REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 11 OF 2017

JAMES KIBET SONGOK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from against both the conviction and the sentence of Principal Magistrate Hon. B. Mararo. delivered on 27th January, 2017 in Nakuru Chief Magistrate's Court Criminal Case No. 3595 of 2013)

JUDGMENT

1. The Appellant herein is James Kibet Songok. On 11/11/2013, he and another person who is now deceased were arraigned before the Nakuru Chief Magistrate's Court and charged with a single count of robbery with violence. The charge sheet read as follows:

> *1. EDWIN ROTICH KIAI. 2. JAMES KIBET SONGOK: Robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code.*
>
> *Particulars: On the 9th day of November, 2013 at 2:00am at Kapkures Area in Nakuru District of the Nakuru County, jointly with others not before Court while armed with dangerous weapons namely pangas and rungus robbed Patrick Rotich Kipyakwai, cash money Kshs. 8,000/- and a briefcase all valued at Kshs. 14,000/- and at or immediately before or immediately after such time of robbery used actual violence to the said Patrick Rotich Kipyakwai.*

2. The Appellant and his Co-Accused pleaded not guilty to the charge. A full trial followed. At the conclusion of the trial, the Learned Trial Magistrate convicted both the Appellant and his Co-Accused and sentenced both to death. Both the Appellant and his Co-Accused Person filed their appeals before this Court – but the Co-Accused Person (Edwin Rotich Kiai) died before the Appeal was perfected for hearing. That left only the Appellant to prosecute the appeal.

3. The Appellant's appeal raises a number of complaints including the complaint that the Prosecution case was not proved beyond reasonable doubt; that the identification evidence was not free of error; and that the Learned Trial Magistrate was wrong in dismissing the Appellant's defence which he insists was plausible.

4. During the hearing of the appeal, the Appellant submitted his written submissions and chose not to highlight them orally while Ms. Rotich, Learned Prosecution Counsel, submitted orally in opposition to the appeal.

5. As the first appellate Court, I am duty bound to re-evaluate and reconsider all the evidence adduced during the hearing afresh and come to my own conclusions about all the elements of the crimes charged. In doing so, I am to be guided by two principles. First, I must recall that I must make appropriate allowance for the fact that I did not have a chance to see or hear the witnesses. This means that I must give due deference to the findings of the Trial Court on certain aspects of the case. Second, in re-evaluating and re-considering all the evidence, I must consider the evidence on any issue in its totality and not any piece in isolation. This principle constrains me to reach my own conclusions on the totality of the evidence as opposed to merely using the Trial Court's findings as a foil to endorse or reject its findings. See ***Okeno v Republic*** **[1973] E.A. 32**; *Pandya* ***vs. R*** (1957) EA 336, *Ruwala* ***vs. R*** (1957) EA 570.

6. My duty has the first appellate Court includes assessing the entire Trial Court record de novo. In doing so, one obvious point that emerged is that the charge sheet as framed was, according to our controlling case law, defective and could not sustain a proper conviction for the offence of robbery with violence.

7. As reproduced above, the charge was duplex: the Appellant was charged with the offence of robbery with violence contrary to section 295 as read together with section 296(2) of the Penal Code. The leading case in this respect is ***Joseph Njuguna Mwaura and Others vs R,*** **(2013) eKLR.** In that case, the Court of Appeal was categorical that framing a charge of robbery as happened here under sections 295 and 296(2) of the Penal Code would amount to a duplex charge. The said Court, while following its earlier decisions in ***Simon Materu Munialu V Republic [2007] eKLR (Criminal Appeal 302 of 2005)*** and ***Joseph Onyango Owuor & Cliff Ochieng Oduor v R [2010] eKLR (Criminal***

Appeal No 353 of 2008), stated as follows:

> ***Indeed, as pointed out in Joseph Onyango Owuor & Cliff Ochieng Oduor v R, the standard form of a charge, contained in the Second Schedule of the Criminal Procedure Code sets out the charge of robbery with violence under one provision of law, and that is section 296. We reiterate what has been stated by this Court 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 any 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 to 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.***

8. Many other cases have since followed this reasoning in the ***Joseph Njuguna Mwaura Case***. I see no facts, context or circumstances to distinguish the rule announced in this case from the present case. I, thus, find that the charge as framed in this case against the Appellant was duplex and therefore defective. As ***Joseph Mwaura Case*** and its progeny have announced, duplicity is not a curable defect under section 382 of the Criminal Procedure Code.

9. Having come to this conclusion, this disposes this appeal on this point alone: *the conviction cannot stand*. The only question I must determine next is whether to order a re-trial.

10. Having perused the record of the trial Court with the keenness and evaluative eye demanded of the first Appellate Court, I have come to the conclusion that a retrial would be appropriate here. The case of ***Makupe v Republic***, ***Criminal Appeal No 98 of 1983***, the Court of Appeal at Mombasa on July 18, 1984 (Kneller JA, Chesoni & Nyarangi Ag. JJ A) set out the general test to be utilised in determining whether a retrial should be ordered or not: In general a retrial will be ordered when the original trial was illegal or defective. Conversely, a retrial will not be ordered where the conviction is set aside because of insufficient evidence. The court must in ordering a retrial take the *view that had the case been properly prosecuted and admissible evidence adduced, a conviction might fairly result.*

11. I am persuaded here, from my view of the case that properly prosecuted there might be sufficient admissible evidence to result in a conviction. The less I say about this, the better.

12. In the end, therefore, the orders and directions of the Court are as follows:

> **a. The conviction entered in *Nakuru Chief Magistrate's Criminal Case No. 3595 of 2013* is hereby set aside.**
>
> **b. The sentenced imposed on the Appellant is hereby consequently set aside.**
>
> **c. The Appellant shall be released from Prison forthwith and shall, instead, be placed on remand pending his presentation before the Chief Magistrates' Court to take plea in a properly framed charge sheet.**
>
> **d. The Appellant shall be presented before the Chief Magistrate's Court, Nakuru on Wednesday, 17/06/2020 to take plea. The case shall be assigned to a magistrate other than the Learned Honourable B. Mararo who initially heard the case.**
>
> e. **The Deputy Registrar is directed to send back the Trial Court file in *Nakuru Chief Magistrate's Criminal Case No. 3595 of 2013* and a copy of this judgment to the Chief Magistrate's Court, Nakuru for compliance.**

Dated in Nakuru this 11th day of June, 2010

JOEL NGUGI

JUDGE