REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 121 OF 2012

GEOFFREY THIONGO MUKUNYI……..……..APPELLANT

VERSUS

REPUBLIC…….....RESPONDENT

(Being an appeal from original conviction and sentence contained in the judgment of Hon. C. A. Otieno (Ag. Principal Magistrate) in the Senior Principal Magistrates' Court at Kikuyu Criminal Case No. 12 of 2012 delivered on 22nd May 2013)

JUDGMENT

The Appellant was charged with three counts of the offence of robbery with violence and one count of the offence of stealing as follows:

Count I: robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code, in that on the 25th day of July, 2012 at Regen Estate in Kiambu County within Central region jointly with another not before court while armed with a slasher and a knife robbed Fred Kiprotich Sambu of a mobile phone make Nokia valued at Ksh. 10,500/-, CPU make Compaq valued at Ksh. 16,000/-, ATM card and ID card all valued at Ksh. 26,500/- property of Fred Kiprotich Sambu and immediately before and after the time of such robbery used actual violence on the said Fred Kiprotich Sambu.

Count II: robbery with violence contrary to Section 295 as read with Section 296 of the Penal Code in that on the 25th day of July, 2012 at Regen Estate in Kiambu County within Central region jointly with another not before court while armed with a slasher and a knife robbed Peter Kuria Njoroge of mobile phone make Nokia 1202 valued at Ksh. 2,500/-, ID card , ATM card and insurance card the property of Peter Kuria Njoroge and immediately before and after the time of such robbery used actual violence on the said Peter Kuria Njoroge.

Count III: robbery with violence contrary to Section 95 as read with Section 296 of the Penal Code in that on the 25th day of July, 2012 at Regen Estate in Kiambu County within Central region jointly with another not before court while armed with a slasher and a knife robbed Monica Waithira Mwangi of one mobile phone make Nokia valued at Ksh. 6,000/-, and laptop make Samsung (notebook)valued at Ksh. 32,000/-, all valued at Ksh. 38,000/- the property of Monica Waithira Mwangi and immediately before and after the time of such robbery used actual violence on the said Monica Waithira Mwangi.

Count IV: stealing contrary to Section 275 of the Penal Code the particulars of which were that on the 25th day of July, 2012 at Regen Estate in Kiambu County within Central region jointly with another not

before court stole sub-woofer valued at Ksh. 4,000/-, 2 camping lights valued at Ksh. 12,000/-, one suit case valued at Ksh. 2,800/-, one bag valued at Ksh. 800/-, iron box valued at Ksh. 2,800/-, *meko* gas valued at Ksh. 5,300/- ,all valued of Ksh. 32,500/- the property of Levi Maina Wanyoike.

The Appellant was convicted on the 1st count of robbery with violence and the 4th count of stealing. He was sentenced to death in respect of the 1st count while the sentence for the offence of stealing was held in abeyance. He was acquitted on the 2nd and 3rd counts on the grounds that the charges were based on the wrong provisions of the law, thus a violation of his constitutional right to a fair trial.

The Appellant challenged the decision of the trial court and filed an appeal. He subsequently filed Amended Grounds of Appeal under which he challenged the sentence and conviction on the following grounds:

a. That there was variance between the particulars of the charge and the evidence in breach of Section 214 of the Criminal Procedure Code.
b. The trial court erred in failing to find that the witnesses were coached and investigations had been done when the Appellant had been arrested.
c. The charge sheet was defective and duplex.
d. The prosecution witnesses' testimonies on the mode of arrest were doubtful.
e. The prevailing conditions were not conductive for a positive identification.
f. The prosecution case was not proved to the required standard.
g. The trial court disregarded the Appellant's defence without good reasons contrary to Section 169 of the Criminal Procedure Code.

Subsequently, the Appellant filed Further Amended Grounds of Appeal under Section 350(2)(v) of the Criminal Procedure Code in which he introduced the following further grounds; that no first report had been made prior to the Appellant's arrest, that the charge sheet was defective for leaving out an essential element of the offence and finally that the trial magistrate shifted the burden of proof to him.

