REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

HCCRA NO 35 OF 2014

CONSOLIDATED WITH HCCRA NO. 36 OF 2014

BERNARD MUSYOKI MWANGANGI

JUSTUS MUENDO MANGAU.....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence in Machakos Chief Magistrate's Court Criminal Case No. 579 of 2013 delivered on 21st February 2014 by the Hon. L. Simiyu (Ag. SRM)]

JUDGMENT

Introduction

1. The Appellants were on 21st February, 2014 convicted and sentenced to death for the offence of robbery with violence contrary to section 296 (2) of the Penal Code and sentenced to suffer death. The charge and the particulars of the offence were set out in the Charge sheet dated 17th September, 2013 as follows:

> ***"Charge:*** ***Robbery with violence contrary to section 295 as read with 296(2) of the Penal Code.***
>
> ***Particulars:*** *(1) Bernard Musyoki Mwangangi (2) Justus Muendo Mangau. On the 11th day of June 2013 at Kola Market , Kola Location in Machakos district within Machakos County, being armed with offensive weapons namely stones jointly robbed Isaak Makau Mulandi Ksh.10,000/- and a mobile phone make Samsung valued at Ksh.6,000/- and immediately before the time of that robbery assaulted the said Isaak Makau Mulandi."*

2. The Prosecution called four witnesses to prove the charge and when placed on their defence the appellants testified in their defence without calling any witnesses.

Grounds of Appeal

3. They appealed the conviction and sentence on the grounds set out in their respective petitions of appeal as follows:

The 1st appellant's grounds of appeal

> 1. The learned trial Magistrate erred in points of law and fact while basing my conviction on the purported visual identification by recognition of which remained to be doubtful and totally questionable as confirmed by the O.B No. of July 12th day of June, 2013 at 7.20 am of Kola Police Station, in light of no any descriptions nor actual names to suit the same of which was in contravention of Section 165 of the Evidence Act Cap 80 Laws of Kenya. Thus, rendering a prejudice upon me the appellant herein.
>
> 2. The learned trial Magistrate gravely erred in law and facts by failing to find that the prosecution did not prove to the required standard that the prevailing conditions at the time of crime were not conducive at all for positive identification of the appellant, since source of light, its intensity and location relative to the appellant were not disclosed as the law requires.
>
> 3. The learned trial Magistrate erred further in law and fact by relying on the prosecution's evidence which was contradictory, inconsistent and incredible to achieve the conviction and sentence against me and also, by failing to observe that the provisions of

Section 163 (I) (c) of the Evidence Act Cap 80 Laws of Kenya were wrongly and duly contravened.

4. The learned trial Magistrate gravel erred in matters of Law and fact by failing to conduct a fair and impartial trial by being expressly biased against me the appellant herein. Thus, rendering to the serious miscarriage of law and justice upon me the appellant.

5. The learned trial Magistrate grossly faulted in matters of law and fact in relying on the weakness of my defence evidence to justify and achieve a conviction, yet failure to note and consider that I was and also I am a layman who never knew in the trial court how to defend myself in the serious matter like the present one. Notwithstanding the strange fact that I was just a victim of circumstances and not the one of the robbers as contended by the Prosecution side witnesses, thus rendering a prejudice.

6. That the learned trial Magistrate gravely faulted in points of law and fact, and, or, misdirected himself in failing to resolve or approach the circumstances surrounding the arrest with the due circumspection, hence rendering a prejudice upon me the appellant.

7. That the learned trial magistrate erred in matters of law and fact by failing to put into account that the mere purported re-conciliation agreement to settle the matter at hand out of court room allegations were not proved into the required standard needed in law thus, lacks affirmation value of the Prosecution's case.

8. The learned trial Magistrate further erred in law and fact by holding that the state had proved her case beyond reasonable doubt, yet the same was in contravention of Section 107(1) and 111 (i) of the Evidence Act, thus rendering a prejudice upon me the appellant herein.

9. The pundit Magistrate grossly faulted in matters of law and facts while basing my conviction on the reasoning that both the appellants in this case had committed the alleged crime, yet failure to observe and consider that:-

(a) No evidence was presented in court by the bar attendant to prove my presence in the bar at the material date and time of crime in question.

(b) That the evidence from the said bar attendant was very vital and necessary to prove or disapprove the Prosecution's claim that both the Appellants did combine efforts to attack and rob the complainant. Not a word was said to have been uttered by them in conspiracy, and

(c) That the provisions of section 21 of the Penal Code were not considered or seem to be established at the lower court for justice to prevail, and for the interest respectively.

10. The learned trial Magistrate further erred in law and fact by failing to make a finding that the Prosecution left out key witnesses that could have established the true state of affairs, in that:-

(i) The alleged Appellants parents that were purported by PW1 to have gone to his home before the arrest to seek settlement of the matter were not availed in court to testify, so as to confirm or disapprove PW1's allegations of settling the matter out of court agreement.

(ii) And that, the bar attendant as stated earlier, was never called by the Prosecution to testify and give more light to the participation of the Appellant in crime hence, contravention of section 144 and 150 of the Criminal Procedure Codes which absolutely rendered the Prosecution's case to be not only detrimental, but as no proved beyond reasonable doubt.

11. That the learned trial Magistrate erred further in law and in fact by objecting to my defence statement and thus, failed or violated the law provisioned under section 169(1) of the Criminal Procedure Code and also, by shifting the burden of proof to the defence, yet failure to consider that my defence statement was not displaced at all by the Prosecution side as provided by the law under section 212 and 309 of the Criminal Procure Code.

