REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO.120 OF 2014

MARTIN KIMANI WAITHANJE …….APPELLANT

VERSUS

REPUBLIC …….....PROSECUTOR

(*Being an appeal from the whole judgment by* ***P. O. OOKO*** *(Ag Principal Magistrate) dated* ***13th May, 2014*** *in Mavoko Criminal Case No.* ***230 of 2013)***

JUDGMENT

Brief facts

1. This appeal emanates from the decision of Hon P.O. Ooko (Ag. Principal Magistrate) at Mavoko Law Courts dated 13th May, 2014 in **PM Cr. No.230 of 2013,** wherein the Appellant herein was charged with an offence of Robbery with violence contrary to Section 295 as read with Section 296 (2) of the Penal Code. The particulars of the offence were that on the 30th day of October, 2012 at Kitengela township in Isinya district within Kajiado County, jointly with others not before court, being armed with dangerous weapons namely metal bars robbed **PHILIP CHESIKAKI MARANDAFU** of cash Kshs. 14,000/= and a mobile phone make Samsung all valued at Kshs.19,500/= and at the time of such robbery used actual violence to the said PHILIP CHESIKAKI MARANDAFU. The Appellant was convicted of the charge and sentence to death by the said court. Unsatisfied by the decision of the trial court, the Appellant appealed seeking to have both the conviction and sentence quashed. The appellant filed a Petition of appeal on 7/04/2014 and which was later amended on 10/07/2014 and which raised the following grounds of appeal:

(1) THAT the learned trial Magistrate erred in law and fact in convicting the Appellant on suspicion and failed to consider the Appellants defence.

(2) THAT the Learned trial Magistrate misapplied his mind and arrived at a wrong decision and wrong interpretation of the law.

(3) THAT the Learned trial magistrate erred in law and shifting the burden of proof to the Appellant which is contrary to established principles of law.

(4) THAT the learned magistrate erred in law and fact in convicting the Appellant on the basis of unfavourable presumption under Section 119 of the Evidence Act.

(5) THAT the conviction of the Appellant was based on contradictory set of facts and circumstances.

2. A brief summary of the lower court case was that the complainant one PHILIP CHESIKAKI MARANDAFU was heading to his house at around 10.00 p.m, when he was suddenly hit with a metal bar on the back of the head and immediately fell down and lost consciousness. He was later assisted by good Samaritans to a nearby health centre and upon regaining consciousness he discovered that his cash Kshs.14,000/= and mobile phone make Samsung had been stolen. A report was made at Kitengela police station and investigations commenced. It later transpired that a certain cell phone repairer within Kitengela town had been approached by the Appellant herein to help in opening up password on a mobile phone that he (Appellant) had. The complainant later received a track alert indicating that his stolen mobile phone had been activated by a sim card which was traced to the said cell phone repairer. The police interrogated the said cell phone repairer who led them to the Appellant herein. The Appellant was arrested while in possession of a different mobile phone though of similar make as that belonging to the complainant. The same was seized and kept as exhibit. The complainant received treatment and after the prosecution closed its case with six witnesses, the Appellant herein was placed on his defence. The Appellant tendered an unsworn statement and denied the charge. He maintained that the mobile phone found on him belonged to his uncle one Moses Nganga who had given him for safe keeping while they were both on a drinking spree in a certain bar. The trial court however found that the prosecution had proved its case against the Appellant and thereby convicted and sentenced him to death. The Appellant has now appealed against the said conviction and sentence and wants the same quashed and set aside.

3. <u>The Submissions:</u>

With the court's leave, parties agreed to canvass the appeal by way of written submissions. Counsel for the Appellant submitted that the charge the Appellant faced was a duplex one in that it was erroneous for the prosecution to charge the appellant with the offence of robbery with violence under both Sections 295 and 296(2) of the Penal Code thereby making it difficult for the Appellant to know the exact offence he faced so as to prepare for the case. Counsel relied on several authorities such as **<u>JOSEPH NJUGUNA MWAURA & 2 OTHERS =VS= REPUBLIC CRIMINAL APPEAL NO.5 OF 2008</u>**. Also the case of **<u>MATHENGE =VS= REPUBLIC CRIMINAL APPEAL NO.222 OF 2014</u>**. Counsel further submitted that the error on duplex charge is not one curable under Section 382 of the Criminal procedure Code. Further Counsel submitted that the trial court erred in holding that the Appellant had been found in possession of a stolen property yet the mobile phone recovered did not belong to the complainant. Finally, Counsel submitted that the trial court erred in shifting the burden of proof upon the Appellant contrary to the law and sought for an order that the appeal be allowed as prayed.

