REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 150 OF 2017

BETWEEN

BONIFACE MWONGO MUTSOTSO……...……APPELLANT

AND

REPUBLIC……..……RESPONDENT

(An Appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera in Cr. Case No. 142 of 2015 delivered by Hon. Gandani, CM on 23rd June, 2017).

JUDGMENT

1. The Appellant, **Boniface Mwongo Mutsotso**, was charged with two counts of robbery with violence contrary to **Section 295** as read with **Section 296(2)** of the **Penal Code**. In count 1, the particulars were that on the 14th day of May, 2011 at around 2030 hours in Makuyu Lane in Kilimani within Langata sub-County within Nairobi County jointly with others not before the court while armed with a dangerous weapon namely a pistol robbed **Evarlyne Akimara** of a bag valued at Kshs. 350/= and immediately after the time of such robbery threatened to use actual violence against the said **Evarlyne Akimara**.

2. In count 2, the particulars were that on the 14th day of May, 2011 at around 2030 hours in Makuyu Lane in Kilimani within Langata sub-County within Nairobi County jointly with others not before the court while armed with a dangerous weapon namely a pistol robbed **Betty Nyekesa** of a mobile phone make Nokia valued at Kshs. 2,000/= and immediately after the time of such robbery threatened to use actual violence against the said **Betty Nyekesa.**

3. In count 3, he was charged with burglary and stealing contrary to **Section 304(2)** as read with **Section 279(b)** of the **Penal Code**. The particulars of the charge were that on the 14th day of May, 2011 at around 2030 hours in Makuyu Lane in Kilimani within Langata sub-County within Nairobi County jointly with others not before the court broke and entered the building used as a dwelling place by **Pupindu Kaur Bassi** and stole Kshs. 100,000/=, five (5) mobile phones make Nokia 2330, Nokia2100, Nokia X3, two Samsung phones, Nokia Telecom wireless, four laptops make two apple Mac Pro, two Toshiba Ipad all valued at Kshs. 1.1 million, the property of **Pupinder Kaur Bassi**.

4. The Appellant pleaded not guilty to all the three charges. Upon trial, he was convicted of all three offences and sentenced to suffer death on counts 1 and II and five years imprisonment on count III. The sentences in counts II and III were held in abeyance. Aggrieved by both his conviction and sentence, he preferred the present appeal to this court.

5. In a Memorandum of Grounds of Appeal filed in person on 6th November, 2017, he took issue that the trial did not properly evaluate the prosecution evidence against his plausible defence, that the prosecution witnesses' evidence was not credible, that the entire prosecution witnesses were impeachable under Section 163 (1) of the Evidence Act thus unworthy to be relied upon and that the learned trial magistrate failed to appreciate Section 169 of the Criminal Procedure Code by rejecting his plausible defence without giving cogent reason.

Summary of Evidence.

6. I am minded that this is the first appellate court whose duty is to reevaluate the evidence and make independent conclusions. See: **Okeno v Republic (1972) EA,32** and **Kiilu &Another v Republic (2005)1 KLR, 174**. I thus summarize the evidence adduced as follows.

7. The Appellant used to work at the home of the complainant in count III and her husband as a cook. On Saturday 14th May, 2011, **PW4, Mauvinder Pal Singh Bassi** went home and gave his workers advance salary then left for Nakuru with his father. Since his wife **PW1, Pupinder Kaur Bassi** was taking their younger son to a school concert, she told the Appellant to take the afternoon off and return the following day since they were going to return home very late and therefore would not eat dinner in the house. The Appellant left at around 2.00 pm but returned on the same day at around 6.30 pm. He told one of the housemaids **PW2, Evarlyne Minayo Akimara** that he was hungry and requested her to get him sukuma wiki (kale) from the main house since she was the one who had the keys for the house. PW2 gave him the vegetables and proceeded to take a bath in her room at the servant quarters. The Appellant went to the other house maid **PW3, Betty Nekesa's** room and requested her to cook but she declined. As such, the Appellant changed his mind about eating the sukuma wiki and left to go and buy milk so that PW3 could make him tea.

8. A short while later at about 7.15 pm, the Appellant returned with two people who were masked. He told the house maids that the two men found him at the gate and told him that they had come to repair electricity so he entered the compound with them. The two people demanded for the key to the main house but PW2 told them that the key was in her room. The Appellant put the milk on the floor and took the keys. One of the two masked man slapped PW3 while asking her whether she knew where money had been kept. The Appellant asked the men why they were beating the lady yet they had claimed that they came to repair electricity. The Appellant then left the room. He also locked up the dog in its kennel because it knew him.