The Appellant relied on his written submissions. He submitted that the charges against him were contrived. He pointed out that the first report was made on 1st August 2012. He alluded to forgery in the entry no. 29/1/8/2012 as the charge sheet referred to OB entry 53/1/8/2012. He added that PW1 and PW2's accounts that they reported the incident on 26th July 2012 was not supported by the evidence since the entry showed the report was made on 1st August 2012. It was his view that the record showed that the witnesses were coached. He further submitted that the identification could not have been positive since the report was made one week after the incident and after he had been arrested. This, he submitted, was also supported by the discrepancies in the witnesses' testimonies regarding the time of his arrest and circumstances surrounding the robbery incident. In the further written submissions, the Appellant pointed out that the investigating officer had erroneously used OB No. 53/1/8/2012 instead of OB No. 29/1/8/2012 in the charge sheet. He also cast doubt on the allegation by PW1 and PW2 that they had reported to the police on the day following the incident on the ground that he could not have been released if the complainants had reported. The Appellant urged the court to further observe that had any such report been made, the investigating officer could not have failed to notice the entry OB No. 29/1/8/2012. He maintained that he was arrested when he was about to be released. The Appellant further submitted that the prosecution did not challenge the Appellant's defence. On the defective charge sheet, the Appellant submitted that the particulars did not contain the words 'dangerous or offensive weapons' and did not therefore comply with Section 296(2) of the Criminal Procedure Code. Further that the charge sheet was also defective in terms of Section 214 of the Criminal Procedure Code due to the misdescription of the Appellant's names.

Ms. Ngetich for the Respondent opposed the appeal. She refuted the allegations that the witnesses had been coached, insisting that they were honest and credible. She further submitted that the ingredients for the offence of robbery with violence had been proved. On identification, counsel submitted that there was sufficient light from electricity at the time of the robbery and that the attackers could be identified as they had not disguised their faces. Furthermore, both PW1 and PW2 gave corroborative descriptions of the

Appellant supported by subsequent dock identification. It was further submitted that the initial report was made on 26th July, 2012, while the report made on 1st August 2012 was made when the robbers were spotted. Counsel added that the issue of defective charge sheet was resolved by the trial court, as seen from the judgment. She urged this court to find that the conviction and sentence were lawful and therefore, the appeal ought to be dismissed.

Being the first appeal, we are mindful of our duty to subject the evidence to a fresh and exhaustive examination and reach our own independent conclusion, while alive to the fact that we did not have the opportunity to examine the demeanor of the witnesses. **See Okeno v Republic (1972) EA, 32**. We have considered the evidence, and submissions by both parties. We shall first address ourselves on the issues of law raised by the Appellant.

The first issue for our determination is whether or not the charge sheet is defective and the implications of such defect. The Appellant pointed out that the charge sheet was defective in that it was drafted both under Sections 295 and 296 of the Penal Code in respect of the offence of robbery with violence. Further, that there were errors in respect of the OB entries on the basis of which the charge sheet was prepared and in the descriptions of the Appellant's names. The Appellant also submitted that the charges were defective for omitting an ingredient of the offence by describing the weapons allegedly used as 'dangerous or offensive weapons'

We observe that the trial court in resolving this issue, relied on the case of **Johann Ndungu v Republic, Criminal Appeal No. 116 of 1995 (unreported)** where the Court of Appeal held that:

> ***"In order to appreciate properly as to what acts constitute an offence under Section (296) (2), one must consider the sub-section in conjunction with section 295 of the Penal Code.***
>
> ***The essential ingredients of robbery under Section 295 are use of or threat to use actual violence against any person or property and at or immediately before 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.***

The above case has been widely cited in several decisions of both the High Court and the Court of Appeal. The court in the above-cited case proceeded to set out the ingredients of the offence of robbery with violence as follows:

