REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 232 OF 2016

ALEX WEPUKHULU KAREMANA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Being an appeal from the original conviction and sentence in criminal case number 732 of 2013 in the Senior Principal Magistrate's Court at Kimilili – D. O. Onyango (SPM) on 14/12/2016*)

JUDGMENT

1. Before me for determination is an appeal brought by the Appellant, **Alex Wepukhulu Karemana** by way of a memorandum of appeal dated 23rd December, 2016. The appeal arose from his conviction and sentence for the offence of Robbery with Violence contrary to **section 296(2)** of the **Penal Code**, before Hon. D Onyango the Senior Principal Magistrate at Kimilili.

2. The Prosecution presented six (6) witnesses in support of its case. They stated that the Appellant while armed with offensive weapons namely pangas and clubs and acting jointly with others before the court robbed the complainant of a motorcycle registration no. KMCL 630L, a Motorola C117 cell phone and Kshs. 500/- all valued at Kshs. 87,500/- and at or immediately before or immediately after the time, used actual violence to the Complainant. The Appellant in his defense gave unsworn testimony in which he denied the charge and stated that he had been framed. At the close of the trial, the court found that the prosecution had proved all the key ingredients of the charge of robbery with violence against the Appellant and proceeded to convict him, and sentence him to suffer death as provided in law.

3. The Appellant being dissatisfied with the decision of the court, lodged this appeal. Learned Counsel Mr. Olonyi holding brief for learned Counsel Mr. Maengwe for the Appellant filed written submissions on his behalf. In the submissions, Counsel contended that the Appellant was convicted on a charge whose particulars were fatally defective. He collapsed the rest of the grounds to argue that the evidence relied on was contradictory and that as such the trial court arrived at the wrong decision in convicting the Appellant.

4. On the description of the Appellant learned counsel argued that the charge sheet did not meet the requirements of **section 137** of the **Criminal Procedure Code**. That it is not enough just to give the name of an accused person. The description of the accused must be given and it was incumbent upon the prosecution to use the words "person unknown". That **section 137** uses the word "shall" meaning that it is mandatory.

5. The learned state counsel Mr. Oimbo opposed the appeal on behalf of the state on both conviction and sentence. The state counsel argued that the test as to whether a charge sheet is fatally defective is a substantive one. Further that as long as the accused person was charged with an offence known in law, and it was disclosed in sufficiently accurate fashion to give the accused adequate notice of the charges facing him, the charges cannot be said to be defective.

6. I have analyzed and re-evaluated the evidence on record to make my own findings and draw my own conclusions, in line with what was stated by the Court of Appeal in **Nzivo vs. Republic Criminal Appeal No. 81 of 2003 [2005] 1 KLR PG 700**. In the stated case, the learned Judges of Appeal, Tunoi, O'kubasu and Waki JJA, held *inter alia* that:

> **"1. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate courts' own decision on the evidence.**
>
> **2. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. 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 findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."**

7. Section 137(a) of the **Criminal Procedure Code** provides for the rules for the framing of charges as follows:

"(a)(i) 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;

(iv) the forms set out in the Second Schedule or forms conforming thereto as nearly as may be shall be used in cases to which they are applicable; and in other cases forms to the same effect or conforming thereto as nearly as may be shall be used, the statement of offence and the particulars of offence being varied according to the circumstances of each case;

(v) where a charge or information contains more than one count, the counts shall be numbered consecutively;"

8. It is a requirement of the law therefore, that the charge must contain a statement of the offence describing the offence. The said description and particulars of the offence should be executed briefly and in ordinary language, devoid of technical terms and it is not even necessary that the charge should disclose all elements of the offence. It should however contain a reference to the section of the enactments creating the offence.

9. In the case of **Peter Sabem Leitu vs. Republic [2013] eKLR** the Court of Appeal cited and applied the case of **Isaac Omambia vs. Republic [1995] eKLR** in which the court, in considering the ingredients necessary in a charge sheet stated as follows:

"In this regard, it is pertinent to draw attention to the following provisions of section 134 of the Criminal Procedure Code which makes particulars of a charge an integral part of the charge: 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."

10. The question therefore, is whether the aforesaid defect in the charge sheet caused any prejudice to the Appellant as to occasion a miscarriage of justice or a violation of his fundamental right to a fair trial. I do not think so. Having pleaded to the charge, which contained a clear statement of a specific offence, I am satisfied that the Appellant was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet gave further details as to the description of the property stolen, the date, place and the manner of the alleged offence.

