) generis rule, section 296 (1) and 296 (2), have to be read together. Section 296(1), above, provides that a person who commits the felony of robbery is liable to imprisonment for fourteen years. So that when dealing with the offence under section 296(2) of the Penal Code one has to read the statement of the offence as referring to the aggravated circumstances of the offence, or the robbery provided for under section 296(1) of the Penal Code."

18. The Court then stated that section 295 of the Penal Code is merely a definition section, and held that:

"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."

The court went on to state that:

"We agree that this is the correct proposition of the law.

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 to property in order to steal. <u>It would not be correct to frame a charge for the offence of robbery with violence under section 295 and 296 (2) as this would amount to a duplex charge</u>." (emphasis supplied)

19. In the case of **Simon Materu Munialu v Republic [2007] eKLR (Criminal Appeal 302 of 2005)** the Court of Appeal was confronted with the issue whether a charge sheet citing only **section 296 (2)** of the **Penal Code** was sufficient. This Court in that appeal considered the submission that **section 295** of the **Penal Code** creates the offence of robbery, but held that:

'…the ingredients that the appellant and for that matter any suspect before the court on a charge of robbery with violence in which more than one person takes part or where dangerous or offensive weapons are used or where a victim is wounded or threatened with actual bodily harm or occasioned actual bodily harm is section 296(2) of the Penal Code. It is these ingredients which need to be explained to such accused person so as to enable him know the offence he is facing and prepare his case. These ingredients are not in section 295 which creates the offence of robbery<u>. In short, section 296(2) is not only a punishment section, but it also incorporates the ingredients for that offence which attracts that punishment. It would be wrong to charge an accused person facing such offence with robbery under section 295 as read with section 296(2) of the Penal Code as that would not contain the ingredients that are in section 296(2) of the Penal Code and might create confusion.</u>

In our considered view, section 137 of the Criminal Procedure Code would be complied with if an accused person is charged, as the appellant was, under section 296(2) because that section 137 requires one to be charged under the section creating the offence and in the case of robbery with violence under section 296(2), that section creates the offence by giving it the ingredients required before one is charged under it and it also spells out the punishment. We reject that ground of appeal." (emphasis added)

20. In light of the above authorities the charge sheet in this case was fatally defective and cannot stand. This ground of appeal succeeds.

21. Given such a fundamental error, there is no purpose to be gained by determining the other grounds of appeal. The only question remaining is whether to remit the case back to the lower court for retrial or to dismiss the case in its entirety.

22. In arriving at that decision, I am guided by the principles governing whether or not a retrial should be ordered as enunciated in **Fatehali Manji v Republic [1966] EA 343** by the East Africa Court of Appeal as follows:

"In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person."

23. Further, In **Mwangi v Republic [1983] KLR 522** the Court of Appeal also held thus:

"We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that <u>on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result</u>. In our view, there was evidence on record which might support the conviction of the appellant."

24. I am not convinced that this is not a proper case for retrial for the following reasons. First, the prosecution conceded that according to the record, the accused had not been accorded proper mitigation in the lower, and that the court did not take into account his mitigation. Thus a sentence would have to be set aside and a re-hearing on sentence would have to be held.

25. Second, but more importantly, the appellant had impugned the application by the trial court of the doctrine of recent possession. In this case the accused was not found in possession of any money. The case against him was that he had been in possession of the subject money before it fell down and scattered on the floor.The Court of Appeal summarised the essential elements of the doctrine of recent possession

in **Eric Otieno Arum v Republic KSM CA Criminal Appeal No. 85 of 2005 [2006]eKLR**, where the court stated as follows:

> ***In our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect; secondly, that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.***

PW3 who helped the complainant hold and tie the accused, gave no evidence that he saw any money. I think proof of possession is lacking, and the conviction based on the application of the doctrine was unsafe. Further, there was no evidence of positive identification of the allegedly stolen money.

26. Finally, there was the question of the toy pistol allegedly used in this case by the accused. In the case of **John Maina Kimemia v Republic[2003] eKLR,** the Court of Appeal doubted that a toy pistol fits the description of a dangerous or offensive weapon when they said:

> ***"In our view the words "dangerous or offensive weapon" in Section 296 (2) of the Penal Code bear the same meaning as Section 89 (4) of the Penal Code and as construed in the case of Mwaura & Others v. Republic [1973] EA 373 (supra) for the purposes of Section 308 (1) of the Penal Code.***
>
> ***There cannot be any doubt that although a knife is not made or adapted for use for causing injury to a person, it would nevertheless be a dangerous or offensive weapon for purposes of Section 296 (2) of the Penal Code if the robbers in wielding it in the cause of robbery intend to use it for causing injury to any person. We are satisfied that the knives which the robbers had in this case were intended to cause injury to the passengers and are therefore dangerous and offensive weapons.***
>
> ***The definition of the word "firearm" in section 2 of the Firearms Act does not seem to include a toy pistol as the essence of a firearm is that the weapon is capable of discharging any shot, bullet or other missile and is also capable of causing death, injury, maiming or any other bodily harm. However, under paragraph (d) of the definition, a firearm includes any weapon or other device or apparatus which the Minister by order published in the Gazette specifies to be a firearm for the purposes of the Firearms Act.***
>
> ***We are not certain whether a toy gun has been gazetted as a firearm. We did not get any assistance from the learned State Counsel on this subject. If a toy gun is gazetted as a firearm, under the Firearms Act, then in our opinion, it would be considered as a dangerous or offensive weapon for purposes of section 296 (2) of the Penal Code."***

Disposition

27. Since I have found that the conviction is fatally defective and cannot stand, and the sentence would have been set aside for re-sentencing, and that the evidence would not be likely to secure a conviction, I shall not remit the case for retrial.

28. Accordingly, the accused's appeal succeeds, and the appellant's conviction and sentence are hereby set aside. The appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

29. Orders accordingly.

Dated and Delivered at Naivasha this 19th Day of February, 2020

.....

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Peter Ndindi Barasa - Appellant - present in person

2. Ms Maingi for the State

3. Court Clerk - Quinter Ogutu