REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 51 OF 2019

BETWEEN

LUKE MAGERO ALSIGARE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court

at Makadara Cr. Case No. 74 of 2017 delivered by Hon. E. Kanyiri (SRM)

on 14th September 2018).

JUDGMENT

1. The Appellant, **Luke Magero Alsigare** was charged with robbery with violence contrary to **Section 295** as read with **Section 296(2)** of the **Penal Code**. The particulars of the same were that on the 12th day of September, 2016 along Juja Road in Starehe Sub-County within Nairobi County, jointly with another not before court while armed with offensive weapons namely knives, robbed **Dominic Mutua Muendo** of his mobile phone make Samsung J7 IMEI No. 356174073099650 valued at Kshs. 32,000/= and cash of Kshs. 24,000/= and immediately before the time of such robbery, used actual violence to the said **Dominic Mutua Muendo**.

2. The Appellant pleaded not guilty to the charge. Upon trial, he was convicted accordingly and sentenced to serve life imprisonment. Aggrieved by both the conviction and sentence, he preferred the instant appeal.

3. The Appellant raised six (6) grounds of appeal in his Supplementary Grounds of Appeal filed alongside his written submissions on 25th November, 2019. I have summarized them into four. They are that the charge was defective, that he was not properly identified, that the trial relied on medical evidence that was doctored, that his arrest had no relation with offence he was charged with and that the case was not proved beyond a reasonable doubt.

Summary of Evidence

4. This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced by the witnesses before the trial court so as to arrive at its own independent verdict whether or not to uphold the decision of the trial court. In doing so, this court is required to take into account the fact that it neither saw nor heard the witnesses. (See **Okeno v Republic (1972) EA 32).** I accordingly summarize the prosecution's case as follows.

5. On 12th September, 2016 at about 11.30 am, the complainant **PW1, Dominic Mutua Mwendwa** was waiting to board a matatu at St. Teresa stage near Tosha Petrol Station in Mlango Kubwa. Suddenly, the Appellant whom he identified as a tall, slim, dark man with one missing eye and a clean shaved head approached him while shaking. PW1 asked the Appellant what the issue was and he told him that he was sick and had forgotten to take his drugs. The Appellant requested PW1 to escort him to his house nearby to collect the drugs and PW1 agreed. They walked through a place with houses made of iron sheets. Then some four boys appeared from behind and held PW1 by his neck. Instead of helping him, the Appellant turned against him and punched him twice on the face breaking his spectacles. He also hit him on his mouth and removed a knife from the left pocket of his trouser and threatened to kill PW1 if he did not surrender to them the valuables he had. The boys continued beating him while searching his pockets. The Appellant took away his phone, a Samsung J7 worth Kshs. 32,000/= and two wallets, one of which had Kshs. 24,000/= while the other one had his business cards.

6. PW1 screamed for help but no one went to his rescue. He sustained injuries on his nose and mouth and his beige trouser and blue sweater got stained with blood. After the gang left him, PW1 tried to follow them but a woman came from a house nearby and cautioned him against going after them. PW1 knocked on a nearby door and sought help. He was given a trouser and a shirt which he wore then went to Pangani Police Station to report the incident. He gave a description of the Appellant when reporting the incident. It was indicated in the OB Report that PW1 could positively identify the person who attacked him. Thereafter, PW1 sought treatment at Park Road Nursing Home.

7. About one month later, **PW2, Robert Baraza Wamalwa**, a bodaboda rider, met PW1 and informed him that he had witnessed the whole incident. PW2 had seen the Appellant holding a knife with his left hand while other boys were beating him at a corridor near a car wash. PW2 could not intervene since he feared that he would also be beaten by the gang.

8. On 2nd January, 2017 at around 2.00 pm while on patrol, **PW3, PC Samuel John Mutonyi** of Huruma Police Station was called by his boss and informed that there were three boys robbing people along Muranga Road, off Desai Road. The boys were dropping envelopes with a false amount of money indicated on top but containing papers inside. They followed the three boys and managed to arrest the Appellant. They took him to Pangani Police Station for interrogation. PW1 was informed about the arrest and called to the police station to identify his assailant. PW1 identified the Appellant by his striking features which were his dark complexion and a missing eye.