Additional Amended Grounds of Appeal

12. That the learned trial magistrate gravely erred in both points of law and fact while basing my conviction and sentence while relying on a duplex charge sheet. Hence duplex. Thus rendering to serious miscarriage of justice respectively upon me the appellant herein.

2nd Appellant's (Justus Muendo Mango) Amended Grounds of Appeal

4. The 2nd Appellant appealed against both conviction and sentence on the following grounds:

1. That the learned trial magistrate gravely faulted in point of the law and facts in failing to observe that the circumstance of identification at the *Locus-in quo* were not conducive at all to award a positive identification by recognition against the Appellant herein.

2. That the learned trial magistrate gravely erred in law and in fact in basing my conviction on reliance on the unsubstantial identification by recognition evidence which was attributed in court against me by PW1 and PW2 herein, yet failure to observe or note that the same was not sufficiently supported by a conclusive first report to the police contrary to section 165 of the Evidence Act.

3. That the leaned trial magistrate gravely erred in law and in fact with the circumstantial evidence of my arrest without need to note or reconsider that there was no tangible and concrete evidence that was adduced by the Prosecution in support of the same as it was wholly wanted as precise by the law.

4. That the learned trial magistrate further erred in points of law and fact while basing my conviction on the basis of Prosecution's evidence, whereas the entire Prosecution's case was riddled and replete with inconsistencies, discrepancies and fatal contradictions. Thus, section 163(i) of the Evidence Act was wrongly contravened hence a prejudice.

5. That the learned trial magistrate grossly erred in matters of the law and fact in failing to observe that the prosecution failed to call critical witness in court to testify in violation of section 144 and 150 of the Criminal Procedure Code.

6. That the learned trial magistrate erred in matters of the law and fact when he failed to consider that the issue of doctrine of common intention was not affirmatively established at all in line with the provisions on section 21 of the Penal Code thus rendering prejudice against me herein.

7. That the learned trial magistrate erred further in law and in fact by holding that the state has proved her case beyond reasonable doubt, whilst the same was far from the required standard of proof and by failing to observe that I was totally innocent in the present case and a victim of the circumstance, hence rendering the both conviction and sentence imposed against me to be manifestly unsafe.

8. That the learned trial magistrate erred in matter of law and fact in shifting the burden of proof to the defence side contrary to section 107(1) and 111 (1) of Evidence Act hence a prejudice against me the Appellant herein.

9. That the learned trial magistrate gravely erred in law and in fact by failing to observe that the purported signing agreement to settle the matter out of court allegations were not affirmatively proved beyond reasonable doubt as required by the law.

10. The learned trial magistrate gravely erred in matters of law and fact in failing to observe that there were no any charge and cautionary statement under inquiry or either confessionary statement was made, or, recorded from me and produced in court as evidence to support my guilt contrary to section 25 and 26 of the Evidence Act.

11. That the learned trial magistrate erred in points of law and fact by failing to conduct a fair and impartial trial, and by being expressly biased against me the Appellant herein thus rendering a prejudice.

12. That the learned trial magistrate grossly erred in matters of law and facts by delivering his entire judgment against me contrary to section 169(1) of the Criminal Procedure Code due to the following reasons:

i) The judgment itself does not at all contain points for determination as required by the above provisions of Law.

ii) The judgment also did not specify the provisions of the law under which the Appellant was convicted and sentenced as enshrined by the law under section 169 (2) of the Criminal Procedure Code.

iii) The judgment also did not state the reasons why my defence statement was rejected thus rendering a prejudice.

13. That the learned trial magistrate gravely erred in law and in fact by failing to consider that my defence statement was not displaced at all by the prosecution side as provided by section 212 read with 309 of the Criminal Procedure Code.

14. That the learned trial magistrate gravely erred in points of law and facts when he relied heavily on his own speculations, theories, surmise and conjectures as evidence to convict me the appellant herein and completely disregarded the obvious doubts left by the prosecution case hence prejudice.

Additional Ground of Appeal dated 18/11/2015

15. That the learned trial magistrate gravely faulted in matters of law in basing my both conviction and sentence while relying on a duplex charge sheet. Thus rendering, to the serious miscarriage of justice.

WRITTEN SUBMISSIONS

1st Appellant's (Bernard Musyoki Mwangangi) Submissions

5. The 1st appellant urged his submissions as follows:

The trial magistrate relied largely on the evidence of visual identification by recognition by PW1 and PW2 respectively failing to observe that the circumstances and conditions prevailing at the scene of crime were not conclusive for positive conclusive identification, the same was not proved beyond reasonable doubt. A witness maybe mistaken if he believes that what he thinks is likely to be true as was held in the case of ***Abdalla Bin Wendo v. Republic*** [1953] EACA 166. In ***Erick Sebwato v. Uganda*** [1968] CR 37 it was held that:

"It is perfectly entitled to say nothing that the accused well known to the complainant should go with seven other men to commit an organized robbery in house where he was well known. Seems to me to be in unexplainable. He must have known he was bound to be

known."

According to the OB extract, PW1 reported that he was attacked by two people, Kamau Musyoki and Muendo, whereas in court he said he was attacked by two people, Mwende Nthambi and Musyoki Mwangangi.

In ***Etole & another v. Republic*** CA Cr. App. No 24 of 2000 the Court stated that:

> *"Evidence of visual identification can bring a miscarriage of justice. But such can be reduced if whenever the case depends wholly or substantially on the correctness of one or more identification of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made."*

In this case the circumstances of identification were not good and favorable to enable the complainants to make proper identification. There were no corroborative evidence to prove identification by recognition.

