



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 171 OF 2016.

SIMON MWANGI KAMAKO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from against both the conviction and the sentence of Principal Magistrate Hon. WAKUMILE V. delivered on 1st of November 2016 in NAKURU Court Criminal Case No. 2079 of 2015.)

JUDGMENT

1. The Appellant, **Simon Mwangi Kamako**, was arraigned before the Nakuru Chief Magistrate's Court and charged with a single count of robbery with violence. The charge sheet read that the Appellant was charged with "robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code." The particulars of the offence read that "on the 29th of May 2015 at around 2.00pm at Zambezi Estate in Njoro Sub County within Nakuru County, while armed with an offensive weapon namely a Somali sword robbed Ngengi M. Kariuki of his mobile Phone Make Samsung IMEI 353768052431454, white in colour and KShs 2,700 all valued at Kshs 12,700 and at or immediately after the time of such robbery, threatened to use actual violence to the said Ngengi M. Kariuki."

2. The Appellant pleaded not guilty and after a fully fledged trial, the Trial Court convicted the Appellant and sentenced him to death.

3. The Appellant dissatisfied by both the conviction and sentence and has appealed on this Court. The grounds of Appeal, reproduced verbatim, are that:

1) The charge sheet is defective under the meaning of Section 214 of the Criminal Procedure Code, since it charges which are not proved in evidence and thus the charge of Robbery with violence has not been proved under the meaning of Section 296 (2) of the Penal Code.

2) The Learned Trial Magistrate erred in law and in fact by convicting the Appellant in a prosecution case where identification of the Appellant was not free from the possibility of error and obtained in difficult situations.

3) The Learned Trial Magistrate erred in law and in fact by misconstruing the arrest of the Appellant from the pub connecting him to the purported cell phone.

4) The Learned Trial Magistrate erred in law and in fact by dismissing the Appellants possible defence and holding that it was a mere denial.

4. During the hearing of the appeal, the Appellant submitted his written submissions and chose not to highlight them orally while Ms. Kibiru, 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. The principal complaint raised by the Appellant is that the charge sheet was defective and that it could not sustain a proper conviction for the offence of robbery with violence.

7. Charitably paraphrased, the Appellant's argument is that he was convicted on a duplex charge, in that he was charged with a charge of robbery with violence contrary to section 295 as read together with section 296(2) of the Penal Code. He submitted that it was wrong to frame a charge of robbery with violence under the two sections of law, and that he was charged with two offences in one charge sheet under the two sections. He relied on a number of cases decided by our Courts on this question.

8. 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.

9. 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.

10. *Having come to this conclusion, this disposes this appeal on this point alone: the conviction cannot stand. However, it does end the matters. I am still left with the question whether the other grounds of appeal would have independently succeeded so that I can make a determination whether a retrial is appropriate in the circumstances.*

11. *Having perused the record of the trial Court with the keenness and evaluative eye demanded of an 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.*

12. 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.

13. 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. 2079 of 2015 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 Monday, 9th December, 2019 to take plea. The case shall be assigned to a magistrate other than the Learned Honourable V. Wakumile 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. 2079 of 2015 and a copy of this judgment to the Chief Magistrate's Court, Nakuru for compliance.

Dated and delivered at Nakuru this 5th day of December, 2019

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JOEL NGUGI

JUDGE