**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CRIMINAL APPEAL NO. 193 OF 2015**

**TOM MARUA CHACHA......................APPELLANT**

**-VERSUS-**

**REPUBLIC..........................................RESPONDENT**

**(An Appeal from the original conviction and sentence in Mombasa Chief Magistrate's Court Criminal Case No. 3720 of 2011 delivered on 21st October, 2015 by Hon. R. Odenyo, Senior Principal Magistrate).**

**JUDGMENT**

1. The appellant and another were jointly charged with the offence of robbery with violence contrary to section 295 as read with 296(2) of the Penal Code. The particulars of the charge were that on the 5th day of December, 2011 at Nyali estate in Kisauni district of the Coast province jointly with others not before court while armed with dangerous weapons namely pistol and pangas robbed Rashid Mbaruk of Kshs 60,000/= and a suitcase containing assorted clothes and at or immediately before or immediately after such time of robbery used actual violence on the said Rashid Mbaruk.

2. The prosecution called 4 witnesses in support of its case. After considering the evidence adduced and the defence case, the appellant was found guilty as charged. He was sentenced to death. His co-accused was acquitted for lack of sufficient evidence.

3. The appellant filed a petition and grounds of appeal on 29th December, 2016. On 14th January, 2019 his Advocate, Mr. Chacha Mwita filed an amended petition of appeal, with leave of the court. He raised the following grounds of appeal. That:-

> (i) The learned Hon. Magistrate erred in both law and fact in convicting the appellant on the face of a defective charge sheet (sic) and failing to inform him of his right to legal representation in the first instance;
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> (ii) The learned Hon. Magistrate erred in both law and fact in convicting the appellant on a faulty/mistaken identification exercise, whose accompanying evidence was not proven beyond reasonable doubt;
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> (iii) The learned Hon. Magistrate erred in both law and fact in convicting the appellant despite the existence of screaming contradictions, inconsistencies and lack of corroboration in the totality of the prosecution's evidence;
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> (iv) The learned Hon. Magistrate erred in both law and fact in convicting the appellant without considering the strong and un-contradicted defence put forth by the appellant, and more so his defence of alibi which was never dislodged, hence arriving at a wrong conclusion in law and fact;
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> (v) The learned, Hon. Magistrate erred in both law and fact in convicting the appellant despite the prosecution's failure to avail material witnesses whose evidence was adverse to the prosecution's case, hence occasioning a miscarriage of justice;
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> (vi) The learned, Hon. Magistrate erred in both law and fact in sentencing the appellant excessively and in violation of the independence of the judiciary, by failing to exercise discretion under the circumstances and failure to consider the period the appellant had been in custody.

4. On 11th February, 2019 the appellant's counsel filed written submissions and list of authorities. On 12th February, 2019 the said Counsel filed supplementary submissions and an additional list of authorities. On 6th March, 2019 the respondent filed its written submissions through Ms Ogweno, Principal Prosecution Counsel. Both counsel filed elaborate submissions.

5. In highlighting his submissions, Mr. Chacha Mwita, Learned Counsel for the appellant stated that the charge against the appellant was duplex as it combined the provisions of Sections 295 and 296(2) of the Penal Code whereas each of the said Sections created a distinct punishment. He argued that the error was compounded by the fact that the appellant was unrepresented in the subordinate court and he was

prosecuted and tried by learned persons. Mr. Mwita relied on the case of **Peter Mbuvi Wanza vs Republic** [2016] eKLR on the effect of duplicity in a charge. He indicated that the said authority also addressed the issue of lack of representation of accused persons in trial courts.

6. It was submitted that the appellant gave an alibi defence which was never challenged, refuted or rebutted despite the prosecution's knowledge that he would rely on the said defence. The case of **Joseph Munyoki Kimatu vs Republic** [2014] eKLR was cited to support the issue of alibi defence and the time when it should be communicated.

7. It was stated that during the appellant's defence, he said that he wanted to rely on the statement made by the manager of the security company which had employed him and the statement of one Chacha from whom one of the exhibits was recovered. It was further stated that the appellant had explained in his defence that he had resigned from the security company and was doing business at Kongowea market, yet the prosecution did not call a rebuttal witness.