11. The object of **section 137(a)** of the **Criminal Procedure Code** is that the offence charged should be disclosed in a clear and unambiguous manner, so that the accused person is able to understand it well enough to be able to plead to it, and to prepare a defence thereto. From the record, the charge in the trial that gave rise to this appeal was set out as hereunder:

…ALEX WEPUKHULU KAREMANA on the 16th June 2012 at Maliki trading centre in Bungoma North District within Bungoma county, jointly with others already before court while armed with offensive weapons namely pangas and rungus robbed NERBERT MALEA of a motor cycle registration number KMCL 630L Tvs Star, a Motorola mobile phone C117 and cash Kshs. 500/- all valued at Kshs. 87,500/- and at or immediately after the time of such robbery used actual violence to the said NERBERT MALEA…

12. In this case, the offence was sufficiently disclosed to the Appellant in the charge. He was fully aware that he was facing a charge of robbery with violence from the statement of the offence as well as the particulars, so much so that he was able to cross-examine the witnesses and mount his defence. The charge was therefore not defective. In his defence, the Appellant stated "*I understand the charges against me*".

13. On the second ground Mr. Olonyi complained that the court relied on contradictory evidence to convict the Appellant. Counsel contended that only PW1 among the prosecution witnesses was at the scene. The time was between 7.00 p.m. to 7.30 p.m. and it was therefore dark. The complainant stated that he used lights from his motor bike to identify two of his assailants. Counsel observed that the trial magistrate did not assess the amount of light used for identification. That this evidence should have been corroborated. He urged that the court was not told how far the accused was and how bright the light was and if it was possible to identify him.

14. Counsel stated further that the evidence that led to the conviction was mainly circumstantial. He contended that the evidence that corroborated that of PW1 was that the documents belonging to the accused were found at the scene yet no witness testified that they recovered those documents. PW4 merely stated that he received the documents without stating where from or how he recovered them. Further that no dusting was done on the documents to lift any fingerprints.

15. In **John Muriithi Nyaga vs. Republic Criminal Appeal 201 of 2007 [2014] eKLR**, the Court of Appeal (Warsame, G.B.M. Kariuki & Kiage JJA) observed that the evidence of a single identifying witness must be examined with considerable circumspection to ensure that it cannot but be true before a conviction is founded on it. The Appellate court went on to cite and apply the case **Kiilu & Another vs. Republic [2005] 1 KLR 74**, in which the Court of Appeal differently constituted held thus:

"Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification though based on the testimony of a single witness, can safely be accepted as free from the probability of error."

16. Further in the case of **Maitanyi vs. Republic [1986] KLR 198**, the Court of Appeal in an appeal against conviction and death sentence for robbery with violence under **section 296(2**) of the **Penal Code** observed thus:

"That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into. In days gone by, there would have been a careful inquiry into these matters, by the committing magistrate, state counsel, and defence counsel. In the absence of all these safeguards, it now becomes the great burden of senior magistrates trying cases of capital robberies to make these enquiries themselves."

17. From the prosecution's evidence, the offence occurred in the evening between 7.00 p.m. and 7.30 p.m. on 16th June, 2012. The complainant who is a boda boda rider was at Maliki where he secured a pillion passenger who wanted to be transported to a certain home within Maliki area. Along the way, the passenger instructed the complainant to stop when they came upon some four men on the road. The complainant stopped and that is when the four men in the road and his pillion passenger all set upon him.

18. In his defence, the Appellant gave unsworn testimony and called no witnesses, although he asked for and was accorded the chance to call the witness. The Appellant explained that he was arrested at Khetia's supermarket in Kitale as he was shopping, and was transported to Kimilili where he was charged with this offence. He denied the offence and asserted that he had been framed. Further that his village elder had called him earlier to inform him that some people had broken into his house looking for a stolen motorbike.

19. According to the Complainant, he was able to identify two of the men as Alex the Appellant and one Joel Nanjala. They were persons known to him. He identified them by the head lights of his motorbike. PW2, PW3 and PW6, the three prosecution witnesses who went to the scene while the complainant was still there were unanimous in their evidence, that the complainant was unconscious when they found him but he soon regained consciousness at the scene and told them that he knew his attackers.

