REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 27 OF 2016

PETER KIMANI MBITHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the conviction and sentence by Hon. P.O. Ooko (PM) delivered on 5th November, 2015)

JUDGEMENT

1. The Appeal herein arises from the conviction and sentence of Hon. P. O. Ooko, Principal Magistrate in Mavoko PM Cr. No. 220 of 2012 dated 5/11/2015 in which the Appellant was sentenced to death for the offence of robbery with violence contrary to Section 295 as read with Section 296 (2) of the Penal Code. The particulars of the charge were that on 26th day of May, 2012 at Daystar University area in Athi River District within Machakos County jointly with others not before court, while armed with dangerous weapon namely a pistol robbed off Stephen Ochieng Miding cash Kshs. 207, 000/-, National Identity card and mobile phone battery all valued at Kshs. 207,800/- and immediately at the time of such robbery injured the said Stephen Ochieng Miding.

2. The Appellant being aggrieved by the said conviction and sentence filed a petition of appeal which was amended on the 14/2/2017 raising the following grounds of appeal namely:-

(i) *That the learned trial magistrate erred in law and in fact by convicting and sentencing the appellant on a defective charge sheet.*

(ii) *That the learned trial magistrate erred in law and in fact by convicting the appellant on contradictory and uncorroborated evidence.*

(iii) *That the learned trial magistrate erred in law and in fact by failing to give weight to the evidence of the prosecution witnesses who testified that the appellant at the time of arrest was not in possession of the alleged stolen monies.*

(iv) *That the learned trial magistrate erred in law and in fact by convicting the appellant with robbery with violence without any evidence brought in court that the complainant was actually robbed of Kshs. 207,000/-.*

(v) *That the learned trial magistrate erred in law and in fact in failing to find that the ingredients of the offence charged was contrary to Section 296 (2) of the Penal Code were not proved.*

(vi) *That the learned trial magistrate erred in law and in fact by convicting the appellant with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code that indeed any property was stolen.*

(vii) *That the learned Trial Magistrate erred in law by convicting the appellant when clearly the evidence on record did not meet the required standard of beyond reasonable doubt and proceeding to deliver a judgement that did not meet the requirements of Section 169 of the Criminal Code.*

(viii) *The learned Trial Magistrate erred in sentencing and the sentence imposed against the appellant was cruel, inhuman and degrading contrary to the express provisions of the constitution 2010.*

3. This being a first appeal, this court is obligated to analyze the case afresh and reach its own independent conclusion bearing in mind that it did not have the benefit of seeing and hearing the witnesses testify but to provide an allowance for that. (**See OKENO VS REPUBLIC [1972] EA 32)**.

4. The complainant herein **Stephen Ochieng Miding (PW1)** testified and stated that on the material date namely 26/5/2012 at 9.45 a.m. he proceeded to Kenya Commercial Bank where he withdrew some money and went away only to be accosted by persons masquerading as

police officers and who handcuffed him and bundled him into a private car and sped off along Mombasa road. The strangers later abandoned him within Daystar University area. The complainant stated that it was the Appellant who first accosted him and bundled him into the car where there were four other accomplices and he managed to see the Appellant whose cap fell off and he found he was complexion with a slight bald and red lips. He further stated that the robbers snatched all the money he had amounting to Kshs. 207,000/-. He was later assisted by a motorcyclist to Athi River Police Station where he lodged the report. The complainant further stated that after about one month namely on the 27/6/2012, he bumped on the Appellant within Pipeline estate and he followed him all the way to Mlolongo town where he alerted the investigating officer who in turn linked up with officers based at Mlolongo Police Station and that the Appellant was subsequently arrested.

5. No.85806 PC Jephita Ochanda Ochiembo (PW2) stated that he accompanied the complainant to a food restaurant within Mlolongo township and arrested the Appellant who was subsequently handed over to Athi River Police Station.

6. No. 46864 Corporal Jackson Mbito (PW3) was the investigating officer and who obtained bank withdrawal documents confirming that indeed the complainant was in possession of the sum of 207,000/- which was later snatched from him by the robbers. He confirmed on cross examination that the complainant did not give him the description of his attackers while lodging the report and further that the complainant recorded his statement after the Appellant's arrest.

