REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL APPEAL NO. 37 OF 2017

KENNS MAXWELL GETANGE.....APPELLANT

=VRS=

THE REPUBLIC.....RESPONDENT

[Being an Appeal from the Judgement and Decree of Hon. J. Mwaniki – Senior Principal Magistrate

delivered on the 17th day of May 2017 in Keroka SPM CR Case No. 587 of 2015]

JUDGEMENT

The appellant was the 1st accused in a charge framed as "Robbery with violence contrary to Section 295 (2) as read with 296 (2) of the Penal Code."

The particulars of the charge were stated to be that "on 21st May 2015 at Matangi village in Masaba North Sub-county within Nyamira County, jointly and while armed with a panga robbed Nemuel Sagini Nyakundi one mobile phone make Tecno valued at Kshs. 2,000/= and immediately after time of such robbery wounded the said Nemuel Sagini Nyakundi."

The appellant and his co-accused pleaded not guilty to the charge. After hearing and considering the evidence of four prosecution witnesses and the testimonies of the appellant and his co-accused the trial magistrate found them guilty, convicted them and sentenced the appellant to ten (10) years imprisonment. He then issued a warrant of arrest for the appellant's co-accused who had jumped bailed.

The appellant was aggrieved by the conviction and sentence so he preferred this appeal. At the hearing of the appeal Counsel for the appellant relied on supplementary grounds filed herein on 9th October 2017 which are that: -

> **"1. The learned trial magistrate erred in law in convicting the appellant notwithstanding the fact the charge levelled against the appellant was defective.**
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> **2. That the learned trial magistrate erred in law and fact by convicting the appellant contrary to the weight of evidence tendered.**
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> **3. The learned trial magistrate erred in law and fact by creating his own evidence which was not part of the proceedings but which formed the Learned Trial Magistrate's hypothesis in convicting the Appellant.**
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> **4. The learned trial magistrate erred in law and fact by relying on the insufficient evidence of a single witness (the complainant) to convict the appellant herein of the offence of robbery with violence.**
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> **5. The learned trial magistrate erred in law in failing to evaluate the totality of the evidence before him, and particularly he did not evaluate the evidence of the Appellant, hence arrived at an incorrect verdict.**
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> **6. The Learned trial magistrate erred in law and fact by ignoring crucial evidence gleaned on cross examination of prosecution witnesses therefore arriving at a wrong conviction.**
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> **7. The learned trial magistrate erred in law and fact by ignoring the evidence on both the prosecution and the defence that there were differences between the appellant and the complainant which if well considered could not have resulted in the conviction of the Appellant.**

8. The learned trial magistrate erred in law by failing to ensure that the prosecution proved its case beyond reasonable doubt to warrant the conviction he entered.

9. The learned trial magistrate erred in convicting the Appellant without the benefit of investigating officer testifying before the court on such a charge.

10. The learned trial magistrate erred in law and fact by misdirecting himself on the law and evidence which led to a travesty of justice.

11. The learned trial magistrate erred in handing down sentence that was harsh, excessive and unlawful."

Counsel urged that the conviction herein be quashed, the sentence be set aside and the appellant be set at liberty. The appeal which is vehemently opposed was canvassed by way of written submissions.

Counsel for the appellant submitted that the trial magistrate erred in convicting the appellant on a charge that was defective for being duplicitous as it charged him under Section 295 of the Penal Code as well as Section 296 (2) of the Penal Code. He submitted that the trial magistrate also erred for not considering there was bad blood between the complainant and the appellant which could lead the complainant to fix the appellant. Counsel also submitted and took issue of the failure by the prosecution to call the investigating officer. He urged this court to find that the evidence of the investigating officer would have been unfavourable and prejudicial to the prosecution's case and that therefore the trial magistrate erred in prosecuting the appellant without that evidence. Counsel also argued that the trial magistrate erred in relying on the evidence of a single identifying witness without warning himself of the dangers of doing so. He also faulted the magistrate for failing to evaluate the evidence of the appellant and accused him of introducing theories that were not part of the proceedings and using those theories to arrive at his judgement. He contended that it was not in the place of courts to fill gaps where the prosecution had failed. Counsel further submitted that committing the appellant to ten years' imprisonment was harsh, excessive and contrary to the weight of the evidence tendered before the trial court. He urged this court to re-examine the facts, the conviction and the sentence and allow the appeal, set aside the conviction and sentence and set the appellant at liberty. To support his submissions Counsel relied on the following cases: -

- **Joseph Njuguna Mwaura & 2 others v Republic [2013] eKLR.**
- **Samson Omondi Oduor v Republic [2016] eKLR.**
- **James Tumai Epur & Another v Republic [2006] eKLR.**
- **Willingson Ntwiga alias Tosha v Republic [2016] eKLR.**
- **Maitanyi v Republic [1986] eKLR.**
- **Stephen Gatukia Kahura & Another v Republic [2017] eKLR.**
- **Karanja v Republic [1983] eKLR.**
- **Thomas Khisa Wekesa v Republic [2007] eKLR.**

On his part, Mr. Ochieng, Principal Prosecution Counsel, submitted that the charge was not defective, that the land dispute did not involve the parties in this case but their parents and that it had been resolved. He submitted that the trial magistrate gave reasons for relying on the evidence of the single identifying witness and that the alibi defence was an afterthought as the prosecution was no notified of it so that it could test it. He urged the court to dismiss the appeal as all the ingredients of Robbery with violence contrary to Section 296 (2) of the Penal Code were established.

