



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**CRIMINAL APPEAL NO. 44 OF 2017**

**MORRIS OTIENO ROY.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**CONSOLIDATED WITH**

**CRIMINAL APPEAL NO. 56 OF 2017**

**STEPHEN ODHIAMBO OCHIRO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Appeal against the conviction and sentence by Hon. E. K. Too (SRM) in Mavoko***

***Principal Magistrates Court Criminal Case No. 129 of 2015 on 27<sup>th</sup> April, 2016)***

**JUDGEMENT**

1. The Appellants have filed this appeal against their conviction for six (6) counts of the offence of robbery with violence and sentence to death. The particulars were as follows:

**Count 1**

The Appellants on the nights of 5<sup>th</sup> and 6<sup>th</sup> February, 2015 at Syokimau Estate in Athi River Sub County, Machakos County jointly with others not before court, while armed with dangerous weapons namely rifles and pistols robbed Simon Kiprotich Rugut one mobile phone make Samsung IMEI No. 354330056326310, one laptop make Compaq. One digital camera, two rechargeable torches, one DSTV decoder, ignition keys, one L.G. radio, one fridge guard, cash KShs. 44,350/= all valued at Kshs. 300,000/= the property of Simon Kiprotich Rugut and immediately after the time of such robbery threatened to use actual violence to the said Simon Kiprotich Rugut.

To this there was an alternative charge of handling stolen goods contrary to section 322 (1) as read with section 322 (2) of the Penal Code. The particulars was that Stephen Odhiambo Ochiro on 20<sup>th</sup> February, 2015 at Zimmerman Estate in Nairobi within Nairobi County otherwise than in the course of stealing dishonestly received or handled one Samsung mobile phone IMEI No. 354330056326310 knowing or having reasons to believe it to be stolen good or unlawfully obtained.

**Count 2:**

The Appellants on the nights of 5<sup>th</sup> and 6<sup>th</sup> February, 2015 at Syokimau Estate in Athi River Sub County Machakos County jointly with others not before court, while armed with dangerous weapons namely rifles and pistols robbed Janeffer Chemutai Rugut four bags, one motor vehicle registration number KAS 963X make Toyota Premio Chassis No. AT210-0030026, Engine No. 4A-M539000, three Samsung galaxy mobile phones, two ATM cards for Standard Chartered Bank Limited, one national identity card, one driving licence, a copy of certificate of insurance comprehensive cover (Mayfair Insurance Co. Ltd), three rings, one designer perfume, one bottle of body splash, cash KShs. 4,550/= all valued at KShs. 600,000/= the property of Janeffer Chemutai Rugut and immediately after the time of such robbery threatened to use actual violence to the said Janeffer Chemutai Rugut.

### **Count 3**

The Appellants on the nights of 5<sup>th</sup> and 6<sup>th</sup> February, 2015 at Syokimau Estate in Athi River Sub County, Machakos County jointly with others not before court, while armed with dangerous weapons namely rifles and pistols robbed Gift Kamau Mweha one mobile phone duos serial number unknown, cash KShs. 1,500/=, one wrist watch make spectrum all valued at KShs. 116,500/=, the property of Gift Kamau Mweha and immediately after the time of such robbery threatened to use actual violence to the said Gift Kamau Mweha.

### **Count 4**

The Appellants on the night of 5<sup>th</sup> and 6<sup>th</sup> February, 2015 at Syokimau Estate in Athi River Sub County, Machakos County jointly with others not before court, while armed with dangerous weapons namely rifles and pistols robbed Gilbert Osolo Onono one motor vehicle registration number KBR 735A make Voxy Toyota, chassis No. AZR60-0271500, Engine number IAZ-4766345, mobile phone make Iphone, one cell phone make Nokia E90, all valued at KShs. 856,000/= the property of Gilbert Osolo Onono and immediately after the time of such robbery threatened to use actual violence to the said Gilbert Osolo Onono.

### **Count 5**

The Appellants on the night of 5<sup>th</sup> and 6<sup>th</sup> February, 2015 at Syokimau Estate in Athi River Sub County, Machakos County jointly with others not before court, while armed with dangerous weapons namely rifles and pistols robbed Gabriel Kinanga Obaga 5,800 US dollars, two mobile phones, Iphone, one Samsung duos galaxy, a wrist watch, a pair of shoes, cash KShs. 4,000/= all valued at KShs. 650,000/= the property of Gabriel Kinanga Obaga and immediately after the time of such robbery threatened to use actual violence to the said Gabriel Kinanga Obaga.