> ***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 the robbery, he wounds, beats, strikes or uses any other violence to any person.***

And that:

> ***"With regard to the third set of circumstances there is no 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 at or immediately before or immediately after the time of the robbery, he 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.***

In the above decision, while the court observed the need to appreciate the provisions of Section 295, the court proceeded to set out the distinct elements of the offence of robbery under sections 295 and the ingredients for the offence of robbery with violence under section 296(2) of the Penal Code both of which

read as follows:

> ***"295. Definition of robbery***:
>
> ***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 obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.***
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> ***296. Punishment of robbery:***
>
> ***(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.***
>
> ***(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."***

The trial court went ahead to approve the drafting of the charge of robbery with violence contrary to Section 295 as read with section 296(2) of the Penal Code. We differ with this approach. Section 296(2) creates the substantive offence of robbery with violence and sets out its ingredient. Section 295 defines robbery while Section 296(1) provides the penalty for the offence of robbery, which is distinct from the offence of robbery with violence. This issue was settled by the Court of Appeal in later decisions. In the case of ***Simon Materu Munialu v Republic Criminal Appeal No. 302 of 2005 (2007) eKLR,*** it was held:

> ***"The ingredients that the appellants and for that matter any suspect before the Court on a charge of robbery with violence in which more than one person takes part or where dangerous or offensive weapons are used or where a victim is wounded or threatened with actual bodily harm or occasioned actual bodily harm is section 296(2) of the Penal Code. It is these ingredients which need to be explained to such Accused person so as to enable him know the offence he is facing and prepare his case. These ingredients are not in section 295 which creates the offence of robbery. In Short section 296(2) is not only a punishment section but it also incorporates the ingredients for that offence which attracts that punishment. It would be wrong to charge an accused person facing such offence with robbery under section 295 as read with section 296 (2) of the Penal Code as that would not contain the ingredients that are in section 296(2) of the Penal Code and might create confusion.***
>
> ***In our considered view section 137 of the Criminal Procedure Code could be complied with if an Accused is charged, as the appellant was under section 296(2) because that section 137 requires one to be charged under the section creating the offence and in the case of robbery with violence under section 296 (2), that section creates the offence by giving it the ingredients required before one is charged under it and it also spells out the punishment. We reject that ground of appeal."*** *(Emphasis added).*

We find that, in line with the above reasoning, that it was erroneous to draft the charges under Section 295 as read with Section 296(2). The question would be whether or not the error was fatal to the prosecution's case. In the case of ***Joseph Njuguna Mwaura & 2 others v Republic*** **Cr. Appeal No. 5 of 2008 (2013) eKLR**, the Court of Appeal stated that;

> ***"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."***

A charge is said to be duplex if it contains more than one offence in a single charge with the result being that the right of an accused person is compromised. Section 134 of the Criminal Procedure Code requires that a charge is 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.***' Despite the anomaly in citing both sections 295 and 295, we observe that the statement of the offence and the particulars relate to the offence of robbery with violence only. Thus, the Appellant cannot be said to have been prejudiced in that all along he was charged with the offence of robbery with violence, and presented with particulars in respect of the specific offence. No prejudice was occasioned and this error is, in our view, curable under **Section 382** of the Criminal Procedure Code.

The other issue raised in respect of the charge sheet was that the particulars did not indicate that the Appellant was armed with dangerous or offensive weapons. It is true, that the particulars under the charge indicate that the Appellant and the other person were armed with a slasher and knife but does not describe the weapons used as dangerous or offensive. In the case of ***Juma v Republic* 2 [2003] EA 471,** the court found that the charge sheet was fatally defective for failing to indicate in the particulars that the knife was a dangerous weapon. Courts have adapted the meaning of offensive weapons under **Section 89** of the Penal Code '***as any article made or adapted for use for causing injury to the person, or intended by the person having it in his possession or under his control for such use***.'