The magistrate did not observe that no person will commit a serious crime while the person is known by the victim and remain in the same area. In ***George Gichia Ngángá v. Republic*** [1997] court stated that: "if a man is involved in such a serious incident, he would tend to hide at least for few days after the event".

As per my defence statement it is crystal that it amounted to an Alibi. Sir Udo Udoma C.J. In ***Sekitoleko v. Uganda*** [1967] held that:

> *"as a general rule of law the burden is of the prosecution of proving the guilt of a prisoner beyond reasonable doubt, never shifts to whether the defence set up is an alibi or something else.*
>
> *The burden of proving an alibi does not lie on the prisoner, and the trial magistrate had misdirected himself."*

I wish to humbly submit further that section 21 of the Penal Code was wrongly violated.

2nd Appellant's (Justus Muendo Mango) Submissions

6. The 2nd appellant submitted as follows:

The matter lies largely on identification by recognition obtained by PW1 and PW2 under hectic and unfavourable conditions. In the case of ***Paul Etole & Another v. Republic*** CA, CR. App No. UR. 24 of 2000, the Court of Appeal expressed this legal principle as follows:

> *"Evidence of visual identification can bring about miscarriage of justice occurring can be much reduced if whenever the case against the accused depends wholly or substantially on the correctness of one or more identification of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly it ought to examine closely the circumstance in which the identification by each witness came to be made. Finally it should remind itself of any specific weakness which had appeared in the identification evidence. It is true that recognition maybe be more reliable than identification of a stranger, but even when a witness is purporting to recognize someone whom he knows the court should remind itself that mistakes in recognition of close relatives and friends sometimes made. All these matters go to the quality of the identification evidence. When the quality of identification is good, and remains good at the close of the accused's case, the danger of mistaken identification is lessened but the poorer the quality, the greater the danger."*

The circumstances were not ideal for any positive identification and thus, therefore, urges that the entire identification evidence should be treated with scepticism because both PW1 and PW2 did not describe their assailants to the police immediately after the incident, neither did he give the actual names to the police as required by law.

Even though it was narrated by PW1 and PW2 that there was electricity lighting at the scene, no effort was made to give indication as to the brightness and or the intensity of the light and how far it was from the scene of the crime and hence failed to weigh the possibility of the alleged identification and or recognition of the appellant being mistaken, thus rendering a prejudice.

The prosecution did not establish its case beyond reasonable doubt. In ***Woolmington vs. DPP*** [1935] UKHL 1 it is well established that the burden of proof is beyond reasonable doubt and fall on the prosecution. The prosecution was to prove beyond reasonable doubt that the agreement was genuine and reliable and that it is me and my accused person who made and prepared the said agreement by failure to which rendered the alleged agreement to be unreliable. There is no proof that I made an agreement with the complainant to settle the matter out of court. The maker of the agreement and our mothers should have been availed in court as vital witnesses.

The prosecution was bound to prove the doctrine of common intention. In ***Solomon Mungai vs. Republic*** [1965] E.A 363, the Court of Appeal expressed itself as far as the provisions of section 21 of the Penal Code was concerned. None of the prosecutions witness revealed where I was arrested and no explanation given as to why I was arrested 3 days after the incident and yet no claims were issued. Any evidence to be considered should be consistent not contradicting. In ***Tekerali S/O Korongozi and 4 Others vs. Republic*** [1992] 19 E.A.C 259, the Court of Appeal held that:

> *"…that evidence of first report of the complainant to persons in authority are important as they often provide a good test by which the truth and accuracy of subsequent statement may be gauged and, provide a safeguard against later embellishment or made up*

cases."

Section 163 (1) (c) of the Evidence act was wrongly violated hence giving me room to urge that major contradictions in the Prosecution's evidence should be resolved in favour of the accused. The case of ***Mukalazi Michael vs. Uganda*** CR. APP NO.29 OF 1996 KLR.

My defence statement was very real, congest, reasonable and plausible as it captured the events of my innocence but the learned trial magistrate did wrongly ignored the same without any candid or congest reasons contrary to Section 169 (1) of the Criminal Procedure Code. The said defence statement was not displaced at all by the prosecution side as required by the Law under Section 212 as read with Section 309 of the Criminal Procedure Code that state:

> *"If the accused person adduces evidence in his defence introducing a new matter which the prosecutor could not by the exercise of reasonable diligence have foreseen, the court may allow the court prosecutor to adduce evidence in reply to rebut that matter."*

On the other hand, while dismissing the same defence statement, the learned trial magistrate had the following to state at Vide Page (6 of the Judgment) Lines (5-18) that, and I quote:-

> *"I have duly evaluated the testimony and evidence by the accused persons and find that none of them has explained anything about commission of the offence. The accused persons have simply denied."*

They have not given me sufficient reasons to disparage the Prosecution's case. No reason has been advance to show frame up, bad faith or any reason that would instigate a complainant. It is worthy note that through it is alleged that the accused persons attempted.

Settling the case through signing an agreement that same is not in court language and thus in-admissible.

According to the above upshot, it is humbly submitted that the foregoing is tantamount to shifting the burden of proof to I, the Appellant herein. Consequently, the learned trial court magistrate erred in Law and fact by shifting the onus of proof to the Appellant contrary to the basic Legal Principle notwithstanding the fact that the onus of proof remains throughout the trial upon the Prosecution to establish that the accused person is guilty of the offence which he is charged. The evidence adduced fell short of the standard required in a trial of this magnitude and the circumstantial aspects relied upon were disjointed and incapable of sustaining a conviction, particularly while considering the that fact that even the arresting officer herein (PW3) did not at all disclose or clarify the suspects' names, he alleges to have been given by PW1 in his report to the police or either their features descriptions.

