



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEALS NO 157, 158, 159 & 160 OF 2014

RICHARD MUKOTI MULE.....1ST APPELLANT

JOHN KIOKO.....2ND APPELLANT

JOEL MICHUKI.....3RD APPELLANT

ONESMUS MANGUKA PHILLIP.....4TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against the original conviction and sentence of Hon. T.A. Odera, PM in Criminal Case No. 364 of 2013 arising from a judgment delivered on 7th August 2014 in the Principal Magistrate's Court at Mavoko)

JUDGMENT

The Appellants was charged with the offence of robbery with violence contrary to Section 295 as read together with section 296(2) of the Penal Code. The particulars of the offence were that on the nights of 29th and 30th July 2012 at N.K. Brothers Construction Site at Sabaki along Mombasa Road, while armed with dangerous weapons namely pangas, axes and iron bars, they robbed Dennis Mutembei Kathia of various assorted goods which were listed in the charge sheet, all valued at Kshs 1,670,595/=, which was the property of NK Brothers Company Limited, and immediately after the time of such robbery threatened to use actual violence to the said Dennis Mutembei Kathia.

The Appellants were arraigned in the trial court on 31st July 2012 and all of them pleaded not guilty to the charge. They were tried, convicted of the offence and all sentenced to death.

The Appellants are aggrieved by the judgment of the trial magistrate and have preferred this appeal by way of their various Petitions of Appeal all filed in court on 8th September 2014, as well as Amended Petitions and Grounds of Appeal they later filed in Court. The Appellants also availed to the Court written submissions on their appeals during the hearing.

The grounds of appeal by the 1st Appellant in his Amended Petition of Appeal filed in Court on 25th September 2015 in summary were that the prosecution failed to prove their case beyond reasonable doubt; there was no proper identification of the 1st Appellant; the prosecution failed to call two material witnesses to testify; the evidence of PW5 and PW6 was contradictory; and that the trial magistrate imposed an unconstitutional sentence of death.

The grounds of appeal relied on by the 2nd Appellant in his Amended Grounds of Appeal filed in Court on 25th November 2015 are that the trial magistrate relied on a duplex charge in convicting him; the prosecution did not prove their case to the required standard; there was contradictory and conflicting evidence adduced by the prosecution; the production of the scene of crime report and postmortem report was contrary to section 77 of the Evidence Act as they were not produced by their makers; and the Court failed to consider the 2nd Appellant's defence of alibi.

The 3rd Appellant in his Amended Grounds of Appeal filed in Court on 25th November 2015 stated that there was no evidence of identification; the prosecution did not prove their case to the required standard; the trial Court relied on circumstantial evidence adduced by the prosecution; the prosecution failed to call material witnesses; and that the Court failed to consider the 3rd Appellant's defence of alibi.

The 4th Appellant filed an Amended Memorandum of Appeal on 19th November 2015, and his grounds of appeal are collapsed into four grounds which are that the prosecution case was not proved beyond reasonable doubt; the trial Court relied on insufficient, unreliable and uncorroborated evidence; the prosecution failed to call the complainant as a witness; the conduct of the trial was unfair and unprocedural; and that the trial Court failed to consider the 4th Appellant's defence.

The Appellants urged in submissions filed in Court that the charge against them was duplex as it had two offences combined in one charge, and relied on the Court of Appeal decision in **Joseph Njuguna Mwura & Others vs Rep, Criminal Appeal No 5 of 2008** and the decision of this Court in **Ibrahim Mathenge vs Republic, Criminal Appeal No, 222 of 2014** for the position that they were thereby prejudiced. Further, that Dennis Mutembei Kathia who was the complainant never testified in the trial Court neither did Richard Mwove, who was alleged to have called the police about the robbery. Various judicial authorities were cited by the Appellants in support of their arguments.

Lastly, it was submitted that the evidence of PW5 and PW6 as to identification raised the possibility of an error as it was night and they testified that it was dark. Further, that their evidence as to the events of the night of the robbery was contradictory as regards how they accessed the scene by walking, by motorcycle and by car, and as to whether the suspects were arrested at the scene or escaped. The 1st, 2nd, 3rd and 4th Appellants gave various examples of the contradictory evidence give particularly by PW5 and PW6, who were the two witnesses at the scene of the crime. The 4th Appellant in addition also submitted that there was no record of compliance with section 211 of the Criminal Procedure Code after the close of the prosecution's case in the trial Court.

Mogoi Lillian, the learned Prosecution counsel filed submissions dated 21st November 2016 conceding the appeal, on the basis that the charge sheet was defective since it was duplex having referred to both section 295 and section 296 (2) of the Penal Code. It was submitted that the charge sheet disclosed two charges with different sentences namely simple robbery and robbery with violence. The prosecution also conceded the appeal on the grounds raised as regards identification of the Appellants, contradictory evidence given during the trial and failure to call crucial witnesses.