9. The men tied up PW2 and PW3's hands then covered their faces with lesos. They then took PW2 and PW3 to the Appellant's room where they were made to lie down and their legs and hands tied up from behind then tied to the bed. One person remained in the room to guard them while the other one was walking outside as the Appellant entered the main house with others. PW2 and PW3 heard commotion in the main house. The robber who was walking outside cautioned the ones in the house not to make noise as they could be heard by the neighbour. He then entered the room, uncovered PW2's face and hit her head with something which he said was a gun. He asked PW2 and PW3 whether they knew where their employer keeps money but they said they did not know. The man called those in the house and told them that the ladies were not aware. The robbers left then there was total silence.

10. PW1 returned with her children at about 9.00 pm. When they approached the house, they heard screams from the servant's quarters and the dog was still locked and barking. PW1 went to open the dog's kennel while her children went to the servants' quarters to find out what was happening. They found PW1and PW2 tied up. The maids told them that there were thieves in the compound. PW1 and his sons ran out of the gate. They waited for about ten minutes then informed their neighbours who came with guards and accompanied them back to their house. PW1 went upstairs and found that it had been ransacked. She reported the incident to the police the next morning.

11. PW1 went back to the house and found that the following items had been stolen: four laptops make two apple Mac Pro, two Toshiba Ipad, eight mobile phones; two iphones, Nokia 2330, Nokia2100, Nokia X3, two Sam,sung phones, Nokia Telecom wireless, three cameras and one video recorder all valued at Kshs. 1,100,000/=. Her nephew who was visiting from Canada also lost US Dollars amounting to Kshs. 100,000/=. PW2 lost her bag valued at Kshs. 350/= in the robbery. PW3's mobile phone make Nokia 116 worth Kshs. 2,000/= was also stolen by the robbers. The Appellant disappeared after the robbery and also refused to pick their calls. He had worked for them for about six or seven months.

12. About four years later on 23rd December, 2014, **PW6, CPL Paul Locho Kigamwa** of Police Headquarters met PW4 who informed him about the incident. PW4 gave him copies of the Appellant's ID, NSSF and NHIF cards. On 3rd January, 2015, PW6 managed to trace the Appellant through the telephone number he was using then. PW6 tricked him through a text message that there was a job offer at KICC. PW6 pretended that the text message had been sent to the wrong recipient so he called the Appellant and apologized. The Appellant informed him that he did not have fare. PW6 sent him Kshs. 500/=, then the Appellant called back to thank him.

13. On 9th January, 2015, PW6 met the Appellant at KICC. The Appellant had come with all his certificates and an application for a job. PW6 arrested him and took him to KICC Police Station then Kilimani Police Station where the matter had initially been reported. Thereafter, the OCS Kilimani Police Station asked **PW5, PC Abdullahi Noor** of CID Kilimani Police Station to investigate the case. PW5 checked the occurrence book of 14th May, 2011 and confirmed that the incident had been reported. PW5 called PW4 and informed him about the Appellant's arrest. PW4 went to Kilimani Police Station and recorded a statement. PW1, PW2 and PW3 also recorded their statements. PW5 stated that the occurrence book in respect of the Appellant's arrest showed that the offence was committed in 2014. He also stated that since the Appellant was arrested after about four years, the chances of recovering exhibits and weapon were very low. PW1 also stated that the receipts for the stolen goods got lost when they were renovating their house.

14. After the close of the prosecution case, the court ruled that the Appellant had a case to answer and was accordingly put on his defence. He gave a sworn statement of defence in which he denied committing the offences. He stated that on 14th May, 2011 at around 3.00 pm, one of his colleagues at PW1's home informed him that their boss had called and said that he should go on off duty up to Monday morning. He went away but upon returning on Monday, PW4 went to his room in the servants' quarters and asked him to leave the compound immediately. PW4 pulled out a pistol and threatened to shoot him if he did not leave. He asked PW4 to pay him his salary. They had also quarreled previously over payment and PW4 had threatened to sack him. He picked all his things and gave PW4 his telephone number to call him when he was ready to pay him his dues. PW4 then started accusing him of sending robbers to him. He then went away. He claimed that PW2 and PW3 had been coached by PW4 to frame him so that PW4 does not pay him his dues. He also stated that PW6 used the telephone number he had given PW4 to track and arrest him.

15. In cross examination, he stated that no robbery occurred while he was at the scene. He also stated that he never reported to the police that PW4 had threatened him with a firearm as he was afraid to do so. Further, that he never reported to the labour officer that his employer had refused to pay him because he knew PW4 would bribe his way out.