It is my humble and noble submission that it was absolutely wrong for the Prosecution side to charge me with the offence of robbery with violence under the two section of the law. In this regard I also note that the law on the framing of charges requires clarity in the charge sheet as stated in various provisions.

Section 134 of the CPC provides that:

> ***"Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged with such particulars as maybe necessary for giving reasonable information as to the nature of the offence charged."***

I am guided by the decision of the five judge bench of the Court of Appeal in ***Joseph Njuguna Mwaura & 2 others v. Republic*** [2013] eKLR that explained and laid to rest the reasons why charging an accused person with the offence of robbery with violence under section 295 and 296(2) of the Penal Code would amount to a duplet charge. The said court, while following its earlier decision in ***Simon Materu Munialu v. Republic*** [2007] eKLR and ***Joseph Onyango Owuor & Cliff Ochieng Oduor v. Republic*** [2010] eKLR state as follows:

> *"Indeed as pointed out in **Joseph Onyango Owuor & Cliff Ochieng Oduor v. Republic** supra 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 the 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 person. The offense 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 that, 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 duplex charge."*

The same principle of the law was emphasized in ***Patrick Mwema & another v. Republic*** [2014] eKLR.

It is also vital to note herein that when the learned trial magistrate was drafting and delivering his judgment, he specifically purported in the same at vide page one of the judgment that I with the 1st appellant herein had been charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. The trial Magistrate however did not at all clarify to the court as to per how and why he omitted to indicate the other provisions of the law that is section 295 of the Penal Code. The entire charge sheet was based under the two sections of the Penal Code. Further there was no any amendment of the charges. This was a total miscarriage of the law against me the Appellant herein.

In the case of ***Suleiman Juma 'Alias' Tom v. Republic*** [2002] it was held that:

"*we would like to point out that in charging a person under section 296(2) of the Penal Code, the prosecution must extremely be carefully as the consequences of a conviction are serious and care must be taken while dealing with drafting of the charges as it is the life of an individual is at stake."*

The same scenario surrounding herein, the high court of Machakos in the afore mentioned case of Machakos in the case of ***Patrick Mwema & another v. Republic*** [2014] Supra decide not to evaluate the evidence before the trial court, and instead, ordered that the two Appellants to be re-tried afresh at the trial court for the interest of natural justice. In doing so the judges did rely in the case of ***Fatehali Manji v. Republic*** [1966] EA 343 KRL 522 that this Honorable Court of justice will observe the same and accord me the benefit for the justice to prevail.

Respondent's Submissions dated 9th February, 2016 in reply to the Appellants'

7. The DPP filed written submissions as follows:

In response to the first ground and the second ground, PW1 and PW2 were categorically and stated that the scene had adequate lighting from a security light bulb. Further the stated that they recognized the Appellants from inside the bar. PW1 stated that he knew the Appellants since they come from the same village.

On the other grounds, the learned Magistrate carefully considered the evidence adduced. The witnesses were cogent and concise on the account of the events of that day of the robbery and the evidence was well corroborated. PW4, the doctor produced a p3 confirming injuries on the complainant. PW3 the investigating officer gave in the findings of this investigation that concluded in the charging of the Appellants.

The ingredients of the offence of robbery with violence were clearly seen in this particular case.

During the defence, each Appellant gave sworn evidence which did not shake the Prosecution's evidence. The Appellants did not explain anything about the commission of the offence.

The court dully analyzed the evidence led by the prosecution and defence and was satisfied it led to the irresistible conclusion that the appellant committed the offence. The decision of the court is well reasoned and supported by the evidence.

The conviction should be upheld and sentence confirmed.

Evidence before the trial court.

Prosecution's case

8. The Prosecution called four witnesses to prove the charge as follows:

(PW1) Isaac Makau Mulandi

"*I live at Mikono Village, Kola Sub-location. I am a business man; I sell livestock and am also a farmer. On 11th June, 2013 at about 9.00 pm I was walking from Kola market going back home; I had arrived from Machakos accompanied by Mutanguli Julius Nyumu. At Kola we entered a pub to get cigarette; we meet Mwende Nthambi (accused2)*

Musyoka Mwangi (accused 1). We all are from the same Village. We bought cigarettes and we left. Accuse 1 and 2 woke up and followed us; I saw them because there were security lights outside the pub. Accused 1 suddenly struck me with a stick on the head and I fell, accused 2 struck me with a stone. Julius Mutanguli went when I was tied. Accused 1 and 2 stole from me Ksh.10,000/= cash and a phone make Samsung worth Ksh.6,000/= I screamed and they fled; I later proceeded back home and called my brother who sent me a car to take me to hospital, at home I met my father, mother and my wife. I was stitched on the head and eye. The next morning I reported at Kola Police Station. I took police to the scene I also took to the police my blood stained clothes. I wore a brown leather jacket – PMFI 1, a blue jean trouser- PMFI 2 and a grey T-shirt with red strips- PMFI 3. I was given a note to take to hospital and issued with a p3 form – PMFI 4.

X-rays were taken at level 5 hospital in Machakos. I was also seen by an Ophthalmologist. I was given medicine and discharged. I also have a receipt dated 17th August, 2012 for my lost phone PMFI 5.

The two accused were arrested at Kola market. I personally gave their names to the police. I recorded my statement with the police. Before they were arrested the two accused and their mothers come to my home seeking a settlement, they offered to compensate me. We entered an agreement on 15th June, 2013.

