REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 14 OF 2017

ALEX MUTHINI MUASYA.....1ST APPELLANT

JACOB MAKAU KAMII.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against both conviction and sentence in Cr. Case No. 1631 of 2014 at PM's Court, Machakos by Hon. I.M. Kahuya Esq. Judgment awarded and delivered on 27th November 2016)

J U D G E M E N T

1. The two Appellants herein **Alex Muthini Muasya** and **Jacob Makau Kamii** had been charged with an offence of robbery contrary to section 295 as read with Section 296 (2) of the Penal Code.

The particulars were that on the 14th day of September 2014 at 3.00 am at Dreams Inn Bar and Restaurant in Kyumbi trading centre within Machakos County, jointly with others not before court robbed Everlyne Mwongeli 6 Caprice wine, 45 Redds, 18 bottles of Guinness, 5 Gibleys ½, 5 Gibleys of ½ , 10 packets of Sportsman, 12 packets of Embassy, 9 packets of SM, 12 bottles of Viceroy, 15 bottles of Richot, Music system make hoofer, dec music with its speakers, cash Kshs. 10,000/= and Safaricom sim card all valued at Kshs. 94,270 and at the time of the said robbery used personal violence to the said Everlyne Mwongeli. The trial court heard evidence from eight witnesses and thereafter convicted the appellants and sentenced them to death.

2. The appellants were aggrieved by the conviction and sentence and raised the following grounds of appeal:

1) That the charge was duplex.

2) That the identification of the appellants was faulty.

3) That the trial magistrate erred in law and fact in convicting the appellants yet nothing was recovered from them during their arrest.

4) That the appellants defence evidence was not considered by the trial court.

5) That the respondent's case had not been proved against the appellants beyond reasonable doubt.

3. The Appellants therefore sought for an order that the appeal be quashed and sentences be set aside and they be acquitted of the charge.

4. As this is the first appellate court, its duty is to re-evaluate the evidence afresh and to come to its own independent conclusion (see **OKENO –VS- REPUBLIC [1972] EA 32.**

5. Everlyne Mwongeli (PW1) testified that on the material date at around 3.30 am she was asleep when she heard a knock from her colleague with whom they worked at Dreams Inn Bar & Restaurant and on peeping through the window saw four men who ordered her to open the door but she declined forcing the strangers to smash a glass window nearby and who forced themselves into the premises. The robbers terrorized her and demanded for money as well as the M-pesa pin for the business phone. She handed a total sum of Kshs. 10,000/= and the robbers proceed to cart away the items from the bar such as drinks and cigarettes. She maintained that she was able to see and identify what was going on and identified the two appellants as among the robbers at the scene and during a police identification parade.

6. Gregory Mutuku (PW2) testified that the two appellants had earlier in the night approached him and sought to book two rooms and indeed

paid Kshs. 1000/= and left to come back later. He stated that around 3.00 am the appellants arrived and he duly opened the gate only to learn that the appellants were in company of two other persons all of whom attacked him and ordered him to lead them to the bartender. As the robbers engaged the bartender (PW1), he managed to hide in one of the rooms as he had been badly injured. He later participated in a police identification parade where he identified the appellants herein.

7. Daniel Mumo (PW3) testified that he was the proprietor of Dreams Inn Bar and Restaurant and that he was briefed of the incident and he contacted the flying squad officers based at Kyumbi police station and after investigations a suspect who had withdrawn money using the business M-pesa line was arrested and who led them to the appellants herein who were his accomplices.

8. Sergeant Sageya (PW4) testified that he conducted a routine swoop at a certain bar operating beyond the licenced time and took the revellers to Machakos police station from where the appellants were picked up by Kyumbi flying squad officers over allegations of robbery with violence.

9. Inspector Maritim (PW5) testified that he was based at Kyumbi police station and that he conducted an identification parade on 10-10-2014 and 11-10-2014 where both appellants were positively identified by PW1 and PW2.

10. John Muinde (PW6) testified that he was a document examiner and that he received specimen signature and a Safaricom agent record sheet and formed the opinion that the signatures had been made by the hand.