I have now had opportunity to consider the grounds of appeal as set out in the supplementary petition filed by Counsel for the appellant. I have also had opportunity to consider the rival submissions of Counsel for the appellant and the respondent. More importantly I have, as it is my duty as the first appellate court reconsidered and evaluated the evidence before the trial court so as to arrive at my own conclusion. In so doing I have made provision for the fact that I did not see or hear the witnesses testify and so did not observe their demeanour. I propose to first deal with the issue of the legality of the charge and then deal with the merits of the appeal.

Counsel for the appellant submitted that the charge was defective for being duplicitous. I agree with her. The Court of Appeal pronounced itself on this matter in **Joseph Njuguna Mwaura & 2 others v Republic [2013] eKLR** where it stated: -

"……We reiterate what has been stated by this court in various cases before us: the offence of robbery with violence ought to be charged under Section 296 (2) of the Penal Code. This is the section that provides the ingredients of the offence which are either the offender is armed with a dangerous weapon, is in the company of others or if he uses any personal violence to any person.

The offence of robbery with violence is totally different from the offence defined under Section 295 of the Penal Code, which provides that any person who steals anything, and at, or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or to property in order to steal. It would not be correct to frame a charge for the

offence of robbery with violence under Section 295 and 296 (2) as this would amount to a duplex charge."

Be that as it may Section 382 of the Criminal Procedure Code provides that a sentence finding of a competent court cannot/shall not be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint or charge unless the error, omission or irregularity has occasioned a failure of justice. The proviso then states: -

"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."

Counsel appearing for the appellant also represented him at the trial and at no time did he raise the issue of the duplicity of the charge. In this appeal he has not demonstrated that any prejudice was occasioned to the appellant as a result of the defect in the charge. It is therefore my finding that the irregularity of the charge alone is not in this case a good ground to set aside the judgement of the trial court.

Turning to the merits as I stated earlier, I have evaluated the evidence before the trial court. My finding is that the charge against the accused person was not proved beyond reasonable doubt. The case against the accused person turned on identification. The complainant's evidence was that he was going home at about 7.30 pm when this robbery, which I have no doubt occurred, took place. He stated that he had a torch and that he recognized his attackers because he knew them. He stated that the 2nd accused was his neighbour. He stated that the 2nd accused – appellant's co-accused, told him to put out the torch but he refused. He then stated that the appellant who had bought land from him hit him on the forehead with a metal rod he was carrying. The appellant and his co-accused then took his phone and fled. It is however instructive that the appellant did not mention how he used the torch. Did he flash it at the assailants? He did not connect his being in possession of a torch with the identification or recognition of the assailants. The court cannot presume that just because he carried a torch its light is what helped him to identify his attackers. It was upon the prosecution to prove that he actually shone the light of the torch upon the assailants and saw their faces and recognized who they were. Merely saying that he had a torch and that he refused to switch in off is not sufficient evidence that he recognized the attackers. This coupled with the fact that he did not even say who those attackers were either at the scene or even in his statement to the police makes it even more doubtful that he recognized them. This being a single identifying witness his evidence must be tested carefully. The fact that the complainant did not state that he shone the torch towards the attackers, that he did not tell the people who came to his rescue the names of the attackers and that he still did not give their names to the police in his statement makes it doubtful that he was truthful. Whereas he may have feared for their lives while at the scene he does not state why he did not tell the police their names when he eventually made his statement. I am not satisfied that the appellant was positively identified and for that reason I would allow the appeal.

Counsel for the appellant submitted and faulted the trial court for failing to evaluate the appellant's defence. That evidence was that the accused was not at the scene when it is alleged he committed the offence as he was admitted in hospital. Counsel submitted that the trial magistrate ought to have accepted this alibi. It is true that in this case the trial magistrate did not consider the defence put forth by the appellant. In **Karukenya & 4 others v Republic [1987] KLR 458** the Judges of appeal held: -

"It is the duty of the court to analyse the alibi by weighing and testing it intrinsically as against the prosecution evidence, to see if it might reasonably be true or if it can safely be rejected as false. It is not sufficient for the court to dismiss it in a perfunctory phrase."

Following the above principle, I have myself considered the evidence produced by the appellant as proof that the he was in hospital. My finding is that those documents do not support his alibi. What he produced were a prescription dated 19/5/2015, a Patient Treatment Card dated 5/12/2015, a Keroka District Hospital Card (Clinic Appointment Card) containing a prescription and another card showing the scheduled treatment commencing 8th December 2015. None of them support his alibi so that even though the prosecution did not disprove the alibi as it is its duty to do, the alibi could not stand as it was false. As I have however already found that this appeal has merit the same is allowed and the conviction of the appellant quashed and the sentence set aside. The appellant should be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

Signed, dated and delivered at Nyamira this 18th day of October 2018.

E. N. MAINA

JUDGE