Accused one's name is No. 4 (on the agreement) accused two name's is No 11 on the agreement. The agreement is here in court- PMFI 6. It was made on 16th June, 2013.

None of my property was recovered. The two accused attacked me about 5 steps from the door of the bar that is about 3 meters. I had no previous disputes with the accused."

Cross-examination by accused 1

"I know you personally. You stole from me and attacked me. You live at Kola market. I did not personally look for the phone or the money. There was adequate light from the security light bulb. I did not record that in my statement. If the court visits the scene they will see the security light. Nobody come out from the bar, in the bar there was only the bar attendant. You and the co-accused were the only customers. On 11th I first sought medical help. My home is 1 km away from the scene; the police station is ¼ km from the scene. I thought of running back to my relatives. I went to hospital first to be helped stop the bleeding before I sought the p3 form. A p3 is not as critical as getting treatment."

Cross-examined by PW2

"I have known you for a very long time. None of my items were found on you. There was lighting at the scene. There were also light inside the bar. I made my initial report at Kola Station. My first reaction was to run home to be rescued. Julius never told me why he did not report to police. The duty to report is mine not my witness. I was injured and was treated that night. I have no reason to accuse you falsely. I gave the police the agreement we had made. You were arrested at the market where you work. You never told me why you did not rob Julius. I was hit twice. I did not see the person who hit me the first time."

Re-examination by the prosecution

"I was conscious. The first accused was the first person to hit me, he was with the second accused Muendo; after the first stone hit me I fell down, a second stone hit me when I was down sprawled on the ground. I reported the next morning at 9.00 am. In initial report I mentioned their names and indicated the point where each could be found; I saw the two attack me. There were only two people in the bar. It was the two accused and the attendant who were serving them."

(PW2) Joseph Mutanguli Nyumu

"I live in Kola market in Mikono Village. I am a farmer. On 11th June, 2013 at about 9.00 pm I was called by Isaac (PW1) to meet him at Kola. I went and waited for him at the bus stage. We proceeded back home. At Kwa Muli bar at Kola market we entered and he bought cigarettes. There was a female bar attendant known as Christine. There were two customers drinking alcohol. The two people I saw are well known to me. Bernard Musyoki (accused 1) and Muendo (accused 2). As we walked away, a stone was thrown from behind and Isaac screamed. I looked behind and I saw Bernard and Muendo rush towards us. Isaac sprawled on the ground. I rushed of the scene and hid behind the house about 20 meters away and peeped and saw the two assault Isaac and later left the scene and entered a small dark corridor. They hit Isaac with stones. I returned to the scene and found still sprawled on the ground and bleeding. I held his hand and took him to his house. He said he had been robbed, that he had lost a phone and Kshs.10,000/= he bleed from his head and face. PMF 1, 2 and 3 identified. These are the clothes Isaac wore. At Isaacs home I saw his mother and wife. Later he was taken to hospital; I stayed at his home as his mother and wife took him to hospital. I had seen accused inside the bar. I identified them outside because there was adequate light. I have known accused persons for a long time because we live in the same Village."

Cross-examination by accused 1

"My name is Joseph not Julius. I saw what happened. I ran away but did not scream because I feared you. I was not drunk. I hid and watched to see what you did. There were many stones at the scene. You were the first person to attack the complainant. I did not record it in my statement that I saw you throw a stone at Isaac. You also hit me with a stone."

Cross-examination by accused 2

"I have known you since you were young boys growing up. I have never heard another person accused you of stealing. You asked personally Isaac to settle the case out of court. You did not rob me because I escaped. I took Isaac to his home so that his relatives can take him to hospital.

I am not your accomplice to harm Isaac. It is normal for a man to flee. When you attacked Isaac, Christine was starting to close the bar. The security lights are outside the bar. Isaac took police to the scene."

Re-examination by the prosecutor

"The accused persuaded Isaac for settlement. My statement reads Joseph not Julius. My other names are Mutanguli Nyumu. The exact place where Isaac was attacked had sufficient light from a bulb. I saw both Bernard and Muendo run with stones towards Isaac. I have no reason to frame the accused persons."

PW3 No. 79059 PC Davis Kamborua

"Attached at Kola Patrol Base performing general duties. I have been in the service for 4 years. On 12th June, 2013 at about 7.20 am Isaac Makau Mulandi came reporting that on 11th June, 2013 at 9.30 pm while walking home he was hit with a stone and he fell down; he was in company of Mutanguli his friend. Mutanguli was attacked with stones when he tried to assist him and he fled. The two accused identified by the complainant using a security light at Muli's bar. That the accused emerged as the complainant lay on the ground and assaulted him. They stole a phone make Samsung of Ksh.10,000/= the value of the phone was Ksh.4000/= I recorded in the occurrence book, visited the scene at Kola market. There were many stones at the exact location and he would not identify which stone hit him.

The complainant explained his attackers to me and also gave me their exact names and occupation. I issued the complainant a note to be treated. I recorded witness statements. On 14th in company of two colleagues we arrested the accused persons.

Accused identified by witnesses. The complainant led us to the 2 accused. No recovery was made.

At the time of reporting the complainant was bleeding from head and back; his clothes had blood stains (Jeans, jacket and T-shirt). The clothes were handed to me by the complainant. He also brought us a receipt for the mobile phone.

During investigation I established that the accused had visited the complainant's home and agreed to pay him so that he does not press charges. An agreement was given to me; accused one is known to me as a miraa vendor and accused 2 is a neighbor at the police patrol base. I have known them for three years, no dispute with them."