Learned counsel for the Respondent submitted that the Complainant's stolen mobile phone was never recovered from the appellant and hence the doctrine of rent possession does not apply. It was further submitted for the Respondent that the charge preferred against the appellant is duplex and that the evidence adduced against the Appellant was not sufficient and hence the Respondent concedes to the Appeal.

4. As this is a first appellate court, it is its duty to re-evaluate the evidence tendered before the trial court and to come to its own independent conclusion bearing in mind that it neither heard nor saw the witnesses testify and to make an allowance for that **<u>(OKENO =VS= REPUBLIC [1972] EA, 32).</u>** It was the evidence of the complainant that he was attacked around 10.00 p.m. while he was walking to his house and that the lost consciousness and only came to while in hospital and then learnt he had been robbed of a mobile phone make Samsung and cash Kshs.14,000/=. He was examined by Geoffrey Wagura (PW.5) a Clinical Officer who filled the P. 3 form and who confirmed the injuries on complainants neck and head which he classified as grievous harm and produced the P.3 form as exhibit No.1. The matter was investigated by Corporal Abdi Edin Dida (PW.6) who stated that he sought the assistance of a mobile phone repairer within Kitengela town Geoffrey Musembi (PW.2) and managed to arrest the Appellant herein who by then was in possession of a Samsung mobile phone which incidentally did not belong to the complainant but one Moses Nganga who refused to testify against the Appellant. It was the evidence of PW.2 that the appellant had earlier taken to him a Samsung mobile phone and sought him to crack its password but later went away with it. It was the said PW.2 who pointed out the appellant and who was promptly arrested and later charged. The Appellant upon being put on his own defence tendered an unsworn statement. He stated that he had been having drinks with his uncle one Moses

Nganga at a certain bar and later his said uncle gave him a Samsung mobile phone for safe keeping. Later when the Appellant went out to purchase some airtime from a nearby shop, an argument between him and the shop owner arose and therereafter the complainant claimed that the Samsung mobile phone that he Appellant had resembled one that had been stolen from the said complainant. Suddenly the police officers arrived and he was arrested and escorted to Kitengela police station where statements were recorded. The Appellant maintained that his said uncle was summoned and recorded his statement but denied that his mobile phone had been stolen. The Appellant vehemently denied being involved in the commission of the alleged offence.

5. Determination:

Upon evaluating the evidence presented before the trial court and upon considering the submissions of learned counsels for the Appellant and Respondent, I find the following issues necessary for determination namely:-

> **(1) Whether the charge preferred against the Appellant was duplex.**
>
> **(2) Whether the Respondent proved its case before the trial court beyond the requisite standard of proof.**

As regards the first issue, it is noted that the Appellant had been charged with the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal code. Each of the two provisions of the law herein appear to attract different kind of sentences as follows:

Section 295:

> "**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."**

On the other hand Section 296 (2) of the Penal Code entails robbery with violence in which more than one person takes part or where a victim is wounded or threatened with actual bodily harm or occasioned actual bodily harm and which provides for a penalty of death sentence if one is found guilty. Hence there is clearly a distinction between the two provisions. Section 296 (2) of the Penal code provides for the ingredients for the offence as well as the punishment Section. It has been held in several cases that it would be wrong to charge an accused person facing such an offence with robbery under section 295 as read with section 296(2) of the Penal code because that would not contain the ingredients that are in Section 296(2) of the Penal code and could create confusion and hence a charge which contains both section 295 and 296(2) of the Penal Code amounts to a duplex charge. In the case of MATHENGE =VS= REPUBLIC – MACHAKOS HC CR.A. NO. 222 OF 2014 it was held thus:-

> **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 of the offence of robbery with violence under Section 295 as read with Section 296(2) as this would be a duplex charge".**