Analysis and determination

16. This Appeal was canvassed by both written and oral submissions. The Appellant filed his written submissions on 27th November, 2019 and appeared in person during the oral highlighting of the same. The Respondent was represented by learned state counsel, Ms. Kibathi who

tendered oral submissions. Upon a careful reevaluation of the evidence on record and consideration of the parties' respective submissions, I find that there are only three issues for determination namely; whether the defect in the charge sheet was material, whether the prosecution proved its case against the Appellant beyond reasonable doubt and whether the death sentence should be upheld.

Whether the defect in the charge sheet was material

17. The Appellant submitted that there were material inconsistencies between the charge sheet and the evidence on record. He questioned why the charge sheet indicates that he was arrested on 9th October, 2015 yet the PW5 said he was arrested on 9th January, 2015. In response, Ms. Kibathi submitted that the same was an error.

18. It is true that the charge sheet erroneously indicated that the Appellant was arrested on 9th October, 2015 instead of 9th January, 2015 as testified by PW5 and PW6. In the case of ***JMA v. Republic*** **[2009]** KLR 671, the Court of Appeal held that:

> ***"It was not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the CPC was meant to cure such an irregularity where prejudice to the Appellant is not discernible."***

19. The said **Section 382** of the **Criminal Procedure Code** provides thus;

> ***"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."***

20. Further, **Section 214(2)** of the **Criminal Procedure Code** provides that:

> ***"…variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof."***

21. In view of the foregoing, I find that the Appellant was not prejudiced by this discrepancy as no miscarriage of justice was occasioned by the difference in dates.

Whether the prosecution proved the case against the Appellant beyond reasonable doubt

22. Of paramount consideration under this head is whether the Appellant was properly identified. It was the Appellant's submission that he was not positively identified. He questioned how PW2 and PW3 saw him yet they were inside the house. He contended that PW2 and PW3's testimony that he returned with two people who were masked is illogical because he was the one who was well known to them hence, would have been the one to disguise himself so that they don't recognize him. He submitted that it was not possible for him to return to his employers premises with robbers when all his personal documents namely identity, NHIF and NSSF cards were in the hands of his employer. He also questioned why he was not arrested immediately after the incident yet he was the prime suspect and contended that the fact that he never changed his phone number during the four years when he went missing proves that he was innocent. Further, he submitted that since PW1 to PW4 all came from one place, a conspiracy to fix him due to the existing differences between him and PW4 could not be ruled out. It was also his submission that there was no other independent evidence to support the testimonies of PW1 to PW4.

23. Ms. Kibathi submitted that identification was by way of voice recognition. She stated that PW2 and the Appellant had worked together for four months and interacted for a long period. As such, when the Appellant uttered distinct words to the attackers in the presence of PW2 and PW3 when asking the masked men why they were beating the ladies yet they had come to repair electricity, it was easy for PW2 to recognize his voice. Ms. Kibathi further argued that although the trial magistrate did not inquire into the sufficiency of lighting as set out in ***Maitanyi v R [1986]eKLR*** there existed other evidence that could sustain a conviction. She submitted that the Appellant's act of fleeing after the robbery and only getting arrested four years later was questionable. She urged the court to consider the provisions of **Section 8 (2)** of the **Evidence Act** on the conduct of the Appellant since if he was innocent he would not have fled. In Ms. Kibathi's view therefore, the Appellant was an enabler of the offences because he came with the robbers hence a principal offender under **Section 20** of the **Penal Code**.

24. The uncontroverted evidence on record is that PW2 and PW3 had lived and worked with the Appellant in their employer's residence for about four to six months prior to the day of the incident. He was therefore well known to them and his identification could easily be by way of recognition if the prevailing circumstances at the time of the incident favoured a positive identification. In **R v Turnbull (1976) 3 ALL ER 549, page 557,** the court held that recognition is more reliable than identification of a stranger.

25. PW2 and PW3 testified that the Appellant came back with two masked men at about 7.15 pm whereupon he took the key to the main house. However, the trial court did not make an inquiry as to the nature and intensity of the light which enabled the witnesses to recognize the Appellant at a time when it was presumably dark. To that end, the evidence of visual identification cannot be considered to be free from error. In the case of ***Maitanyi v Republic [1986] eKLR,*** the Court of Appeal held as follows:

> ***"The strange fact is that many witnesses do not properly identify another person even in daylight... It is at least essential to ascertain the nature of light available. What sort of light, its size and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are unknown because they were***

not inquired into....' See Wanjohi & Others -vs- Republic [1989] KLR 415.