Cross-examined by accused 1

"The complainant told me that he was attacked at about 9:30 pm. I did not recover anything from you. The complainant pointed you out. I arrested you at a hotel, PW1 pointed you out and left the scene then I approached you and arrested you. The complainant told me that there was security lights that were on. I visited the scene and saw the bulb on the bar attached outside. I also know you as a notorious person. I did not ask for bribe from you or your parents. The agreement was for Ksh.80,000/= between yourself and the complainant. The law does not require me to take you back to the scene."

Cross-examination by accused 2

"The complainant took me to the scene. The scene is about 10 km away from the door step of Muli's bar. The complainant said you emerged from a dark corridor. When you attacked him he was at an area that had light, you hit him with stones, kicks and blows. I don't know what he said in court about the value of the phone. The receipt he gave me also was Ksh. 4,000/= the report was made on 12th.

When he came he was bleeding, he had been treated but the bleeding passed through the bandages and I gave him a letter to attend treatment at District Hospital. The bulb provide light up to 20 meters radius. There was no evidence of extortion. You later entered in an agreement with the complainant to pay him to abandon the charges.

On 6th I never asked for a bribe from your parents; I was attending fraying at Makindu and was not duty. All statements were supplied immediately. The complainant was injured but assault could not be preferred because it is under the offence of robbery with violence."

Re-examination by the prosecution

"At first the complainant was attacked with a stone and when he fell he was assaulted with kicks and blows. I was confused on the issue of value."

(PW4) Doctor Peninah Kanini Musyoka

"I hold a Bachelor Degree in Medicine and Surgery. I work at Machakos Level 5 Hospital. PMFI 4 referred to (P3 form); name of the patient Isaac Makau Mulandi 35 years old, clothes stained with blood. History of assault by known people, injury on head and left eye. Date 16th June, 2013 examination revealed; healthy general conditions, cut on head occipital region, above the eye that was swollen and red, all limbs were normal. Approximate 3 day injuries. Weapon sharp and blunt. The patient was treated, degree of injury was harm. I sighed the p3 form on 13th June, 2013."

Cross-examination by accused 1

They said they were injured on 10th June, 2013. I do not have other particulars. I saw the patient on 13th June, 2013 for purpose of filling P3 form stamped at Machakos Level 5 Hospital. He had treatment notes to show that he had been treated. I did not refer to the same."

Cross-examination by accused 2

"He did not tell me what weapon was used, it was my opinion as a doctor. I saw the patient personally on 13th June, 2013. He said the injury was inflicted on 10th June, 2013. I saw clothes with dry blood stains. A P3 form is an original document and have no reference number apart from police reference number which is an OB number. This p3 form is not fake it has the hospital stamp."

Defence Case

9. When put on their defence the Appellants testified before the trial court as follows:

Bernard Musyoki Mwangangi (DW1)

"I did not commit the offence. On 14th I woke up and went to work at about 3.00 pm I went for lunch and upon returning I met two officers who pounced on me without explanation. At the station he asked for Ksh.20,000/= so that he assists me. I was later charged on 17th for an offence I did not commit. I have never committed any offence, I am a first offender."

Cross-examined by accused 2

"I know nothing about the offence."

Cross-examined by the prosecution

"I recall on 11th June, 2013 I spent my day at the pool table. My employer was Mutunga Nthege, I left work at 6.30 pm. The pool table is at the bus station. I know Isaac Mulandi I never saw him on 11th. ***Isaac knows me very well.*** *I know the owner of Amani store, his name is Kitinga he has never employed me. I know Muli's bar, it is far from my work place, far from the road I use when going home. I saw my employer that day, when I returned home I saw my father, mother and siblings. All of them know that I stayed home till morning; it is not necessary to call my relatives to testify that I stayed home all night. My mother is in court.*

On 15th June, 2013 I never meet Isaac because I was at the police station. I do not know if Justus met Mulandi was also in custody. ***I drunk at Muli's bar. Outside the bar there are security lights. There is sufficient lighting from an electric bulb outside the bar.***

Accused 2 was a stranger to me, both live in Kola. His home is near the police station. He told me that he is employed at Amani store. I don't know John Mutalangi Nyumu. I only saw him in court."

Justus Muendo Mangau (DW2)

"My home is near Kola market, my village Thoma. I used to work at a shop known as Amani store. I was working as a porter; I was carrying a customer's goods to the bus stage. As I loaded the goods onto a motor vehicle when I was grabbed suddenly. I looked behind and saw police officers who had arrested Jacob Mutua Kiio. I was handcuffed with him and taken to the police station with no explanations. On 15th Jacob was released I met accused one in the cells. On 16th the arresting officers told us to give him Kshs.20,000/= so that he releases us. We were charged on Monday 17th June, 2013.

The complainant has been asking for Kshs.50,000/= so that he withdraws complaint."

Cross-examined by the prosecutor

"My nickname is J, I had worked at Amani Store for a year. I know Kola market very well, there are few offices but I don't know all officers. My employer is Jonna Mwillu Kitinga; from Monday to Wednesday we work from 5.30 am – 6.00 pm on Thursday. I leave work at 6.30 pm.

On 11th I worked to 6.30 pm and went back home a kilometer away from Kola market. I did not go to Muli's bar that day; Isaac was a stranger to me prior to this proceedings. I first saw him in court and so is Joseph. I know the location where accused 1 works. At home I found my family members; I stayed home till morning. I usually sleep in my house alone. I went to work at about10.00 pm. My mother is here in court. I have not called her as my witness. I never entered into an agreement with anyone; I do not know the contents of the agreement. On 12th I reported to work at 6.30 am. Isaac was not known to me prior to the case. I serve customers and they would know me by name and face. I have no evidence regarding 11th June, 2013.