11. Police Constable Thomas Onyiso (PW7) testified that he investigated the case and managed to obtain the agent record sheet that showed a withdrawal had been made on a stolen M-pesa registered number and which led him to a suspect namely Festus Vutu Muasya who led him to the appellants herein as accomplices and that the appellants were later positively identified in an identification parade as part of the robbers by PW1 and PW2. The said Festus Vutu Muasya later escaped from lawful custody leaving the two appellants to continue with the case.

12. Dr. John Mutunga (PW8) testified that he filled the P3 form in respect PW2 and established that he had sustained a cut on the head and had pains on his neck and right leg. He classified the degree of injuries as harm and established the weapon to have been blunt and he produced the P3 form as exhibit 3.

13. The trial court found the appellants had a case to answer and put them on their defence. The 1st appellant tendered a sworn testimony and stated that he was unlawfully linked to one Festus Vutu Muasya who was unknown to him and further the parade had been comprised since the witnesses had seen him prior to the exercise.

14. The second appellant also tendered a sworn testimony and stated that he had visited the 1st appellant who was his cousin only to be roped into the criminal case which had nothing to with him since he had only gone to spend the night at the home of is cousin namely the 1st appellant.

15. The appeal herein was canvassed by way of written submissions. It was submitted by the appellants that they were convicted on a duplex charge thereby their rights under Article 50 (2) of the constitution were violated and further that the framing charge of the charge was in breach of section 134 and 137 of the Criminal Procedure Code since it was at variance with the evidence tendered by the prosecution. The appellants sought reliance on the case of **YONGO-VS- REPUBLIC [1983] e KLR**.

Finally, the appellants submitted that the conditions under which PW1 and PW2 were said to have identified them were unfavourable and relied on the cases in **Paul Etole & Reuben Ombima-VS- Republic, Criminal Appeal No. 24 of 2000, Matanyi –VS- Republic [1989] eKLR and Joseph Ngumbao Nzaro –VS- Republic [1991] 2KLR 212**. The appellant further contended that the identification parade was not conducted in accordance with the required standards since the evidence did not reveal that the complainants gave the descriptions on the suspects and that the police ought not to tell the witnesses to pick out somebody.

Finally, the appellants contended that it was the police were only looking for one Festus Vutu Muasya who later escaped and not them and that they did not even get a chance to cross examine the said Festus Vutu Muasya who later escaped from lawful custody.

It was submitted for the respondent that the appellants did not suffer any prejudice or confusion since the charge was read to them and witnesses testified and that the appellants fully cross examined the said witnesses. It was further submitted for the respondent that the appellants were properly identified by PW1 and PW2 who spent considerable time with them during the robbery and hence the evidence was overwhelming.

16. I have considered the evidence adduced before the trial court as well as the submissions by both appellants and learned counsel for the respondent. I find the following issues necessary for determination namely:

i. **Whether the charge preferred against the appellants was duplex.**

ii. **Whether the appellants were positively identified as among the robbers during the incident.**

iii. **Whether the respondent's case had been proved against the appellants within the required standard of proof.**

17. As regards the first issue it is noted that the appellant had been charged with an offence of robbery with violence contrary to section 295 as read with section 296 (2) of the penal code. Indeed section 295 of the Penal Code is the one which describes the offence of robbery while section 296 (2) provides both the offence and the sentence. Section 295 penal code provides:

"Any person who steals anything and at, or immediately before, or immediately after the time of stealing it used 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 as robbery".

In order for the offence to qualify as a violent one attracting a death sentence as per section 296 (2) of the penal code any of the following **conditions must obtain namely:**

a) The offender is armed with a dangerous or offensive weapon.

b) The offender is in company with one or more other persons.

c) The offender immediately before or after the time of robbery wounds, beats, strikes or uses any other personal violence to the victim.

From the charge sheet and particulars as well as the evidence of the witnesses it is clear that the robbers who had attacked the two employees of Dreams Inn Bar and Restaurant on the night in question were in company of more than one person and armed with dangerous or offensive weapons and did injure one of them. Indeed every accused person is entitled to have charges facing him or her to be clear and unambiguous so as to enable him or her know the exact offence and to be able to conduct his or her defence in the trial. For offences of this nature the courts have categorically held that an offence of robbery with violence under Section 296(2) of the Penal Code should be sufficient in itself since the same contains the definition of the offence and the penalty and hence it is self contained. In the present circumstances Section 295 has been introduced in addition to Section 296 (2) and that the Appellants have claimed that the charge was duplex. The issue which a court has to consider is whether the same had prejudiced the Appellants in any way. It is noted from the record that the Appellants fully participated in the trial and cross-examined the witnesses. A perusal of the cross –examination reveals that the same was conducted in a manner that showed the Appellants understood the charge they faced. Hence I find they were not prejudiced in any manner whatsoever. Under Section 382 of the Criminal Procedure Code, substantive justice is possible to be achieved even where there is a defect in a charge sheet since the same is curable. The said Section 382 provides as follows:-