8. It was pointed out that the prosecution did not call the manager of the security company to confirm or dispute the claim that the appellant had resigned from security duties. It was also argued that Charles Marko Chacha was not called as a witness by the prosecution to rebut the appellant's defence. Further, that a suitcase was found in Charles Chacha's house but its ownership was not determined. In stating that the burden of proof in an alibi defence lies on the prosecution, Mr. Mwita relied on the case of **Caroline Wanjiku Ngugi vs Republic** [2015] eKLR.

9. Counsel for the appellant submitted that vital witnesses such as the manager of the security firm was not called to adduce evidence on the identity of the person who had been assigned duty to guard the house where the robbery was said to have taken place. On the said issue, He relied the case of **James Omondi Were vs Republic** [2014] eKLR.

10. On the issue of identification of one of the robbers, Mr. Mwita stated that the name given in PW2's statement was for one Chama which was not the appellant's name. It was contended that identification by PW2 was dock identification which was unreliable. With regard to identification by PW1, it was argued that he was not able to identify the robbers and that the said information was captured on the 1st page of the P3 form under the sub-heading of personal medical history. It was indicated that PW1 stated that he was attacked by persons unknown to him.

11. It was submitted by the appellant's Counsel that although PW1 was referred to as the complainant, he was not robbed of anything as he was in hospital at the time the offence occurred. Counsel relied on the cases of **Dominic Ali Rajab and Another vs Republic** [2009] eKLR and **Republic vs Stephen Kiprotich Leting and 3 Others** [2009] eKLR where courts held that any doubt in the prosecution's case should be resolved in favour of an accused person. On the issue of failure by a witness to describe a suspect in the first report, the case of **George Odoyo Omollo & Another**, Mombasa High Court Criminal Appeal No. 228 of 2008, was relied on.

12. The cases of **Isaak Ng'ang'a Kahiga** alias **Peter Ng'ang'a Kahiga vs Republic** [2006] eKLR and **Titus Muindi Mukoma vs Republic** [2017] were cited, to address the issue of failure by prosecution witnesses to describe exhibit 2 or how they came about it or how they came to own it.

13. Counsel for the appellant submitted that there were discrepancies in the prosecution's case in that PW2 said Kshs. 60,000/= was stolen but PW1 said in his evidence that Kshs. 50,000/= was stolen. It was stated that there were inconsistencies also with regard to the weapons the assailants were armed with.

14. The appellant's Counsel was of the view that the death sentence imposed against the appellant was harsh and that the Hon. Magistrate did not consider the mitigation proffered by the appellant. It was submitted that there were no fatalities in the said case. He relied on the cases of **Francis Karioko Muruatetu and Another vs Republic** [2017] eKLR and **William Okungu Kittiny vs Republic** [2018] eKLR which gave courts the mandate to impose less severe sentences to offenders charged with capital offences. Mr. Mwita indicated that the appellant was in custody from the year 2011 to 2015 when his case was undergoing trial. The case of **Fundi Bakari Fundi & Another vs Republic**, Mombasa High Court Criminal Appeal No. 298 of 2006 was cited to demonstrate that this court has the powers to review the appellant's sentence on appeal.

15. In highlighting the submissions filed by the respondent, on the issue of duplicity of the charge, Ms Marindah, Prosecution Counsel submitted that it was curable under the provisions of Section 382 of the Criminal Procedure Code. She referred to the case of **Paul Katana Njuguna vs Republic** [2016] eKLR, in which the Court of Appeal relied on, in its decision in **Cherere s/o Gakuhi vs Republic** (1955) 622 EACA in holding that the appellant was fully aware of the case he was to meet when he was charged before the trial court and the charge as framed did not lead to a failure of justice.

16. On the issue of the alibi defence that was raised by the appellant, the Prosecution Counsel stated that he never informed the Trial Court that he would rely on an alibi defence. She prayed for the said defence to be dismissed as a mere denial. It was submitted that PW1 and PW2 confirmed that the appellant was the guard on duty on the night the offence in issue was committed. Further, he had worked for them for 6 months and therefore identification was by way of recognition. It was stated that PW2's suitcase was recovered by PW3 in the appellant's house, where they found him sleeping and that they were told that the house belonged to the appellant, by his neighbour. Ms. Marindah submitted that PW2 found his stolen items in the said suitcase and it was not disputed that the items belonged to him.

17. On the number of witnesses that were called, the Prosecution Counsel relied on the provisions of Section 143 of the Evidence Act and stated that it was not necessary to call the manager of the security company. She submitted that the inconsistency with regard to the exact amount of money that was stolen did not go to the root of the case and did not negate the fact that money was stolen. It was submitted that the robbers were armed with a pistol and pangas but none of the weapons were recovered.