STATEMENT OF THE JUDGEMENT

10. In convicting the appellants, the trial court found as follows:

"Evidence: the complainant has given a very cogent and concise account of the events of that day. The prosecution unveiled an eye witness in the matter. Both the complainant and the witness have given corroborated evidence that the first saw the accused pursued them accosting them with stones. There is evidence of recognition which was held in the case on ***Anjononi & 8 others Vs. Republic [1980] KLR*** *to be "more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."*

Loss of property: I have received clear evidence that the complainant lost money and a mobile phone during the encounter with the accused persons. His claim is buttressed with the act that he immediately informed PW2 when he rescued him at the scene, have also seen the receipt in PEX5.

Injuries: I find that there is ample evidence vide PEX4 that the complainant sustained harm; clear from PW1 and 2 that they were inflicted by the accused persons in joint effort. The investigating officer also confirms that when the complainant reported he had been treated and bandaged and still bled through the bandages.

Charge: the ingredients of the offence of robbery with violence were clearly set out by the Court of Appeal in the case of ***Oluoch vs. Republic [1985] KLR*** *where it was held:*

"Robbery with violence is committed in any of the following circumstances:

> ***a.) the offender is armed with any dangerous and offensive weapon or instrument; or***
>
> ***b.) the offender is in company with one or more person or persons ; or***
>
> ***c.) At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person."***

In this case the complainant said that he was accosted persons injured him and p3 form was produced together with blood stains clothes.

The defence: I find that none of them has explained anything about the commission of the offence. The accused persons have simply denied. They have not given me sufficient reason to disparage the prosecution's case.

Findings: there is overwhelming evidence against the accused person. The state has proved its case beyond reasonable doubt."

Issue for determination

11. The issue before the court in the criminal trial was whether the offence of robbery with violence was proved against the Appellants. A peripheral issue whether the charge was duplex as was raised by the Appellants' submissions.

Determination

Whether charge was duplex

12. At the outset, the preliminary question whether the charge facing the Appellants before the trial court was duplex must be answered in the affirmative in view of the holding of the Court of Appeal in ***Joseph Mwaura*** case that -.

> "*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 person. The offense 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 that, 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 duplex charge.***"

Were the appellants prejudiced?

13. However, the question at the centre of any appellate intervention in criminal justice is whether an accused was prejudiced in their trial or defence to the charge leveled against him. Section 382 of the Criminal Procedure Code puts this golden thread of the criminal review process as follows:

> ***"382. Finding or sentence when reversible by reason of error or omission in charge or other proceedings***
>
> *Subject to the provisions hereinbefore 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, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry 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.*
>
> *[Act No. 33 of 1963, First Sch.]"*

14. The question the appellate court in this case must determine is whether the reference in the charge to the two penal sections of 295 and 296 (2) of the Penal Code occasioned a failure of justice in the case of the Appellant before the court. The two appellants were represented by Counsel in the trial court. The said Counsel dutifully cross-examined the Prosecution witnesses on their evidence and made submissions on no case to answer for the Appellants and when put on their defence led them in sworn testimony and in re-examination after cross-examination by the Prosecution. The issue of the duplex charges was never raised before the trial court, and consequently the disqualification in the proviso to the principle in section 382 of the Criminal Procedure Code applies, so that "*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."*

15. The object of a charge as disclosed in section 134 of the Criminal Procedure Code is to inform an accused as to the offence that it is alleged he has committed, so as to enable him to respond to it during his trial.

> **"134. Offence to be specified in charge or information with necessary particulars** Every charge or information shall contain, and ***shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.***"

16. Section 137 (a) of the Criminal Procedure Code as relevant on the preparation of criminal charges require that the charge be so framed as to communicate to the accused the offence he is alleged to have committed in order that he may suitably defend himself, without technical language and the technical difference between the simple and aggravated robbery need not be included:

> ***"137. Rules for the framing of charges and information***
>
> *The following provisions shall apply to all charges and information, and,*
>
> *Notwithstanding any rule of law or practice, a charge or information shall, subject to this Code, not be open to objection in respect of its form or contents if it is framed in accordance with this Code—*
>
> *(a) (i) Mode in which offences are to be charged.—a count of a charge or information shall commence with a statement of the offence charged, called* ***the statement of offence****;*
>
> *(ii) the statement of offence shall* ***describe the offence shortly in ordinary language****, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment shall contain a reference to the section*
>
> *of the enactment creating the offence;*
>
> *(iii) after the statement of the offence,* ***particulars of the offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary:***
>
> *Provided that where any rule of law or any Act limits the particulars of an offence which are required to be given in a charge or information, nothing in this paragraph shall require more particulars to be given than those so required…."*

17. In this case, the charge clearly stated that the offence was one of robbery with violence, which is the subject of section 296(2) of the Penal Code. The error in including section 295 on simple robbery does not detract from the statement of the offence which is a clear description of the offence in concise and ordinary language as required by section 137 (a) (ii) above.

18. In addition, the particulars given in the charge sheet clearly point to a charge of ***robbery with violence*** under section 296(2) of the Penal Code. There is no way that the appellants could have been prejudiced by mistaken comprehension of the offence with which they were charged and consequently become embarrassed as to the proper defences they would put forward. Moreover, their alibi defence was not in any way affected by the nature of the charge that they faced or their understanding of the technical differences the element of the offences of simple robbery under section 295 and robbery with violence under section 296(2) of the Penal Code.