7. The Appellant was put on his defence and he opted to tender a sworn testimony and called one witness. The Appellant's case is that he had travelled to Mlolongo town on the 27/6/2012 to meet his friend one Stephen Kithuku whom he had requested for a friendly loan of 40,000/- with which to purchase a water pump. He further stated that he later met the said Stephen Kithuku and chatted for a while at a certain restaurant before his said friend left to fetch money from a nearby ATM only for the Appellant to be accosted by police officers on allegations of robbery and who escorted him to Mlolongo Police Station. The Appellant maintained that he was busy assisting his father at Vulie Guest House based in Machakos town and at no time did he venture out to Mlolongo. He denied having seen the complainant until the court hearing.

The Appellant called his friend Stephen Kithuku (DW2) who confirmed receiving appellant's request for a soft loan of Kshs. 40,000/- from him and that the Appellant joined him at Mlolongo on 27/6/2012 and they discussed the request and he later left the restaurant to go get money from a nearby ATM only to reform and learnt that the Appellant had been arrested by police officers.

8. Parties agreed to canvass the appeal by way of written submissions.

Mr. Makundi learned counsel for the Appellant first submitted that the charge sheet was defective as the evidence adduced does not appear to support the charge for instance the complainant confirmed not having been injured and thus no P3 form was filed yet the particulars alludes to injuries. The case of **YONGO VS REPUBLIC [1983] eKLR** was relied upon. Learned counsel for the Appellant further submitted that the witnesses gave contradictory testimonies for instance the complainant did not give a description of the robbers at the time he first lodged complaint and only did so after the arrest of the appellant. Further the appellant was the only witness as PW2 and PW3 did not witness the alleged incident and again nothing was recovered from the Appellant.

Mr. Machogu learned counsel for the Respondent conceded to the appeal and submitted that the appellant was not accorded a fair trial and that the entire proceedings were a sham and should not be allowed to stand but be set aside and a retrial ordered. Mr. Machogu submitted that the charge was duplex and hence the trial prejudiced the Appellant's right to a fair trial. Learned counsel further submitted that the Appellant had not been given legal representation yet 0he faced a serious capital offence which attracted a death sentence.

9. I have considered the evidence adduced before the trial court as well as the submissions of learned counsels for the parties herein. I find the following issues necessary for determination namely:

(i) *Whether the charge was duplex and whether the same prejudiced the appellant.*

(ii) *Whether the Respondent's case had been proved beyond the required standard of proof.*

(iii) *Whether the case is one suitable for a retrial.*

10. As regards the first issue, it is noted that the charge preferred against the Appellant was robbery with violence contrary to Section 295 as read with Section (2) of the Penal Code. Clearly these two provisions provide for different scenarios in that whereas Section 295 relates to a simple robbery for which sentence upon conviction is 14 years while Section 296 (2) relates to robbery with violence for which sentence upon conviction is death. When a person is faced with such two offences there is a likelihood of prejudice in the sense that he or she will not be able to understand clearly the charge he is facing. The situation is further compounded especially during conviction as happened in this case whereby the trial court convicted the appellant for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code and no mention was made about the fate of Section 295 of the Penal Code. The Appellant in the circumstances was clearly prejudiced since the provisions of Section 134 of the Criminal Procedure Code regarding offences to be specified in charge or information with necessary particulars were not adhered to. As to whether a retrial would be ordered on the bases of the duplicity of the charge this court will address the same at the tail end of the judgement herein based on whether or not evidence has been tendered to support the charge of robbery with violence.

11. As regards the second issue, it is noted that the Respondent had lined up three witnesses in support of its case. There were no eyewitness since the complainant was alone while the other two witnesses were the arresting and investigating officers respectively. The complainant in his evidence both in chief and cross examination confirmed that he was not injured as he was examined at Mbagathi Hospital and found with no injuries and thus no P3 from was filled in that regard. The complainant's testimony appears to be rather contrary to the particulars of the charge that indicated that he was injured during the alleged robbery. Learned counsel for the Appellant submitted that in view of the variance of the complainant's evidence and the particulars then it follows that the charge sheet is defective. I find the learned counsel's submission on that aspect appears to have merit in that the evidence of the witnesses in criminal trials should ordinarily support or be in tandem with the charge and particulars so as to sustain a conviction. From the evidence of the complainant, there appears to have been no violence visited

upon him as alleged in the particulars of the charge.