18. On the issue of who the complainant was in this case, it was submitted that PW1 was the father of PW2 and that the former said that the items they were robbed of belonged to them. Ms. Marindah submitted that the robbers were 3. They attacked PW1 and PW2 and robbed them of their goods. She was of the view that the prosecution proved its case beyond reasonable doubt with regard to the use of violence. She

submitted that PW1 and PW2 were tied up with ropes and PW1's mouth was covered with a masking tape during the robbery.

19. In his rejoinder, Mr. Mwita reiterated his earlier submissions that the suitcase which was recovered was in Charles Marko Chacha's house as per the defence of the appellant. It was stated that the landlord should have been called to confirm if the appellant had leased a house in the premises where the suitcase was found. The appellant's Counsel stated that the 2nd accused in the lower court was acquitted yet he had been subjected to an identification parade. In his view, the appellant herein was convicted by mistake.

**THE EVIDENCE ADDUCED BEFORE THE COURT BELOW**

20. PW1 was Rashid Mbao Rashid a businessman in Mombasa. He testified that in the early morning of 5th December, 2010 as he was going for morning prayers with his son, Ali Rashid, they were attacked by a security guard who was guarding their premises. The said guard was in the company of 2 others. They were ordered to raise their hands as a pistol was pointed at them. Their assailants tied his hands behind him and led him to a toilet which was downstairs. The 3 robbers then went upstairs. It was his evidence that he escaped from the toilet and ran towards the wall which he climbed. He fell on the other side.

21. He got injured from the fall and was taken to Pandya Hospital. His son Ali went to see him and told him that the robbers had stolen Kshs. 50,000/= and his bag. He was later told that the bag had been recovered. He identified the said bag as theirs, as he used to see his son carrying it.

22. PW1 testified that he recognized one of the attackers as the appellant, who was their security guard. He further stated that there was security light coming from a fluorescent tube outside the house. He indicated that the incident took 15 to 20 minutes and that one of the attackers had a panga. He was issued with a P3 form which was later filled.

23. PW2 was Ali Rashid Mbai (original handwritten proceedings read Ali Rashid Mbani). He was the son of PW1. His evidence was that on the material day at 5.00a.m., he was at home. He opened the door to the house as he and his father were about to go for morning prayers. He met 2 people in the company of their security guard Mr. Chama (the original handwritten proceedings read Mr. Chacha). PW2 testified that the 2 men were each armed with a gun and a panga. They ordered them to surrender and they were then searched. They were ordered to sit down. PW2 said that the appellant tied his hands with ropes. PW2 further testified that the attackers were demanding for money and arms from them as the one with a gun aimed it at his temple. The said assailant led him to the sitting room and ordered him to sit down. He was then blindfolded with a masking tape. When there was silence, he managed to get up to where his sisters were. His 6 year old sister removed the masking tape from him eyes.

24. PW2 testified that he had Kshs. 60,000/= for his trip to Nairobi, which was stolen by the robbers. They also took a bag which had his clothes and passport. He further testified that he went to look for PW1 whom he found on a pavement outside their compound. He noticed that he had injured his leg. He took him to Pandya Memorial Hospital where he was treated and discharged after a day. It was PW2's evidence that after his bag was recovered, he identified it and the clothes which had been stolen. His passport and perfume were missing. He identified the appellant as their watchman who was one of the robbers. PW2 explained that he was carrying a panga at the time they were attacked. He testified that he was able to identify their assailants very well during the robbery as there was filament illumination from an electricity bulb.

25. No. 83537 PC William Otiko testified as PW3. He was the Investigating Officer in this case. He stated that on 5th December, 2011 at 9.00a.m., he was instructed to investigate a case of robbery that had been reported by Ali Mbanik at their house at 5.00a.m., that morning. PW3 visited the scene with other police officers. He gave evidence that following information from an informer he went to the appellant's house. They found him sleeping. They recovered a bag and some clothes which were later identified by the complainant as his. His passport was missing from the bag. PW3 stated that he was informed that the appellant is the one who was guarding the main gate to PW1's and PW2's house and that he left with the robbers. PW3 further stated that the appellant never reported the robbers to the police. He later learnt that PW1 had gone to India for further treatment. PW3 produced the bag and clothes that were in it as evidence.