19. In the case of ***Paul Katana Njuguna v Republic*** [2016] eKLR, the Court of Appeal at Nairobi considered the issue of effect of duplicity in a charge sheet where, as here, both sections 295 and 296 (2) of the Penal Code were cited in the statement of the offence of robbery with violence and after considering the Court earlier decisions including ***Joseph Njuguna Mwaura,*** supra, cited by the appellants held as follows:

> *"Having considered the law on duplicity as it has evolved, can we say that the charge as framed in the appeal before us was so defective as to have occasioned a failure of justice? Can it be said with any certainty that the said defect is incurable under* ***Section 382*** *of the* ***Penal Code****. We observe that the offence under* ***Section 295*** *and* ***296 (2)*** *were not framed in the alternative. So, following the decision in* ***Cherere s/o Gakuli -v- R*** *(supra)* ***Laban Koti -v- R****. (supra) and* ***Dickson MuchinoMahero v R****. (supra), the defect in the charge herein is not necessarily fatal.*
>
> *39. We appreciate that* ***Section 296 (2)*** *of the* ***Penal Code*** *creates the offence of robbery with violence or aggravated robbery. In our view, the offence of robbery must first be demonstrated before proceeding to demonstrate the ingredients provided in* ***Section 296 (2)*** *of the* ***Penal Code****. As a corollary to this proposition, an accused person facing those charges would in defence seek to demonstrate that no offence of robbery was committed and that the ingredients alleged under* ***Section 296 (2)*** *were absent or were not demonstrated by the prosecution.*
>
> ***40. In the matter before us, we are unable to detect any prejudice which the appellant suffered. The record shows that the appellant suffered no confusion when the charge, as framed, was read to him and when the witnesses testified, he fully cross-examined them. He raised no complaint before both the trial court and before the High Court.*** *So, while it would be undesirable to charge an accused person under both sections in the alternative, it would not be prejudicial to that accused 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 has 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.***
>
> *41. In this appeal, 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. We must, therefore, reject the appellant's belated complaint that the alleged duplicity in count one of the charge caused him prejudice.* ***We find that the defect if any, was in any event, curable***

under Section 382 of the Criminal Procedure Code."

20. The matter being so governed by authority, I have no hesitation in finding that the inclusion of section 295 of the Penal Code along with section 296 (2) in the charge sheet the particulars of which clearly indicate the offence of robbery under the latter section did not at all prejudice the accused persons, who were in any event represented by counsel at the trial. Citing the wrong section of the law as the provision under which the offence, which was otherwise clearly stated, is based was not prejudicial to the accused. They knew the nature of the charge that they faced and they defended themselves appropriately with cross-examination of the Prosecution witnesses and gave sworn testimony in their defence. In cross-examination, they refused to answer questions as to the date of the alleged offence, the 1st appellant stating that *"my evidence is about 17th [June 2013]"* and the 2nd appellant that *"I have no evidence regarding 11th June 2013"*.

Proof of the ingredients of robbery with violence

21. Having considered the evidence before the trial court as required of a first appellate court (***Okeno v. R*** (1972) EA 32), I find that the ingredients of the offence of robbery with violence were proved in the attack on the complainant by two persons who while stealing money and mobile phone from the complainant wounded him by striking him with a stone. See the ingredients of offence of robbery with violence under section 296 (2) of the Penal Code and the explanation in ***Oluoch v. R*** (1985) KLR 549.

Identification of the appellants

22. The appellants were identified by use of security lighting outside the Muli's Bar by the complainant during the attack and by his colleague PW2 from his vantage hideout. The 1st appellant Bernard Musyoki Mwangangi (DW1) conceded ***"I drunk at Muli's bar. Outside the bar there are security lights. There is sufficient lighting from an electric bulb outside the bar."***

23. The Appellants' defences related only to their arrests denying that they were never near the scene of crime at Muli's bar in Kola Market on the material date 11th June 2013. However, this alibi defence is disproved by the cogent evidence of the Prosecution witnesses (PW1 and PW2) who identified the Appellants as the assailants. The Appellants were known to the complainant and his companion and the security lighting at the scene removed the possibility of mistaken identity.

24. In addition, it was evidence of recognition, which is more reliable, rather than that of identification which is more open to possibility of error. See ***Anjononi v. R,*** supra.

Consideration of the Judgment of the trial court

25. I agree with the trial court in its evaluation of the evidence on the basis of the ingredients of the offence of robbery with violence as set out in the Court of Appeal decision in ***Oluoch v. R*** (1985) KLR 549.

Sentence

26. However, on the sentence, the death sentence, by the authority of the Supreme Court in ***Francis Karioko Muruatetu & Anor. v. Republic,*** Petition No. 15 of 2015 (delivered on 14th December, 2017) being only a maximum rather than mandatory sentence, as considered by the trial court as the ***"only one sentence under the law"***, the court has discretion in sentencing depending on the circumstances of the case. Considering the modest value of the subject matter of the theft (see ***Ambani v. R*** (1990) KLR 161,) and the non-aggravated nature of injuries suffered by the complainant during the robbery, the court considers that a sentence of imprisonment for a term of ten (10) years will meet the justice of the case.

Orders

27. The consolidated appeals from conviction for the offence of robbery with violence contrary to section 296 (2) of the Penal Code are without merit and are dismissed.

28. However, consistently with the Supreme Court decision in ***Muruatetu,*** the sentence of death is reviewed and substituted with a sentence of imprisonment for ten (10) years for each appellant from the date of sentence in the trial court.

Order accordingly.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 9TH DAY OF JULY 2018.

G.V. ODUNGA

JUDGE

Appearances:

Appellants in Person

Ms. Saoli, Prosecution Counsel for the DPP.