9. **PW5, CPL Peter Mwangangi** of Pangani Police Station investigated the case. He was introduced to PW1 by Inspector Alice Chemtai on 3rd January, 2017 at around 8.00 am. PW1 told him that he could identify the people if he saw them even though he had never seen them prior to the day when he was attacked. PW1 gave him the clothes he was wearing on the day of the incident. The record showed that the Appellant had been arrested by police officers on patrol after they had received information that there were some thieves in a matatu and one of them had a bad eye. PW5 went with PW1 to the scene of the crime where he interviewed witnesses and recorded statements.

10. Thereafter, he prepared Misc File No. 11 of 2017 to enable him conclude investigations since PW1 had not obtained a P3 Form. PW5 obtained a photocopy of the receipt issued to PW1 from the shop where he had purchased his phone. He also obtained a report on PW1's damaged spectacles from PCEA Kikuyu Hospital. The Appellant told him that he could get PW1's phone from someone called Steve whom he had given it to but they did not manage to get the phone. When they wanted to conduct an identification parade, the Appellant declined to participate claiming that he was well known in the area.

11. **PW4, Dr. Maundu** of Police Surgery examined PW1 on 4th January, 2017. He relied on treatment notes from Park Road Nursing Home where PW1 first sought treatment on 12th September, 2016. According to the notes, PW1 had been hit on the nose which was swollen and was in pain. His left eye and forehead were also swollen and had a wound on his upper lip. On physical examination, PW4 found that PW1's injuries were approximately three months old. He classified them as harm. PW4 filled a P3 Form which he produced in court.

12. PW5 produced the following exhibits in evidence: PW1's beige trouser as exhibit 1, PW1's broken spectacles as exhibit 2, PW1's blue sweater as exhibit 3; treatment notes from Park road nursing home as exhibit 4, ID parade form dated 9th January, 2017 as exhibit 6, copy of receipt for Samsung J7 as exhibit 7 and documents from Kikuyu Hospital as exhibit 8.

13. Upon being placed on his defence, the Appellant chose to remain quiet and did not tender any defence.

Analysis and determination

14. The appeal was canvassed by way of both written and oral submissions. The Appellant filed his written submissions on 25th November, 2019 and orally highlighted them. The Respondent through learned State Counsel, Ms. Kibathi made oral submissions. Upon carefully reevaluating the evidence on record and considering the parties' respective submissions, I find that only three issues for determination arise namely; whether the charge was defective for want of duplicity, whether the prosecution proved its case beyond a reasonable doubt and whether the sentence imposed was legal and proper.

Whether the charge was defective

15. On this issue, the Appellant submitted that the charge was defective for being duplex since it was framed under both Sectionsw 295 and 296(2) of the Penal Code. He argued that due to the duplicity, he was unable to understand the exact offence that he had been charged with.

16. ***Section 295*** of the ***Penal Code*** provides as follows:

> ***"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 obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery".***

17. ***Section 296*** of the ***Penal Code*** on the other hand provides as follows:

> ***"(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.***
>
> ***(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death".***

18. From the foregoing, it is clear that *the* elements of *the offence of simple robbery under* ***Section 295*** of the **Penal Code** are different *from those of the aggravated offence of robbery with violence under* **Section 296 (2)**. This was aptly put by the Court of Appeal in the case of

Joseph Njuguna Mwaura & 2 Others v Republic [2013] eKLR, as follows:

> ***"We reiterate what has been stated by this Court (sic) 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 personal violence to any person. 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. 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".***

19. I therefore agree with the Appellant that the charge as framed was duplex. However, duplicity will not automatically result in the acquittal of the Appellant. The test to be applied is whether there was a miscarriage of justice as was set out by the Court of Appeal in the case of ***Paul Katana Njuguna v Republic [2016] eKLR.*** The Court in that case pronounced itself as follows when faced with a similar circumstance:

> ***"Having considered the law on duplicity as it has evolved, can we say that the charge as framed in the appeal before us was so defective as to have occasioned a failure of justice? Can it be said with any certainty that the said defect is incurable under Section 382 of the Penal Code. We observe that the offence under Section 295 and 296 (2) were not framed in the alternative. ……..***
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> ***39. We appreciate that Section 296 (2) of the Penal Code creates the offence of robbery with violence or aggravated robbery. In our view, the offence of robbery must first be demonstrated before proceeding to demonstrate the ingredients provided in Section 296 (2) of the Penal Code. As a corollary to this proposition, an accused person facing those charges would in defence seek to demonstrate that no offence of robbery was committed and that the ingredients alleged under Section 296 (2) were absent or were not demonstrated by the prosecution.***
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> ***40. In the matter before us, we are unable to detect any prejudice which the appellant suffered. The record shows that the appellant suffered no confusion when the charge, as framed, was read to him and when the witnesses testified, he fully cross-examined them. He raised no complaint before both the trial court and before the High Court. So, while it would be undesirable to charge an accused person under both sections in the alternative, it would not be prejudicial to that accused person if the offences are not framed in the alternative. As we have already noted the rule against duplicity is to enable an accused know the case has to meet. We accept as the correct position in law that uncertainty in the mind of the accused is the vice at which the rule against duplicity is aimed. If there is no risk of confusion in the mind of the accused as to the charge framed and evidence presented, a charge which may be duplex will not be found to be fatally defective.***
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> ***41. In this appeal, the appellant was fully aware of the case he was to meet when he was charged before the trial court and the charge as framed did not lead to a failure of justice. We must, therefore, reject the appellant's belated complaint that the alleged duplicity in count one of the charge caused him prejudice. We find that the defect if any, was in any event, curable under Section 382 of the Criminal Procedure Code."***

20. Similarly, in the present case, a scrutiny of the trial court's proceedings shows that the Appellant did not suffer any prejudice as a result of the duplicity. When the charge was read out to him as framed, he suffered no confusion as he readily answered "not true" and the trial court entered a plea of not guilty. He also went ahead and fully participated in the proceedings by cross examining witnesses without raising any complaint on the duplicity. The defect envisaged therein is curable under **Section 382** of the **Criminal Procedure Code**.

Whether the prosecution proved its case beyond reasonable doubt.

21. On this issue, the Appellant submitted that the case was not proved beyond a reasonable doubt. In rebuttal, the learned state counsel submitted that the prosecution proved its case against the Appellant to the required standard.

22. In determining this issue, the court is enjoined to first consider whether the evidence on record established the offence of robbery with violence. **Section 296(2)** of the **Penal Code** sets out the essential ingredients of the offence as follows:

> ***a. The offender is armed with any dangerous and offensive weapon or instrument; or***
>
> ***b. The offender is in the company with one or more other person(s); or***
>
> ***c. At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes , or uses other personal violence to any person***

23. PW1's evidence that he was robbed by the Appellant and a gang of four other boys was corroborated by PW2, an eye witness who testified that he saw PW1 being attacked by a gang of five boys. Further, PW1's testimony that the Appellant was armed with a knife was also well corroborated by PW2 who was categorical that he saw the Appellant holding a knife with his left hand during the incident. PW1 further testified that the Appellant and his accomplices beat him up and he sustained injuries on his nose and mouth as a result thereof. The injuries suffered therefrom were corroborated by the medical notes from Park Road Nursing Home and the P3 Form adduced in evidence by PW4. Indeed, the P3 form indicated that PW1 sustained the following injuries; a blunt injury to the nose, a swollen eye and nasal bridge, tenderness around the neck, bruised upper lip as well as a swollen forehead. In view of the foregoing therefore, I am satisfied that all the three elements of the offence of robbery with violence were sufficiently established.

24. I now grapple with the question of whether the Appellant was positively identified. The Appellant was convicted on the basis of visual

identification. Such identification can cause a miscarriage of justice unless tested carefully. In ***Wamunga v. Republic (1989) eKLR*** **the Court of Appeal stated as follows:**

> ***"Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction"***

25. Further, in the case of ***R vs. Turnbull and others (1976) 3 All ER 549***, Lord Widgery C.J. said the following regarding the identification of an accused person:-

> ***"First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance?"***

26. In the present case, both PW1 and PW2 stated that they had never seen the Appellant before the day of the incident. However, the circumstances under which they identified the Appellant left no doubt in my mind that the identification was positive and free from any possibility of error. Foremost, the robbery incident took place in broad daylight at around 11.30 am – noon. Secondly, PW1 had ample time and opportunity to identify the Appellant as he approached him while at St. Teresa stage and engaged him in a chat in which PW1 enquired about the Appellant's purported ill health. PW1 also spent a considerable amount of time with the Appellant while escorting him back home to go and take his drugs as the Appellant had made him believe. Thirdly, both PW1 and PW2 stated that the Appellant had a striking feature namely a missing eye which enabled both witnesses to identify him. Fourthly, when giving their evidence in court, both PW1 and PW2 narrated the actions of the Appellant at the time of the robbery with clarity and were also able to identify him. PW1 identified the Appellant as the tall, dark, slim man with a missing eye whereas PW2 identified him as the one who was holding a knife during the robbery. There is therefore, no doubt that the Appellant was positively identified by PW1 and PW2 as having taken part in the robbery.