26. PW4, Doctor Ngome produced the P3 form for PW1 who had been examined by Doctor Wahome who had retired. PW4 indicated that the degree of injuries sustained by PW1 had been classified as harm.

27. The appellant gave unsworn evidence. He stated that he was a trader of matoke at Kongowea market. He further stated that on 5th December, 2011 he got a telephone call from the manager of YKM Security, who asked him where he was. He informed him he was in the market. That the said manager went to Kongowea market and asked him where Charles Kiama was. He indicated that on 7th November, 2011 he had taken Charles Kiama to work for the Security firm and that he was the guarantor. The appellant stated that he took the manager to Charles Kiama's residence in Shauri Yako but he was not there. They found one Charles Chacha. They searched his house and recovered a bag and they then went to the police station with the said Charles Chacha. The appellant indicated that the said man recorded a statement.

28. The appellant stated he was not asked to record a statement. He claimed that he was told to get Charles Kiama by calling him but he did not have a phone. That he gave the phone number for Charles Kiama to his manager. He further claimed that he was told that unless Charles (Chacha) was found, he was the one who would go to court. He was later charged with the offence herein, which he denied. He sought to rely on the statements of Charles Chacha and the manager.

29. The Hon. Magistrate considered all the evidence in totality and found that the appellant was recognized by PW1 and PW2 as having been one of their attackers at the scene of crime.

**ANALYSIS AND DETERMINATION**

30. The duty of the first appellate court is to analyze and re-evaluate the evidence adduced before the lower court and come to its own independent decision while bearing in mind that it neither saw nor heard witnesses testify and make an allowance for that fact. In **Kiilu and**

**Another vs Republic** [2005] 1 KLR 174, the Court of Appeal stated thus:

> ***"1. An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.***
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> ***2. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."***

31. The issues for determination in this appeal are:-

> **(i) If the charge was fatally defective for duplicity;**
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> **(ii) If the appellant was positively identified;**
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> **(iii) If there were contradictions and/or inconsistencies in the prosecution's case;**
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> **(iv) Whether the defence of alibi was considered and dislodged;**
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> **(v) If there was failure to call material witnesses;**
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> **(vi) Whether the prosecution proved its case beyond reasonable doubt; and**
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> **(vii) If the sentence was harsh or excessive.**

**If the charge was fatally defective for duplicity.**

32. The appellant herein was charged under the provisions of Section 295 as read with Section 296(2) of the Penal Code. The marginal note to Section 295 gives the definition of the offence of robbery. The said Section states as follows:-

> ***"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 obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery."***

33. The above Section in conjunction with Section 296(1) create the offence of simple robbery. It then follows that Section 295 of the Penal Code goes hand in hand with the provisions of Section 296(1) of the said Act.

34. The provisions of Section 296(2) of the Penal Code create a complete offence. The provisions of Section 295 do not have to be conjucted with the provisions of Section 295 of the said Act for a charge of robbery with violence to gain traction. Section 296(2) of the Penal Code states as follows:-

> ***"If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other persons, or if at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death".***

35. In this instance, I do agree with Mr. Mwita that the charge facing the appellant as framed, was bad for duplicity. The question that ensues from the said finding, is if the charge herein is fatal to the prosecution's case for being duplex. While doing so, this court must bear in mind the fact that the appellant was not represented in the lower court.

36. In **Joseph Njuguna Mwaura & 2 Others vs Republic** (2013) eKLR, a 5 Judge bench of the Court of Appeal after considering a number of cases stated as follows regarding duplex charges:-

> ***"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".***

37. In the decision of the Court of Appeal in **Paul Katana Njuguna vs Republic** [2016] eKLR, the said court looked at the issue of duplicity in a charge of robbery with violence and stated thus:-

> ***"--- so, while it would be undesirable to charge an accused person with both offences in the alternative, it would not be prejudicial to that person if the offences are not framed in the alternative. As we have already noted the rule against***

***duplicity is to enable an accused know the case to meet. We accept as the correct position in law that uncertainty in the mind of the accused is the vice at which the rule against duplicity is aimed. If there is no risk of confusion in the mind of the accused as to the charge framed and evidence presented, a charge which may be duplex will not be found to be fatally defective."***

38. The Court of Appeal in the above case cited with approval the case of **Cherere s/o Gakuhi vs Republic** (1955) EACA 622 where the said court reviewed cases on the effect of a charge which is found to be duplex and concluded that:-