"***Subject to the provisions hereinabove contained no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summon, warrants, charge, proclamation, order, judgement or other proceedings before or during the trial or in any enquiry or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.....***"

The test in dealing with a duplex charge was discussed in the case of ***CHERERE s/o GAKULI =VS= REPUBLIC (1955) 622 EACA*** where the court held thus:

"***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.***"

A similar position was held by the court of Appeal in ***PAUL KATANA =VS REPUBLIC [2016] eKLR*** where the court cited the decision in ***Cherere s/o Gakuli (supra)*** with approval as follows:

"***In the matter before us, we are unable to detect any prejudice which the Appellant suffered.***"

It is noted that the Appellants had been aware all along that they faced a charge of robbery with violence in which all the ingredients were disclosed in the particulars of the charge sheet. The said charge was read to them and they returned a plea of not guilty and a trial took place in which they cross – examined the witnesses at length. They also did not raise any objection at the outset of the presence of Section 295 in the charge sheet so as to cause for amendment of the charges but they proceeded with the matter all through in a manner to suggest that they knew what charges they faced. I find there was no prejudice suffered by the Appellants due to the duplicity of the charge.

18. As regards the second issue, it is noted from the evidence of Gregory Mutuku Nzau (PW.2) the appellants were the ones who had earlier approached him at Dreams Inn Bar and Restaurant and sought to book a room and did pay a sum of Kshs.1000/= and left for the town centre to find food and who later came back while in company of two others and assaulted him. Indeed the said witness had spent considerable time with the Appellants when they were being shown around to choose the rooms they wanted and also during the receipt of the money for the rooms. There had been security lights and that the witness saw the Appellants clearly and that when they came back later he was able to identify them as he opened the gate for them. The said witness did not have any difficulty in picking the Appellants during the identification parade. Again the bartender Everlyne Mwongeli (PW.1) was able to identify the Appellants during the robbery mission which took over two hours and saw them removing the items and she was even engaged in conversation when they demanded for the money as well as the M-pesa Business Pin and further had stayed with one of the Appellants during the incident and did not therefore have any difficulty in positively identifying them out during the identification parade. The Dreams Inn Bar and Restaurant had security lights and which enable the witnesses to identify the Appellants during the robbery which lasted for about two hours.

The Appellants having been positively identified, I find it is immaterial whether or not any of them was found in possession of stolen items. The first suspect arrested Festus Vutu Muasya led the police to the arrest of the two Appellants as his accomplices. Indeed the same Festus Vutu Muasya was also identified as one of the robbers during the robbery mission but that he had subsequently escaped from lawful custody thereby leaving out the Appellants herein to continue with the case. Even though the Appellants were entitled to cross- examine the said Festus Vutu Muasya for implicating them in the crime, I find that the opportunity did not arise as he escaped from lawful custody and the Appellants were now left to contend with the evidence of PW.1 and PW.2 who positively identified them both at the scene of crime and at

the identification parade. I find the appellants were positively identified and their claim that they were framed is not believable since the witnesses had not known them before and nothing such as a grudge arose from the evidence.

19. As regards the last issue and from the totality of the evidence presented before the trial court, I find the Appellants defence evidence did not shake that of the prosecution which was quite overwhelming and that the charges against the Appellants had been proved against them beyond any reasonable doubt. The trial court properly considered the entire evidence and convicted the Appellants.

20. In the result, I find the Appellants appeal lacks merit. The same is dismissed. The conviction and sentence of the trial court is affirmed.

It is so ordered.

Dated, Signed and delivered at Machakos this **4th** day of **April, 2018.**

D. K. KEMEI

JUDGE

In the presence of:

Alex Muthini Muasya & Jacob Makau Kamii - the Appellants

Machogu - for the Respondent

Kituva - Court Assistant