The complainant also stated in his evidence that he gave a description of the robbers who included the appellant while lodging his complaint to the police at Athi River on the alleged date of the robbery. However, the investigating officer Corporal Jackson Mbito (PW3) confirmed that the complainant did not give him the description of his attackers. Indeed the complainant's initial report made to the police station dated 26/5/2012 and which was produced by the Appellant does not give a description of the robbers and further does not indicate the registration number of the vehicle involved. It transpired from the evidence that the complainant actually recorded his statement after the arrest of the Appellant one month after the alleged robbery incident. The complainant claims that he spotted the Appellant around Pipeline estate and followed him all the way to Mlolongo township where he was arrested. However, the Appellant and his witness appear to have given credible explanation as to how they found themselves at Mlolongo township. The Appellant and his witness tendered sworn testimonies and were cross examined at length and what came out was that the Appellant had raised an alibi regarding his whereabouts on the alleged date of the robbery. It was therefore incumbent upon the prosecution to prove his guilt and not for the Appellant to prove his innocence. The complainant's evidence was not corroborated at all in any material respect. The evidence of the Appellant and his witness appear to cast doubt upon that of the complainant. The complainant not having furnished the description of the Appellant and the vehicle used at the time of lodging the report to the police, then for him to spot somebody resembling the alleged robber one month after the incident must be taken as a case of mistaken identity. Further, it is noted that the complainant did not see the need to have the good Samaritan who helped ferry him to the police station after the robbery record a statement. Also the complainant's relative who sent him money for transport was not called to testify. Finally none of the alleged stolen properties were found in possession of the Appellant.

It is clear therefore that from an analysis of the entire evidence presented by the prosecution that the charge had not been proved against the Appellant beyond any reasonable doubt. The trial court was clearly in error when it convicted the Appellant on an uncorroborated evidence. The Appellant ought to have been acquitted of the charge.

12. As regards the last issue, it is noted that the learned counsel for the Respondent has submitted that a retrial should be ordered in this case. On the other hand, learned counsel for the Appellant submits that the Appellant submits that the Appellant ought to be acquitted. An order for retrial ordinarily arises in circumstances where the original trial was illegal or defective. In the case of **HORACE KITI MAKUPE VS REPUBLIC CRA No. 98 of 1983** the court of Appeal held as follows:

> "*In general, a retrial will be ordered when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of the insufficiency of the evidence or for prosecution to fill up gaps in the evidence at the trial, even where a conviction is vitiated by a mistake of the trial court for which the prosecution is to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the Appellant (or accused)".*

A similar position was held by the East African Court of Appeal in **Fatehali Manji Vs Republic [1966] EA 343,**

The charge levelled against the Appellant was indeed duplex but nonetheless the case proceeded to conclusion and hence the trial was neither illegal nor defective. The prosecution called three witnesses in support of its case while the Appellant did testify and called one witness. It was therefore a proper trial so to speak. The trial kicked off on the 29/6/2012 and concluded on the 5/11/2015 which is a period of about three and half years. The Appellant has been in custody serving sentence now for about three years. It is deemed that the prosecution had put its house in order when it presented its three witnesses and closed its case. Now that it has been established that the case had not been proved beyond any reasonable doubt, an order for retrial is likely to enable the prosecution to tie up loose ends and fill up gaps in the evidence. This will greatly prejudice the Appellant who is likely to suffer an injustice. In the premises I am satisfied that the case is not one suitable for a retrial.

13. In the result the appeal herein succeeds. The conviction is hereby squashed and the sentence set aside. The Appellant is to be set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

Dated and Delivered at Machakos this 1st day of October, 2018.

D. K. KEMEI

JUDGE

In the presence of:-

Makundi for the Appellant

Machogu for the Respondent

Josephine - Court Assistant