***"The test still remains as to whether or not a failure of justice has occurred. In our opinion, the result of the application of this test must depend to some extent upon the circumstances of the case and the nature of the duplicity."***

39. In this case, on 6th December, 2011 the charge was read out to the appellant and he pleaded not guilty. The case was on 18th January, 2012 consolidated with Mombasa Chief Magistrate's Court Criminal Case No. 3790 of 2011. The charge was once again read out to the appellant and his co-accused. Each one of them pleaded not guilty. On 6th March, 2012 the lower court made an order for the appellant and his co-accused to be supplied with witness statements. On 14th May, 2013 PW1 testified and his evidence left no doubt that the offence facing the appellant was one of aggravated robbery under Section 296(2) of the Penal Code. PW1 testified that the attackers were 3, they were armed with pistols and pangas and they used violence when they tied him and PW2 up. They also robbed PW2 of some personal items.

40. It is the finding of this court that the appellant was not prejudiced by the duplicity in the charge. The evidence of PW1 and PW2 elucidated the charge facing him as that of robbery with violence. He was given an opportunity to cross-examine witnesses and to defend himself. This court holds that the charge as framed was curable under the provisions of Section 382 of the Criminal Procedure Code.

**If the appellant was positively identified.**

41. The offence in issue occurred on 9th December, 2011 at 5.00 a.m. PW1 and PW2 were going out of their house to the mosque when they were accosted by 3 men. PW1 identified one of them as the appellant who was a night security guard who had been guarding their homestead. He stated that there was security light from a fluorescent tube outside the house and that the incident took 15 to 20 minutes.

42. The evidence of PW2 corroborated that of PW1 as to the identity of the appellant. Although in the typed proceedings, the appellant's name is typed as **"Chama"**, a perusal of the handwritten proceedings establishes that PW2 gave the name of one of their attackers as **Chacha**, who was a security guard in their homestead. It was PW2's evidence that he recognized the appellant through electric light which shone from a fluorescent tube. It is this court's finding that identification was by way of recognition. Further, the appellant's services had been procured from a security company. This court holds that the electric light and time span taken by the robbers inside the house created favourable circumstances for positive identification.

43. Mr. Mwita submitted that PW1 and PW2 did not give a description of the appellant. The court's finding on the said issue is that in this case, the appellant's name and identity was known to PW1 and PW2 and as such, it would have served no useful purpose to give a description of him. The police were in a position to make investigations and arrest him based on the information given by PW1 and PW2.

**Whether there were contradictions and inconsistencies in the prosecution's case.**

44. This court finds no evidence of contradiction or inconsistency in the evidence of the prosecution as to who the complainant was. It was PW2. He was the one who was robbed of cash and a bag containing clothes by the robbers. PW1 was his father. He was robbed of nothing. An inconsistency however exists as to the amount of money that was stolen from PW2. PW1's evidence was that PW2 told him that he was robbed of Kshs. 50,000/= by the robbers. PW2's evidence was that he was robbed of Kshs. 60,000/=.

45. In **Dickson Elia Nsamba Shapurata & Another vs Republic**, Criminal Appeal No. 42 of 2007, the Court of Appeal in Tanzania, had the following to say:-

***"On evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."***

46. In this case, this court's finding is that even if there were inconsistencies on the amount of cash stolen, that was not the only item that was stolen during the robbery. PW2 was robbed of a bag containing his clothes, passport and a perfume. The said inconsistency would therefore not vitiate the fact that in the course of the robbery, PW2 was robbed of some of his personal items.

**Whether the defence of alibi was considered and dislodged.**

47. The appellant raised the defence of alibi to the effect that he was not on guard duty at PW1's and PW2's homestead when the offence happened. He stated that he had resigned from the security company he previously worked for and was a trader at Kongowea market. In the Court of Appeal decision in **Athuman Salim Athuman vs Republic** [2016] eKLR, the Court of Appeal when addressing the issue of an alibi defence stated thus:-

***"The principle has long been accepted that an accused person who wishes to rely on a defence of alibi must raise it at the earliest opportunity to accord the prosecution an opportunity to investigate the truth or otherwise of the alibi way back in 1993 in R v Sukha Singh s/o Wazir Singh & others (1939) 6 EACA 145, the former Court of Appeal for Eastern Africa upheld the decision of the High Court in which it was stated:-***

> ***"If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forwards at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped."***

48. Similarly, the Supreme Court of Uganda in **Festo Androa Asenua vs Uganda**, Criminal Appeal No. 1 of 1998 stated as follows:-

