REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 163 OF 2016

ALFRED MUCHESIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

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

at Kibera Cr. Case No. 4012 of 2014 delivered by Hon. Juma on 9th November, 2016).

JUDGEMENT

1. The Appellant herein was charged with the offence of robbery with violence contrary to **Section 295** as read with **Section 296(2)** of the **Penal Code**. The particulars were that on the 29th of August 2014 at Katwekera area in Nairobi County while armed with a dangerous weapon namely a stone robbed Vincent Oduori of Kenya Shillings two thousand(Ksh 2000) and a mobile phone make Nokia valued at Kenya Shillings three thousand (Ksh 3000) and immediately after such robbery wounded Vincent Oduori. On conclusion of the trial, he was convicted and sentenced to suffer death. He preferred the instant appeal.

2. In his amended grounds of appeal filed on 13th March, 2019, he was dissatisfied that his identification was not properly established, that he was convicted based on contradictory and insufficient evidence, that the charge sheet was duplex and that his defence was not considered.

Evidence

3. As the court of first appeal I am required to reevaluate the evidence and come up with my independent conclusions. (**See Okeno V R[1972] eKLR**).

4. The prosecution called a total of four (4) witnesses in support of their case. They also presented documentary evidence to substantiate the charge. **PW1, Vincent Oduori** was the complainant in the matter. He testified that he was walking at Katwekera in the company of **PW2, Sylvester Simon Odhiambo**, at about 12.00 noon when he was hit with an object that he could not see. He fell to the ground and in the process of the scuffle he lost his mobile phone and money. On cross-examination, he stated that it was the Appellant who hit him. **PW2, Sylvester Simon Odhiambo** confirmed that he saw three (3) men attack **PW1**. On cross-examination, he stated that there were many people on the road where the attack took place. In response, he raised an alarm and the assailants fled the scene. **PW1** went to Coptic Hospital for treatment. He then proceeded to Kilimani Police Station to report the matter. On cross examination, **PW1** reiterated that he did not see what was used to hit him.

5. **PW3, Dr Joseph Maundu** of Police Surgery examined the complainant on 1st September 2014. He observed that **PW1** had cut above the right eye, swelling on the left side and that the injuries were two days old. **He** testified that the attack was by persons he could identify. He filled out a P3 form which was adduced as Exhibit 1. He also testified that the complainant, **PW1**, was treated at Shining Hope Clinic. **PW4, PC Victor Omondi**, was the investigating officer. He testified that **PW1** and **PW2** were accosted and in the scuffle a stone was flung on to the complainant's face. The complainant lost his mobile phone and money. He also testified that they managed to arrest the Appellant a week after the incident. However, none of the items stolen were recovered. On reexamination, he stated that the incident was reported at 8.00 am and that it happened at 7.00 am.

Analysis and determination

6. The Appellant who was in person filed written submissions whilst Miss Akuja for the Respondent made oral submissions. I have narrowed down the issues of determination to two, namely;

a. whether the charge sheet was duplex; and

b. whether identification was proved.

Whether the charge sheet was duplex

7. The Appellant submitted that the learned trial magistrate erred in failing to find that the charge sheet was duplex for being drawn under both Section 295 and 296(2) of the Penal Code. He argued that the charge was incapable of affording him sufficient information to allow him to plead appropriately. The Respondent argued that the defect cited by the Appellant was not fatal and could be remedied under **Section 382** of the **Criminal procedure Code**.

8. On this issue, the Court of Appeal in the case of ***Joseph Njuguna Mwaura & 2 Others v Republic [2013] eKLR,*** held that:

> ***"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".***

9. In the circumstances, it would be proper to hold that the charge was duplex having been drawn under both Sections 295 and 296(2) of the Penal Code. Nevertheless, the test is whether the duplicity prejudiced the Appellant. In the present case, the Appellant pleaded to the offence of robbery with violence, the offence for which the prosecution adduced evidence. He all through defended himself against this offence. In the circumstances, I find that no prejudice was occasioned to him merely because the charge sheet was drawn under the two provisions of the law.

Whether the Appellant was properly identified

10. At the time of the incident, it was the testimony of the complainant **PW1, Vincent Oduori,** that he did not see his attackers. He neither saw the object used to attack him. He only recalls that he was attacked at around midday and that in the process he lost some items. It is difficult to understand how, on cross-examination, he suddenly affirmed the position that the Appellant hit him.

11. **PW2, Sylvester Simon Odhiambo** who accompanied **PW1** testified that the assailants were three (3) in number. However, he stated that he only saw one of them. In his testimony, he recalled seeing the attack on the complainant but he failed to recount what was used to facilitate the attack, yet he said he saw the attacker.

12. It is clear that identification was by a single witness. The court is mandated to treat such evidence with caution. This is in a bid to satisfy itself as to the truthfulness of the same. **PW2** could not recount the object used in the attack. Further, despite the fact of there being many people on the road, he stated that there were three assailants. Curiously out of these, he only saw the Appellant. He failed to give any peculiarities that aided him in singling out either the assailants or the Appellant amongst other assailants.

13. In sum, I find that the identification of the Appellant was marred by error and inconsistency. There is no proof that the Appellant was involved in the offence. While the incident happened in broad daylight and that **PW2** witnessed the incident, it is also clear that none of the assailants were clearly singled out.

14. According to the investigating officer, **PW4, PC Victor Omondi,** the arrest of the Appellant was done a week after the incident. The sole identifying witness **PW2** in his testimony stated that he did not describe the assailant in the initial report. It is therefore not clear what the arresting officer relied on to trace and arrest the Appellant.

15. There also remains the fact that the Appellant may have been identified by way of dock identification. The general rule, in this regard, is that dock identification is worthless unless corroborated by a properly conducted identification parade. There is, however, an exception to that rule. The decision of the Court of Appeal in the case of **Samuel Mwaura Muiruri v Republic [2002] eKLR** is instrumental in this regard. It held that not all dock identification is worthless but may be admitted as sufficient identification evidence;

> ***"if from the facts and circumstances of the case the evidence has to be true and that prior thereto the court duly warns itself of the possible danger of mistaken identification."***

16. The only person who identified the perpetrator on the dock was the investigating officer. **PW2** who was the sole identifying witness did not make any attempt to identify the Appellant in the dock. As such, it is clear that while dock identification could have been reliable it was not adduced by the proper witness.

17. It is also clear that there was failure to elucidate what dangerous or offensive weapon was used. It is however evident that the complainant suffered injuries. It was claimed that he got hit but in the absence of sufficient evidence as to who hit him, it can as well be concluded that he could have fallen and bumped his head when he landed on the ground. As such, the elements of the offence of robbery with violence as set out under Section 296(2) of the Penal Code were not established.

18. I am satisfied that the Appellant was not identified as being culpable. As such, I find that his conviction was not safe. I accordingly quash the conviction and set aside the sentence. I order that he be forthwith set at liberty unless otherwise lawfully held.

DELIVERED AND DATED THIS 8TH DAY OF MAY 2019.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of

1. *The Appellant in person.*

2. *Mr. Momanyi for the Respondent.*