### **Count six**

The Appellants on the night of 5<sup>th</sup> and 6<sup>th</sup> February, 2015 at Syokimau Estate in Athi River Sub County, Machakos County jointly with others not before court, while armed with dangerous weapons namely rifles and pistols robbed Kevin Nyansinga Kinanga one mobile phone make HTC 606 Desire Dual Sim IMEI No. 353835061967545, 353835061967552, one identity card No. 22515797, one ATM card of Barclays Bank Account No. 0861066681, voters registration card, cash KShs. 2,400/= all valued at KShs. 110,000/= the property of Kevin Nyansinga Kinanga and immediately after the time of such robbery threatened to use actual violence to the said Kevin Nyansinga Kinanga.

Morris Otieno Roy faced an alternative charge of handling stolen goods contrary to section 322 (1) as read with section 322 (2) of the Penal Code. Particulars being that Morris Otieno Roy on the 8<sup>th</sup> day of February, 2015 at Monte Carlo Club in Nairobi Town within Nairobi County jointly with others not before court, otherwise in the course of stealing dishonestly undertook the disposal of one mobile phone make HTC 606 Desire Dual Sim IMEI No.353835061967545, 353835061967552 knowing or having reason to believe it to be stolen goods or unlawfully obtained.

2. Plea of not guilty was entered and the Appellants were put to trial. Brief facts are as follows. Gift Makau (PW1) was on the material day at Mlolongo within Syokimau in company of Kevin Nyanchama Kemanga (PW6) Gabriel Kinyua (PW7) and Gilbert Osolo (PW2) to finalize a sale transaction for motor vehicle registration number KBR 735A. On their way back, they were accosted by 4 men who took control of the vehicle. The vehicle was driven to an area near Taj Mall where they were tied, something bitter was sprayed on them and abandoned and the robbers went away with the vehicle. PW1 recalls seeing a pistol which was brown in colour. Some of the men opened the doors to the vehicle and instructed them to go to the rear. She stated that she was unable to identify the robbers since it was dark. She was also unable to identify the men even when the light inside the vehicle was put on since they were instructed to look down. She stated that her phone, watch and money was taken. That the phone was valued at KShs. 120,000/=. PW2 saw three (3) of the men armed. He stated that the men took phones and money from them. He said that it was dark but saw one of the robbers. That Stephen Odhiambo sat at the front. That he identified him using street lights since he had no cap on. He lost his Iphone5, Nokia E90, 1 gold ring and 1 silver ring and a watch valued at KShs. 120,000/=. That PW 6's phone was traced leading to the arrest of the Appellants. Mariam Lydia Omahi (PW3) a Human Resource officer at AutoPort Freight Terminal who had secured a loan with Equity Bank using KBR 735A and had given PW 2 the vehicle to sell was informed by PW2 that the vehicle had been stolen. She stated that the vehicle was valued at KShs. 700,000/=. She called and informed the bank of the theft. She later recorded a statement with the police and stated that the vehicle has however not been recovered. PW3 stated that she does not know the suspects. Josephat Saidi Munyumba (PW4) a bouncer at Monte Carlo Club in Nairobi was on 8<sup>th</sup> February, 2015 at around 9.00 pm at work when he was informed by a waiter that some 6 customers had failed to pay a bill of KShs. 4,000/-. He ordered them to pay but Morris Otieno Roy offered to leave a phone make HTC and promised that he would later bring the money. The phone was later traced by the police and he was called to Lang'ata Police Station and later Mlolongo Police Station where he gave his statement. Simeon Kiprotich Rugut (PW5) was on 6<sup>th</sup> February, 2015 at about 2.30 am awoken by a bang on his door. When he checked, he saw a man whose cheek had a mark holding a pistol. The grill of the window adjacent to the dining area had been cut. The robbers were six in total. The one with the pistol put the pistol on his face and ordered him to cooperate. The robbers took his phone, KShs. 12,000/- from his wife and KShs. 500/- from him. They shot at the bedroom floor and took a rechargeable lamp. They then took the logbook to motor vehicle registration number KAS 963S and took PW5 to the vehicle which one of the robbers drove. They drove to a place where there was another vehicle from which some robbers were removed. They then drove to an ATM machine at Buruburu where they demanded for his pin number and they made a withdrawal. They then took him to Nyora road and was ordered to lie down. His shirt was ripped and used to tie him. He was thrown out of the vehicle at about 5 am and he reported the matter at Kilimani Police Station. He stated that the vehicle was valued at KShs. 600,000/- and that only his phone was recovered. He was later called for identification at Athi River Police Station where he identified Morris Otieno Roy. He stated that a bullet cartridge was also recovered at his house. PW6 stated that he saw the man who held the gun on full lights. He described him as being light skinned and stated that he was Stephen Odhiambo Ochiro. PW7 stated that the items stolen were valued at KShs. 800,000/-. That he identified Morris Otieno Roy who was in charge. Kishoyan David Lemayan (PW8) was on 9<sup>th</sup> February, 2015 called by PW4 informing him that he had a HTC phone which he could sell to him if he was interested. He took the phone but was 3 days later informed to return since he did not seem interested to buy it. He was informed that its going price was KShs. 9,000/- but he offered KShs. 6,000/-. In March, he was called by Police Officer Limo over some investigations. He informed the police that he got the phone from PW4 who admitted to selling the phone to him. William Kimani (PW9) was on 5<sup>th</sup> February, 2015 approached by his son in company of two