26. I thus have to grapple with the question of whether the Appellant was identified by voice recognition. In ***Karani vs. Republic [1985] KLR 290*** the Court of Appeal held as follows:

> ***"Identification by voice nearly always amounts to identification by recognition. Yet here as in any other cases care has to be taken to ensure that the voice was that of the Appellant, that the complainant was familiar with the voice and that he recognized it and that there were conditions in existence favouring safe identification."***

27. Further, in the case of **Choge vs. Republic [1985] KLR 1** the Court of Appeal set out the principles of receiving evidence of voice recognition as follows:

> ***"Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual recognition. In receiving such evidence, care would be necessary to ensure that it was the accused person's voice, that the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it..."***

28. PW2 testified that when one of the masked men slapped PW3, she heard the Appellant ask why they were beating the ladies yet they had come to repair electricity. This happened in PW3's room at the servant quarters. I am persuaded that the fact that PW2 had lived and worked with the Appellant at their employer's residence for about four months meant that she was very familiar with his voice. I am also persuaded that the conditions under which the voice recognition was done were favourable since they were both in the same room. Further, the Appellant uttered very distinct words which made it easier for PW2 to recognize his voice. I am therefore satisfied that the said words placed the Appellant at the scene of crime.

29. Further, apart from the evidence of voice recognition, I find that there are other inculpatory facts that connect the Appellant with the offences herein. Inculpatory facts are defined as evidence that shows, or tends to show a person's involvement in an act, or evidence that can establish guilt. (see. **Black's Law Dictionary, 9th Edition**). In the case of **Sawe v Republic [2003] eKLR** the Court of Appeal stated as follows:

> ***"In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution and always remains with the prosecution. It is a burden, which never shifts to the party accused."***

30. In the instant case, despite being at the scene of crime, the Appellant did not bother to raise alarm and/or contact the police when the masked men who pretended that they had come to repair electricity forcibly gained entry into his employer's main house. He also did not let the dogs out of their kennels as a security measure. Further, he left with the robbers and did not bother to go back and check on PW2 and PW3 who were left tied up together in his room at the servant quarters. Most importantly, he disappeared immediately after the incident and refused to pick his bosses calls and/or contact them to let them know why he did not resume work as agreed if at all. He also relocated from Kangemi where he used to live and was only tracked and arrested by PW6 four years later upon being tricked that there was a job vacancy. Indeed, his aforesaid actions were not consistent with innocence. The only inference that can be drawn is that he disappeared because he was involved in the robbery and feared that he would be arrested by the police.

31. I find the Appellant's defence that he went back to his employer's residence on Monday morning but was sent packing by PW4 due to a dispute regarding his salary unbelievable. The Appellant did not raise the issue of the alleged dispute at any point when cross examining PW4 or any of the witnesses whom he claims were present when he was being sent away. I find that line of defence to be an afterthought which cannot water down the strong prosecution evidence against him. Further, there being no evidence of a grudge between him and PW4, his claim that he was framed cannot stand. In the premises, his contention that the trial court unfairly rejected his defence is unfounded and lacks merit.

32. Further, the Appellant submitted that the testimonies of PW1, PW2 and PW3's were contradictory. He argued that PW1's testimony that the maids told her that a probox came into her compound after he had opened the gate and allowed the occupants of the vehicle into her compound contradicted the maids testimonies that they were in the house. I find that PW1's aforesaid evidence was hearsay evidence which was inadmissible and in any event, the Appellant's conviction was not founded on the same.

33. It was also his submission that the prosecution failed to call the following crucial witnesses; the person who linked him with PW4 who would have confirmed whether he went into hiding after the robbery; the children who said that the dog had been locked as well as the visitor who lost the US Dollars. It is firmly settled law that the prosecution is not obliged to call a superfluity of witnesses in order to prove a fact. I am convinced that the evidence on record sufficiently established the Appellant's guilt without the need for more witnesses.

34. As to whether the offence of robbery with violence was established, the elements constituting it are provided under **Section 296 (2)** of the **Penal Code**. These are that:

> ***a) The offender is armed with a dangerous or offensive weapon or instrument; or***
>
> ***b) The offender is in the company of one or more person or persons; or***
>
> ***c) If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any personal***

violence to any person.

35. No doubt the Appellant was in the company of at least two other men one of whom was armed with a gun. The robbers used personal violence on PW2 and PW3 by slapping them, tying up their hands and feet together as well as blindfolding them with lesos. All the three ingredients constituting the offence were proved even though proof of any one set of ingredients would suffice.