> ***"We should point out that in our experience in criminal proceedings in this country it is the tendency for accused persons to raise some sort of alibi always belatedly when such accused persons give evidence. At that stage the most that the prosecution can do is to seek adjournment of the hearing of the case and investigate the alibi. But that may be too late. Although for the time being there is no statutory requirement for an accused person to disclose his case prior to presentation of his defence at the trial, or any prohibition of belated disclosure as in the UK statute cited above, such belated disclosure must go to the credibility of the defence."***

49. In this case, the appellant did not disclose to the prosecution that he would rely on an alibi defence so that they could countercheck the same. Even after taking into consideration the alibi defence he raised, the evidence adduced against him by PW1 and PW2 that he was one of the robbers who attacked them, displaced his alibi defence of not having been at the scene when the offence was committed. The Trial Court considered the alibi defence in light of the prosecution's case and found that "it did not remove him from the scene of robbery as brought out by the prosecution." It is the finding of this court that the Hon. Magistrate considered the alibi defence and properly dismissed it.

**Whether material witnesses were left out by the prosecution**.

50. The appellant's Counsel submitted that failure to call the supervisor of YKM security and the landlord of the house in which the appellant was arrested was fatal to the prosecution's case. In **Mwangi vs Republic** (1984) KLR 595, the Court of Appeal held:-

> ***"Whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with that discretion unless it may be shown that the prosecution was influenced by some oblique motive."***

51. In this case, the court's finding is that the supervisor of YKM Security and the landlord of the house from which the appellant was arrested would not have added any value to the prosecution's case. This is after considering the totality of the evidence adduced.

**Whether the prosecution proved its case beyond reasonable doubt.**

52. The evidence of PW1 and PW2 placed the appellant at the scene of crime. Identification was by way of recognition as the appellant had worked for them as a night security guard. There was electric light at the scene where PW1 and PW2 were accosted. The robbers were 3 in number. They were armed with pangas and pistols. They used violence when they tied up PW1 and PW2 with ropes. They robbed PW2 of his personal items.

53. Due to the inconsistency with regard to the amount of cash that PW2 was robbed of, this court disregards that piece of evidence. There was however evidence from PW3, the Investigating Officer that he recovered a bag containing clothes from the house that he found the appellant sleeping in. PW3 was led to that house by an informer.

54. The bag and clothes were identified by PW2 to be his. The said items were recovered on the same day the robbery took place. The said recovery goes further to prove that the appellant was one of the robbers who attacked PW1 and PW2 on 5th December, 2011 at 5:00a.m. The foregoing evidence proves beyond reasonable doubt that the appellant was one of the robbers. I uphold the conviction against the appellant for the offence of robbery with violence contrary to Section 296(2) of the Penal Code.

**If the sentence was harsh or excessive.**

55. The appellant was sentenced to death on 21st October, 2015. As at that time, courts considered the said sentence to be a mandatory one for the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The appellant's Counsel cited the Supreme Court of Kenya decision of **Francis Karioko Muruatetu and Another vs Republic** (supra) and the Court of Appeal decision of **Willian Okungu Kittiny vs Republic** (supra) and submitted that the mandatory nature of the death sentence is unconstitutional. Subsequent to the delivery of the said decisions, Trial Courts and other Courts exercising appellate jurisdiction are under an obligation to consider if the sentences meted out against persons convicted for offences of robbery with violence are commensurate with the circumstances of each case.

56. In this case, although the robbers were armed with offensive weapons, they did not use them to inflict injuries on PW1 and PW2. PW1 however sustained injuries when he scaled a wall and jumped over to the other side as he attempted to escape from the robbers. The said injuries were a direct consequence of the robbery.

57. In the circumstances of this case, I am of the considered view that a sentence of 17 years imprisonment will serve the ends of justice. I set aside the death sentence and substitute it with 17 years imprisonment.

58. In line with the provisions of Section 333(2) of the Criminal Procedure Code, the sentence will run from 6th December, 2011 when the appellant was first arraigned in lower court. The appeal succeeds only to the above extent. It is so ordered.

**DELIVERED, DATED and SIGNED at MOMBASA on this 13th day of December, 2019.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Appellant present

Mr. Magolo holding brief for Mr. Chacha Mwita for the appellant

Ms Mwangeka, Prosecution Counsel for the DPP

Mr. Oliver Musundi - Court Assistant.