young men and shown motor vehicle registration number KRZ 735D which they wanted to buy. They agreed that the transaction be done the next day. He contacted his sponsor and paid 5,800 Dollars. He was later at 2.30 am called by Kevin and informed that they had been carjacked. He informed the Assistant Chief Syokimau and a report was made to Mlolongo Police Station. He called OCS and agreed that a rescue mission be lodged. Juma Mwachi Felix (PW10) on 8<sup>th</sup> February, 2015 at Monte Carlo Club served six people, 4 men and 2 women who he said were known to him. They paid the initial bill of KShs. 4,000/- and continued to drink upto 1.00 pm. They said they wanted to pay using Mpesa but that was not possible since the Club had no till number. They said they were going to withdraw the money but later came back and said Mpesa had delays. He then called PW4 to resolve the matter. He left them talking to PW4 and was later informed that they left a HTC phone and would pay later. That he saw Stephen Odhiambo Ochiro give PW4 the phone.

3. Corporal Samson Nyandundi (PW11) arrested Stephen Odhiambo Ochiro on 20<sup>th</sup> February, 2015 at Kilimani near Yaya Centre. That he arrested him in connection to a robbery within Syokimau. That in the process of investigations the police managed to identify a stolen phone from the scene of robbery. That the suspect had inserted his sim card number 0716305356 and that at the time of arrest he was found with another phone with the said number. Upon investigations, he led the police to recovery of phone model 583018 Huawei 35434005 6326310 belonging to Philip Ragot 22887479. That he accompanied the police to the person who had the phone where he had given it as surety of KShs. 2,000/-. That the police recovered Nokia 1020 and Samsung Note IMEI 356664464644797. That they found Samsung 58301. That the phones were handed over to the investigating officer. Corporal Isaack Sang (PW12) together with Police Constable Lotemo and Corporal Nyakundi were informed of a suspect using a stolen phone from the material robbery. That the phone was used by Stephen Odhiambo. He was contacted through an informer and was met at Yaya Centre and was arrested. Upon interrogation, he led the police to where the complainant's phone was. That phones serial number 354330056326310 and 3566644646797 were recovered. That Stephen Odhiambo stated that Morris Otieno had sold to him the phone. Stephen led the police to Roy where a bolt cutter was recovered. James Onyango (PW13) who is a firearm examiner on 18<sup>th</sup> August, 2015 received a written report prepared by CID Charles Kailegi whose handwriting and signature he is conversant with having worked with him for 5 years. He produced the said report on his behalf since he was attending a police training course and unable to attend court. He produced the said report as P. Exhibit 13. Cadet Stephen Ole Tirki (PW14) who conducted the identification parade stated that he informed Stephen Odhiambo of the said parade. He inquired from him whether he would require an advocate or a friend present and said he did not require any. He was asked to choose a location between the members of the parade and he chose to stand between the 9<sup>th</sup> and 10<sup>th</sup> member. PW5 and his wife were then called. PW5 was the first to be called and he identified Stephen by touching him. He filled the identification parade form (P. Exhibit 9) and Stephen signed the same. Inspector of Police Richard Mugo stated that reports of robbery at PW5's house where motor vehicle registration number KAS 963X and of motor vehicle registration number KBR 735A by PW6 were received. A circular was made with regard to the vehicles and the same were recovered. That data of the stolen phones were sent to Safaricom and some of the phones; Samsung Galaxy IMF18 No. 3430056326310, Samsung IMI 356664646292, Samsung Galaxy Serial Number 35535 3053829960, HTC phone were recovered. That later on 8<sup>th</sup> February, 2015 he received a spent cartridge. He gave an account of the complainants' evidence upon which he conducted investigations.