A perusal of the charge sheet reveals two charges, one for simple robbery and robbery with violence each of which attracts different sentences. It is therefore clear that such a scenario is likely to prejudice a person facing such charges as it would not be clear which offence he or she has been charged with. Under Article 50 of the Constitution of Kenya, an arrested person or any other person for that matter is entitled to be given a fair hearing. As there was a fundamental breach, it is the finding of this court that the Appellant was indeed prejudiced. Such an irregularity in any considered view will definitely affect the Appellants conviction and the same cannot be cured under the provisions of section 382 of the Criminal Procedure Code. It is noted that the Respondent in the trial court did not attempt to amend the

charge sheet until the conclusion of the trial. It is no wonder the Respondent's counsel at the outset in their submissions concedes to the fact that the charge the Appellant faced was duplex in nature. Indeed the appellant was sentenced to suffer death sentence pursuant to Section 296(2) of the Penal code yet Section 295 which is a simple robbery attracting a sentence of 14 years pursuant to Section 296(1) of the Penal Code has been left out yet the same formed part of the charge sheet. The Appellant in such circumstances could not have known which charge he faced in the trial.

As regards the second issues it is clear that the Complainant did not manage to identify his attackers as it was at night. The complainant's stolen Samsung mobile phone was never recovered. The mobile phone recovered from the appellant and which was produced as exhibit 2, belonged to one Moses Nganga who, despite recording a statement, did not testify. The mobile phone repairer one Geoffrey Musembi (PW.2) stated that the appellant had earlier on presented to him a Samsung phone for removal of password but which he handed it back to the Appellant and that the one found on the Appellant at the time of his arrest did not belong to the complainant. It transpired from the evidence that the said phone repairer had inserted his sim card onto the alleged stolen mobile phone whose signal was later picked up by the complainant. However, the said sim card was never even produced in court as exhibit so as to establish beyond doubt that indeed PW.2 had tried the same on complainant's stolen mobile phone. Again the complainant' stolen phone was never recovered though PW.2 maintains it was the appellant who had handled it earlier on. The mobile phone recovered from the appellant belonged to one Moses Nganga who is said to have recorded a statement but was never called by the Respondent. The investigating officer (PW.6) claimed that he tried in vain to convince the said Moses Nganga to come forward and testify. In the absence of evidence by the said Moses Nganga then it was not possible for the trial court to hold that the appellant handled stolen property. Further in the absence of recovery of complainant's stolen phone it was not possible for the Appellant to be compelled to offer an explanation as to how he came by the said mobile phone. Hence the learned trial magistrate erred when he shifted the burden of proof to the appellant while it is trite law tha the burden of proof in Criminal trials always rests with the prosecution. The learned trial magistrate state in his judgment as follows:-

> "**It was incumbent upon the accused person to explain sufficiently as to how he actually came into possession of the complainant's cell phone…… the cursory perusal of the accused's unsworn evidence tendered herein is quite discernible therefrom that he offered absolutely no explanation at all in an attempt to prove that he had innocently possessed the said cell phone."**

As noted above, the complainant's mobile phone was never recovered. The one recovered and produced as exhibit 2 belonged to one Moses Nganga who did not testify and in which the Appellant gave an explanation. It was the duty of the Respondent to call the said Moses Nganga to testify. Furthermore the Respondent had not preferred a charge of theft and handling stolen property as regards the said recovered mobile phone. Hence the production of the said phone as exhibit did not at all add much weight to the respondent's case: it is noted that the Respondent's learned counsel concedes that the evidence adduced by the prosecution was not sufficient to prove the offence beyond reasonable doubt. Had the issue of a duplex charge been the only one herein for determination, then an order of retrial would have sufficed due to the seriousness of the charge. However, in view of the fact that the Respondent's case in the lower court had not been established beyond reasonable doubt, I am of the considered view that the conviction ought to be quashed and sentence set aside.

The upshot of the aforegoing observations is that the Appellant's Appeal succeeds. The Appellant's conviction is hereby quashed and sentence set aside. The Appellant is to be set at liberty unless otherwise lawfully held.

Dated, signed and delivered at Machakos this **16th** day of **March** 2017.

D. K. KEMEI

JUDGE

In the presence of:

Machogu for Respondent.....

C/A: Muoti……