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

I have considered the arguments made by the Appellants and the Prosecution. The grounds of appeal put and relied upon by the Appellants raise three main issues for determination. The first is whether the charge against the 1st, 2nd, 3rd and 4th Appellants was defective; and if the Appellants are found to have been properly charged, the second and third issues to be determined would be whether they were positively identified, and whether there was proper and sufficient evidence to convict the said Appellants for the offences of robbery with violence.

On the first issue, the Appellants relied on the Court of Appeal decision in **Joseph Njuguna Mwaura**

and Others vs R, (2013) eKLR to argue that they were charged under a duplex charge. The rule against duplicity provides that the prosecution must not allege the commission of two or more offences in a single charge in a charge-sheet. Such a charge is sometimes said to be 'duplex' or 'duplicitous'. The rule stems from two important principles: firstly, as a matter of fairness, a person charged with a criminal offence is entitled to know the crime that they are alleged to have committed, so they can either prepare and/or present the appropriate defence.

Secondly, the court hearing the charge must also know what is alleged so that it can determine the relevant evidence, consider any possible defences and determine the appropriate punishment in the event of a conviction.

I am also minded that the law on the framing of charges requires clarity in the charge sheet as stated in various provisions. Section 134 of the Criminal Procedure Code 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, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

Section 135 of the said Code in addition provides as follows:

“(1) Any offences, whether felonies or misdemeanours, may be charged together in the same charge or information if the offences charged are founded on the same facts, or are part of a series of offences of the same or a similar character.

(2) Where more than one offence is charged in a charge or information, a description of each offences so charged shall be set out in a separate paragraph of the charge or information called a count.

(3) Where, before trial, or at any stage of a trial, the court is of the opinion that a person accused may be embarrassed in his defence by reason of being charged with more than one offence in the same charge or information, or that for any other reason it is desirable to direct that the person be tried separately for any one or more offences charged in a charge or information, the court may order a separate trial of any count or counts of that charge or information.”

Coming back to the present appeal, I am guided by the decision of a five-judge bench of the Court of Appeal in **Joseph Njuguna Mwaura & 2 Others v Republic [2013] e KLR (Criminal Appeal No 5 of 2008)** that explained and laid to rest the reasons why charging an accused person with the offence of robbery with violence under sections 295 and 296(2) of the Penal Code would amount to a duplex charge. The said Court, while following its earlier decisions in **Simon Materu Munialu V Republic [2007] eKLR (Criminal Appeal 302 of 2005)** and **Joseph Onyango Owuor & Cliff Ochieng Oduor v R [2010] eKLR (Criminal Appeal No 353 of 2008)**, stated as follows:

“Indeed, as pointed out in *Joseph Onyango Owuor & Cliff Ochieng Oduor v R (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 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 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.”

I am persuaded by this explanation by the Court of Appeal, particularly as *section 296(1) of the Penal Code provides that a person who commits the felony of simple robbery is liable to imprisonment for fourteen years. I am also of the view that this is not a defect that is curable under section 382 of the Criminal Procedure Code, as there are two offences disclosed by the charge namely simple robbery and robbery with violence, which offences attract different penalties under the law. It is also my opinion that there was prejudice caused to the Appellants in this regard as it would not have been clear what offence or sentence was applicable to them.*

It is my considered opinion that this ground of appeal alone is sufficient to dispose of this appeal, and it is not prudent in the circumstances to consider the remaining issues which would go into the merits of the findings of the trial court, given that I have found that the proceedings were based on a defective charge.

The only issue that remains to be considered is whether the appeal should be allowed in its entirety or a retrial ordered. The principles governing whether or not a retrial should be ordered were enunciated in **Fatehali Manji v Republic [1966] EA 343** by the East Africa Court of Appeal as follows:

“In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not 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 injustice to the accused person.”

In **Mwangi v Republic [1983] KLR 522** the Court of Appeal also held thus:

“We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result. In our view, there was evidence on record which might support the conviction of the appellant.”

I am convinced that this is not a proper case for retrial, as it has been argued by the Appellants and conceded by the Prosecution that there were substantial gaps in the evidence brought during the trial as regards the identification of the Appellants, contradictory evidence, and the failure to call material witnesses. A retrial is therefore inappropriate in the circumstances as it may serve the purpose of addressing the gaps in the prosecution case.

I therefore allow the 1st, 2nd, 3rd and 4th Appellants’ appeals and quash the convictions recorded against the said Appellants for the offence of robbery with violence under section 296(2) as read with section 295 of the Penal Code. I also set aside of the death sentence imposed on the 1st, 2nd, 3rd and 4th Appellants for this conviction.

I accordingly order that the 1st, 2nd, 3rd and 4th Appellants be and are hereby set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

DATED AT MACHAKOS THIS 6th DAY OF FEBRUARY 2017.

P. NYAMWEYA

JUDGE