20. PW3 and PW6 stated that the complainant identified two of his assailants by their names to his rescuers while at the scene as Joel Kocha and Alex Karemana. PW2, PW3 and PW6 testified that while at the scene they recovered a wallet from which were recovered the Appellant's passport size photograph and a voter's card. PW2 the owner of the stolen motorbike located the Appellants with the help of the CID and had him arrested at a supermarket in Kitale. The complainant did not identify the other three men.

21. This being a criminal trial, the Appellant was under no obligation whatsoever to explain his innocence or at all. Having elected to testify however, the court is under a duty to analyze his evidence in defence together with that of the prosecution.

22. The court notes however that the Appellant does not appear to have rushed home to establish who the persons who broke into his house were and why they should look for a stolen motorbike in his house, if at all there was any such report. There is also no indication that any such break in was reported to the police.

23. From the evidence, I observe that the Appellant who alleged that he had been framed did not state who it was who had framed him and what the basis of such framing was. From the record there is no basis to arrive at the conclusion that he was framed. In any case, at no time did the Appellant put it to any of the witnesses in cross-examination that there was cause to suggest that he was framed.

24. Having reassessed the evidence afresh, I am in agreement with the learned trial magistrate Mr. D Onyango that the defense that the Appellant was framed is totally unconvincing in the context of the rest of the evidence. In my considered view, it is an afterthought intended only to exculpate the Appellant and must be discarded as such.

25. What follows then is for this court to interrogate whether the elements required to prove a case under **section 296(2)** of the **Penal Code** were satisfied before the trial court.

26. In **Dima Denge Dima & Others vs. Republic, Criminal Appeal 300 of 2007 [2013] eKLR** the Court of Appeal (Nambuye, Kiage & Murgor JJA) opined that the elements of the offence under **section 296(2)** of the **Penal Code** are three in number and they are to be read not conjunctively, but disjunctively. That one element is enough to found a conviction. The Appellate court further cited and applied the decision in **Johana Ndungu vs. Republic Criminal Appeal No. 116 of 1995 (unreported)**, in which the Court stated that:

"In order to appreciate properly as to what acts constitute an offence under section 296(2) one must consider the sub-section in conjuction 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 after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed 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 or instrument, or

2. If he is in company with one or more other person or persons, or

3. If, at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any other violence to any person.

Analyzing the first set of circumstances the essential ingredient apart from the ingredients including the use or threat to use actual violence constituting the offence of robbery, is the fact of the offender at the time of robbery being armed with a dangerous or offensive weapon. No other fact is needed to be proved. Thus if the facts show that at the time of commission of the offence of robbery as defined in section 295 of the Penal Code, the offender was armed in the manner afore-described then he is guilty of the offence under sub-section (2) and it is mandatory for the court to so convict him.

In the same manner in the second set of circumstances, if it is shown and accepted by the court that at the time of robbery the offender is in company with one or more person or persons then the offence under sub-section (2) is proved and a conviction thereunder must follow. The court is not required to look for the presence of either of the other two sets of circumstances.

With regard to the third set of circumstances there is not mention of the offender being armed or being in company with others. The court is not required to look for the presence of either of these two ingredients. If the court finds that immediately before or immediately after the time of robbery the offender wounds, beats, strikes or uses any other violence to any person (may be a watchman and not necessarily the complainant or victim of theft) then it must find the offence under sub-section (2) proved and convict accordingly."

27. From the evidence of the Complainant, first the Appellant herein was in the company of Joel Nanjala and two others when they attacked him. Secondly, one of the assailants cut him in the eye with a knife while the Appellant assaulted him with a club. Thirdly, he sustained a fracture in one leg and a cut wound of the periorbital region on the left side according to the P3 form. These injuries are in tandem with the weapons the Complainant said the assailants had. The P3 form confirmed that he suffered injuries occasioned by both sharp and blunt objects.

28. In sum therefore, all three ingredients of robbery contrary to **section 296(2)** of the **Penal Code** have been proved to have been employed in a robbery in which the Complainant lost a motorcycle registration number KMCC 630L, a cell phone make motorolla C117 and cash Kshs. 500/-. The presence of any one of those three ingredients would have sufficed but in this case, all three ingredients were present.

29. In light of the above, I find that the ingredients of **section 296(2)** of the **Penal Code** have been satisfied and the appeal is found to have no merit. The conviction and sentence are confirmed and the appeal is consequently dismissed. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF OCTOBER 2018.

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L. A. ACHODE

HIGH COURT JUDGE

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUNGOMA THIS 21ST DAY OF NOVEMBER 2018.

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S. N. RIECHI

HIGH COURT JUDGE