27. The Appellant questioned why neither PW1 nor PW2 gave his description in the first report to the police if at all they identified him during the attack. He stated that their failure to do so at the earliest opportunity showeed that they could not be able to positively identify him three months after the alleged incident.

28. The fact is that the failure to give a description of a person seen during the commission of an offence is not fatal if the witness informs the police when making a report that he would be able to identify the person if he saw them again. (See ***Nathan Kamau Mugwe vs. Republic [2009] eKLR).*** From the evidence on record, PW1 was emphatic that he gave the Appellant's description to the police when he reported the incident. It is also on record that it was indicated in the Occurrence Book (OB) extract presented before the trial court that PW1 could identify his attackers if he saw them which position was confirmed by PW5.

29. Be that as it may, it is clear from **the Identification Parade Form tendered in evidence that the Appellant refused to participate in an identification parade because PW1 had seen him prior to the parade. This therefore means that** the identification of the Appellant by PW1 and PW2 was only done in court which amounted to dock identification as submitted by the Appellant.

30. Dock identification is generally frowned upon by courts. However, t**he court might base a conviction on such evidence if satisfied that on the facts and circumstances of the case, the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identification. (See the Court of Appeal in *Muiruri & 2 Others versus Republic [2002] KLR 274***). Similarly, **in the present case, I am satisfied that the identification of the Appellant by PW1 and PW2 was reliable and free from error. As such, whereas it was improper to expose him to the witness before the parade, I find that evidence on the identification parade, had it been conducted, would have been inconsequential.**

31. The Appellant further submitted that the different reasons for his arrest as stated by PW3 and PW5 showed that he had no connection to the offence. He stated that upon his arrest, the police decided to frame him up with an offence which had been lying in their Occurrence Book for three months. Mt view is that this argument lacks merit because the Appellant was positively identified as having taken part in the robbery. Suffice it to add, I see no reason why the police would frame up the Appellant when there was no grudge between them. Further, the Appellant did not raise this issue in his defence or question the two police witnesses, PW3 and PW5 on the alleged grudge. This ground therefore fails.

32. The Appellant also questioned PW4's testimony that PW1's injuries were about three days old and was in pain during his examination yet the same was conducted three months after the incident. However, nothing turns on this as the handwritten proceedings indicate that PW4 stated that the injuries were three months old. This is further supported by the P3 Form in which PW4 indicated the age of the injuries as approximately three and a half months old.

33. Appellant contended that the medical notes contradicted PW1's testimony in the sense that PW1 stated that he was struck on the mouth and nose yet the notes produced in evidence indicated that PW1 had a fractured knee. Nothing also turns on this argument because the medical note regarding the fractured knee was not part of the evidence produced on this case. The note was only presented in court as proof that PW1 could not attend court as he was indisposed. The treatment notes produced in evidence were from Park Road Nursing Home where PW1 first sought treatment. This ground of appeal therefore fails as well.

34. In view of the foregoing, I am satisfied that the prosecution proved the case against the Appellant beyond any reasonable doubt. His conviction was therefore safe and is accordingly upheld.

Whether the sentence was legal and proper

35. I note that the trial magistrate considered the Appellant's mitigation and pre-sentencing report as well as the Supreme Court decision in **Francis Karioko Muruatetu & Anor vs. Republic [2017] eKLR** and sentenced him to life imprisonment instead of the prescribed death sentence. However, I find that an indeterminate life sentence would be harsh and excessive in the circumstances of this case since the Appellant was a first offender and the violence meted was minimal. Accordingly, I set aside the life sentence and substitute it with a sentence of ten (10) year imprisonment term with effect from the date of his arrest which is 2nd January, 2017. It is so ordered.

Dated and Delivered at Nairobi This 3rd March, 2020.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Appellant in person.

2. Ms. Kibathi for the Respondent.