36. As regards the offence of burglary and stealing, Ms. Kibathi submitted that the burglary was proved as witnesses maintained that the offence took place at night. She argued that the intent to commit a felony was established because the attackers were asking where the money was kept. On the offence of stealing, she submitted that although receipts no were not produced, PW1 reported the theft and oral evidence also established the theft. She however argued that the trial court failed to pronounce the two distinct offences as provided in the Penal Code and urged the court to correct this error.

37. There is no doubt that the offences of burglary and stealing from a dwelling house are two distinct offences which are created by different provisions of the law. The punishment prescribed for their commission is also different and provided for separately. It was therefore incumbent upon the trial court to make a distinction between the two offences instead of making a blanket finding that the charge had been proved as framed.

38. Section 304(2) of the **Penal Code** states as follows regarding the offence of burglary::

"(1) Any person who –

(a) breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein; or (b) having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or having committed a felony in any such building, tent or vessel, breaks out thereof, is guilty of the felony termed housebreaking and is liable to imprisonment for seven years.

(2) If the offence is committed in the night, it is termed burglary, and the offender is liable to imprisonment for ten years."

39. Thus, the offence of burglary is considered proved where the prosecution proves not only breaking but entry into any building, tent or vessel used as a human dwelling at night with intent to commit a felony therein. PW2 and PW3 gave consistent evidence that the incident took place between 7.00 and 8.00 pm. They also gave consistent and corroborated testimonies that the Appellant took the key to the main house, left them being guarded by one of the masked men then shortly thereafter, they heard a commotion in the main house. To that, I am persuaded that the robbers gained entry into the main house using the key which the Appellant had picked from PW3's room. Further, the intention to commit a felony was evident from the robbers' inquiry from PW2 and PW3 whether they knew where their employer keeps money. Intention was also clear from the fact that PW1 went upstairs and found that it had been ransacked. In the premises, I am satisfied that the offence of burglary was proved.

40. As regards he offence of stealing from a dwelling house, Section **279 (b) of the Penal Code** provides as follows:

"If the theft is committed under any of the circumstances following, that is to say-

(b) if the thing is stolen in a dwelling-house, and its value exceeds one hundred shillings, or the offender at or immediately before or after the time of stealing uses or threatens to use violence to any person in the dwelling-house;

the offender is liable to imprisonment for fourteen years."

41. PW1 testified that when she went back to her house, she found that the goods listed in Count III had been stolen. She reported the incident to Kilimani Police Station which fact was confirmed by PW5. However, she testified that the receipts for the stolen goods got lost when they were renovating their house hence she could not produce any in court. I find no reason to doubt PW1's evidence in that regard since it was well corroborated by her husband PW4. Further, PW2 testified that one of the masked men entered the room where they had been tied up while the others were ransacking the main house and hit her head with something which he said was a gun. I am therefore satisfied that the offence was also proved even though none of the goods were recovered.

42. The Appellant further faulted the trial court for non-compliance with **Section 169** of the **Criminal Procedure Code**. He submitted that the trial court failed to identify the law relating to the issues he was canvassing in his judgment, failed to provide reasons for conviction and failed to specify the reason for dismissing his defense which was never challenged by the prosecution. My perusal of the trial court's judgment reveals that this was not the case. This ground of appeal therefore lacks merit.

Sentence

43. As regards this, the Appellant urged the court to reconsider the death sentence imposed by the trial court in view of the Supreme Court decision in ***Francis Kariokor Muruatetu & Anor v Republic [2017]***. Miss Kibathi conceded to the appeal on the sentence and urged the court to give an appropriate penalty in view of the aforesaid decision.

44. The Appellant was a first offender. I note that the robbers did not cause any serious injuries to PW2 and PW3. This essentially means that the ends of justice would not be served by him serving a death sentence. Nevertheless, the seriousness of the offence of robbery with violence cannot be downplayed. Accordingly, I exercise my discretion and set aside the death sentence imposed and substitute it with seven (7) years imprisonment in counts I and II respectively. Equally, as regards Count III, the Appellant shall serve years imprisonment in each of

the limbs. All the sentences shall run concurrently commencing from the date of arrest, 9th January,2015.

45. In conclusion, this Appeal lacks merit and is accordingly dismissed save on modifications in sentence.

Dated and Delivered a Nairobi This 9th Day of April, 2020.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. Appellant in person.

2. Miss Chege for the Respondent.