4. The appellants were put on their defence and gave evidence as follows. Stephen Odhiambo stated that he was on 20<sup>th</sup> February, 2015 called by a friend by the name Peter and told that his boss needed a quotation. He gave him the alleged boss's number and gave a description of his dressing and agreed to meet at Yaya Centre. A minute later, a Subaru vehicle stopped in front of him. Four people, 3 men and a woman came from the vehicle and arrested him. He was put in the vehicle and everything was taken from him and asked his whereabouts on 6<sup>th</sup> February, 2015. He told them he was home asleep. He was taken to Nairobi area and asked about a Samsung Phone and he told them he did not know about it. He was taken to a place in Kariobangi and remained there for about 2 hours. He was then taken to a canteen and lunch bought for him. He was taken to the officer and interrogated and later to Nairobi area near Kenyatta National Hospital. He was locked in a room where he stayed till morning. He was the next day taken to Nairobi area police and later to Mlolongo Police Station. His finger prints were taken and charged. He denied the testimony by prosecution witnesses.

5. Morris Otieno Roy stated that he on 21<sup>st</sup> January, 2015 at about 5.00 am left his house smoking bang, on the way he met about 14 men dressed in black, when passing them he heard them say he smelt of bang. He moved faster but they surrounded and grabbed him. He was handcuffed and later informed that they were investigating a robbery with violence case. He was taken to Airport Police and later to Athi River Police Station where an identification parade was conducted and was later charged. He denied having committed the offence.

6. This is a first appeal. The general principles upon which the first appellate court acts are now well settled. It has jurisdiction to interfere with the conviction and sentence imposed by the trial court if it is satisfied that in arriving at the same, the trial court did not consider; a relevant factor or that it considered an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. In so doing, however, the Court should not lose sight of the fact that in sentencing, the trial court exercises discretion and as long as the discretion is exercised judicially and not capriciously, the appellate court should be slow to interfere with that discretion. See *Wanjema v. Republic* [1971] EA 493. The following dicta on *Okeno v. Republic* [1972] EA 32, is additionally instructive on the first appellant court's duty to re-evaluate the evidence afresh thus:

***“An appellant of a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya -vs- R [1957], EA 336), 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 (Shantilal M. Ruwala – vs- R [1975], EA 570. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own finding and draw its on conclusions. Only then can it decide whether the magistrate's findings should be supported.”***

7. I have given due consideration to the evidence adduced by the prosecution witnesses and the appellants in this case together with the submissions tendered. The essentials of robbery with violence are and I find that the issues to be determined are:

**a) Whether or not the appellants were charged on a duplex charge and if answered in the affirmative, what is the effect thereof.**

**b) Whether or not the prosecution proved the essentials of robbery with violence beyond reasonable doubt.**

8. The substantive law on duplicity is enunciated under section 134 of the Criminal Procedure Code which states 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, together with particulars as may be necessary for giving reasonable information to the nature of the offence charged.”***

The Court in **Cherere s/o Gukuli v. Republic (1955) E. A. 478** pronounced itself as follows on the issue of duplicity of a charge thus:

***“Where two or more offences are charged to the alternative in one count, the count is bad for duplicity contravening section 135(2) of the Criminal Procedure Code. The defect is not merely formal but substantial. When an accused is so charged, it cannot be said that he is not prejudiced because he does not know exactly with what he is charged and if he is convicted he does not know exactly of what he has been convicted... We think it is impossible to say, and certainly no court has so far as we are aware ever yet said, that an accused person is not prejudiced when offences are charged in one count in the alternative; he does not know precisely with what he has been charged, nor of what offence he has been convicted. It is indeed, very difficult to say that a breach of an elementary principle of criminal procedure has not occasioned a failure of justice.”***

The offence of robbery is provided for under Section 295 and Section 296 (1) provides the punishment for the offence of robbery while Section 296 (2) provides for a situation where the robbery as defined in Section 295 is aggravated. Section 296 (2) sets out what makes it aggravated and spells out a more severe sentence for the aggravated circumstances. In **Joseph Njuguna Mwaura & 2 Others v Republic [2013] eKLR**, it was held:

***“...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”.***

9. Applying the said test, I find that the charge as drawn was defective. The court in **Shah v. Republic [1969] E. A. 197** however held that a duplex charge does not necessarily vitiate conviction. That the important question a court faced with such an issue should address itself to is whether or not there was a miscarriage of justice. It is noteworthy that the appellants did not raise the complaint of duplicity at the trial and conducted their case as though they understood they were facing the charge of robbery with violence. In the circumstances, I am unable to find that they were prejudiced by the duplicity. That ground must therefore fail.

10. On the second issue, I am guided by the Court of Appeal pronouncement in **Johana Ndung'u v. Republic Criminal Appeal No. 116 of 1995** (Unreported) where it set out the ingredients of the offence of robbery with violence as follows:

***“In order to appreciate properly as to what constitute an offence under Section 296 (2), one must consider the sub-section in conjunction with section 295 of the Penal Code. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the aforescribed ingredients constituting robbery are pre-supplied in the three sets of circumstances prescribed in Section 296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:***

- 1. If the offender is armed with any dangerous or offensive weapon of instrument, or***
- 2. If he is company with one or more other person or persons, or***
- 3. If at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.”***

11. It emerged from the prosecution evidence that PW2 identified Stephen Odhiambo as the man who sat at the front seat of the vehicle and so identified him using street light since he had no cap. PW6 stated that he identified Stephen Odhiambo whom he said had a light skin complexion and that he did so since Stephen held a gun on full light. Stephen's phone number 0716305356's sim card was traced to have been used in one of the stolen phones in the material robbery. Morris was on the other hand identified by PW4 who stated that he gave him a HTC phone to hold and that the bill would be later paid. He was further identified by PW5 who stated that he had a mark on the cheek and that he is the one who held a gun at him and ordered him and was in charge of other robbers. Bearing in mind the time spent in the said robberies, it is clear to me that it was sufficient for positive identification. This is coupled with the fact that the time within which the complainants were called to identify the appellants at the police station had not long passed from the time of the robbery. In the circumstances, I find that the appellants were positively identified.

12. It emerged from the prosecution evidence that the robbers were armed with guns and the same was established by the cartridge that was recovered from PW5's house. I further find that they were together in the said robberies having been so identified. I have considered the evidence by the prosecution vis a vis that tendered by the appellants and find that the prosecution evidence places the appellants at the scenes of crime while that of the appellants does not cast doubt at all to the prosecution evidence. In the end, I find that the prosecution proved the ingredients of robbery with violence beyond reasonable doubt. In the circumstances, I find no error on the trial magistrate's conviction on all six counts of robbery with violence contrary to Section 296(2) of the Penal Code.

13. On the sentences meted out by the trial court, it is noted that the trial court ordered that the Appellants be sentenced to death. However, as the conviction has been upheld on all the six counts of robbery with violence contrary to Section 296 (2) of the Penal Code, I find that the correct approach was to sentence the Appellants on the first count and have the rest be held in abeyance. Consequently, I find it is appropriate to interfere with the issue of sentence and substitute the same with an order that the Appellants are sentenced to death on all counts but that the sentence of death on count one shall take effect immediately while the sentences on counts two, three, four, five and six shall in the meantime remain in abeyance. To that extent the Appellants appeal lacks merit and is dismissed.

Orders accordingly.

Dated and delivered at Machakos this **16<sup>th</sup>** day of **October**, 2018.

**D.K. KEMEI**

**JUDGE**