REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 71 OF 2014

SIMON EKIRU .....APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(From the original conviction and sentence in Criminal case No.2521 of 2012 of the Chief Magistrate's Court at Nakuru by Hon. F. Kombo– Senior Principal Magistrate)

JUDGMENT

1. **Simon Ekiru,** the appellant herein, was convicted for the offence of robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code.

2. The particulars were that on 18th July 2012 at **Machini** estate in **Nakuru** District within **Rift Valley** Province, jointly with others not before the court while armed with clubs and an axe robbed **Jecinta Muthoni Njuhi** of her L.G television set, one Sonitec radio, one pipe range and Nokia 1200 mobile phone all valued at Kshs. 13,170/= and at or immediately before or after the time of the said robbery threatened to use actual violence to the said **Jecinta Muthoni Njuhi.**

3. The appellant was sentenced to suffer death. He now appeals against both conviction and sentence.

4. The appellant raised four grounds of appeal that can be summarized as follows:

a) The learned trial magistrate erred in law and in fact by convicting the appellant on the basis of uncorroborated evidence of a single witness.

b) The learned trial magistrate erred in law and in fact by relying on insufficient evidence of identification.

c) The learned trial magistrate erred in law and in fact by relying on insufficient evidence.

5. The state opposed the appeal through Mr. Chigiti, the learned counsel. He urged the court to find that the offence was proved and that the sentence was lawful.

6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32.**

7. Upon my perusal of the evidence on record I find that the appellant was arrested after he was purportedly identified by the complainant's grandson. This witness was not called and no explanation was proffered for the failure. In **Bukenya vs. Uganda [1972] EA 549,** (Lutta Ag. Vice President) held:

The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.

The failure to call a witness who led to the arrest of the appellant was a miscarriage of justice. The court was denied a chance to evaluate under what condition this witness saw the robber and what led him later to claim that the appellant was the robber he saw. The prosecution hid a knife behind the back and used it to stab the appellant's right to fair hearing. This is not only unfair but repugnant to justice. The

injustice occasioned to the appellant reeks to the high heavens.

8. Prior to the appellant's arrest following the purported identification by the complainant's grandson, the complainant had not described the person she alleged she saw and could identify later to anybody. In her testimony in court, she said she had seen the appellant for one year and that he used to stand at a particular place every day. This if true, is a person she ought to have volunteered information about and describe him almost with precision. Since she did not, we can only assume that she went with the purported identification of her grandson. This was the most worthless evidence of identification.

The charge was erroneously drafted. This is how it read:

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

In the case of **Joseph Njuguna Mwaura & 2 others vs. Republic [2013] eKLR** it was held that it was erroneous to charge an accused person for the offence of robbery with violence under section 295 and 296 (2) as this would amount to a duplex charge. This is what the Court of Appeal said:

> **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.**

The charge on which the appellant was convicted was bad for duplicity**.** In the case of **Cherere s/o Gukuli vs. Republic (1955) E.A. 478,** the Court of Appeal for Eastern Africa held:

> **Where two or more offences are charged to the alternative in one count, the count is bad for duplicity contravening section 135(2) of the Criminal Procedure Code. The defect is not merely formal but substantial. When an accused is so charged, it cannot be said that he is not prejudiced because he does not know exactly with what he is charged and if he is convicted he does not know exactly of what he has been convicted.**

Other than lack of evidence against the appellant, the trial process was vitiated by the duplex charge.

9. When a trial is vitiated where there is sufficient evidence, the recourse is to order a retrial in the interest of justice. In the instant case however, there is no evidence on the basis of which I can order a retrial.

10. The upshot of the foregoing analysis of the evidence on record is that the conviction cannot stand. Consequently, I quash the conviction and set aside the sentence. The appellant is set at liberty unless if otherwise lawfully held.

DATED and **SIGNED** at **Nakuru this 5th Day** of December, **2019**

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KIARIE WAWERU KIARIE

JUDGE

DELIVERED at Nakuru this 10th day of December, 2019

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JOEL NGUGI

JUDGE