That being the case, we observe that the prosecution in this case does not solely rely on the element of being armed. As the Court of Appeal sitting in Kisumu observed in the case of ***David Njuguna Wairimu v Republic*** **Criminal Appeal No. 28 of 2009 [2010] eKLR**:

> ***"… the words "dangerous or offensive" should have been included to describe the type of weapons the robbers were armed with. However, it is quite clear that the prosecution was not relying on the type of weapons the robbers were armed with, but the fact that the robbers wounded one Samuel Marwa Kerario, which is one of the alternative elements of a robbery with violence charge, the other ones being the following:-***
>
> ***(a) If the offender is armed with a dangerous or offensive weapon***
>
> ***(b) If the offender is in the company of one or more persons."***

The prosecution advanced evidence to prove that the Appellant was in the company of another person not before court and that personal violence was used against the complainants. Section 296(2) of the Penal Code requires prove of one of the three elements. Thus, this omission does not render the charge fatally defective, owing to the existence of other elements of the offence of robbery with violence.

With regard to the description of the Appellant's names, the charge sheet correctly refers the Appellant as Geoffrey Thiongo Mukunyi and any differing reference in the police records does not defeat the substance of the charge and its subject.

We now address the substantive issues raised with regard to the evidence on record. Key to determining this appeal is the question of identification. The offence was committed on 25th July, 2012 at night. **PW1, Fred Kiprotich Sambu** testified that they were accosted by two persons just as they got home before he could enter the house. They were ordered to lie down and then led inside the house where they were forced to lie down. PW1 stated that while outside, he had thought that it was his cousin, but that when they got near the security lights, he did not recognise the attackers. He described one of them as having dreadlocks, with one green bead while the other was clean-shaved, tall, oval-faced with dents on the face, and dark in complexion. Inside the house, the dreadlocked robber took a slasher, while the other one ordered them to lie down as they were guarded by the dreadlocked robber. The tall dark robber took a knife from the kitchen. The dreadlocked robber took PW1's phone, and a wallet containing ID card and an ATM card. They also took a CPU of Compaq make. They also stole items from the others. PW1 stated that he saw the dreadlocked robber take PW2's phone from his pocket. He also went to the bedroom and came back with a suitcase in which they packed the stolen items. They asked for a digital camera and PIN

number of the ATM card. They then started assaulting PW2. The dreadlocked robber hit him with a slasher. He then carried out the suitcase while the tall dark one was left in the house.

PW2, Peter Kuria Njoroge largely corroborated PW1's account. They both described what each of the robbers did: the Appellant was guarding them while the other robber collected items in the house. The Appellant was described as short, having dreadlocks with a green bead at the front. This description was also noted at the time of the arrest. PW1 maintained that he would have remembered the Appellant even without the dreadlocks. PW1 and PW2 indicated that even though they were both lying down, they were able to observe the attackers who did not disguise their faces. Further, the house was well lit. We observe that from the testimonies of the complainants, the robbers took their time inside the house; collecting personal items from them and even getting items from other rooms in the house and eventually packing them in a suitcase. With this account of events, we think that there was sufficient time for observing the attackers. Further, the complainants were able to spot the Appellant based on his unique features when they spotted him after the incident. We are satisfied that the identification in this case was proper.

Another issue raised is with respect to the circumstances of the Appellant's arrest. Infact, his defence largely centered on this issue. It was given in unsworn statement. He stated that he was arrested on 30th July, 2012 and taken to Regen Police Post. He was transferred to Kikuyu Police Station the following day where he stayed until the 1st August, 2012 when he was officially released at 9.00 a.m. However, the actual release did not take place since two persons who were at the Police Station reported that he had stolen from them. His witness, Jane Wairimu Mukunyi(DW2), his mother corroborated his defence stating that she was present when the Appellant was taken back into custody as he was about to be released on the 1st August, 2012.

The Appellant maintained that he was in custody at the time the prosecution alleges he was arrested on the basis of a report by the complainants. From the evidence before us, there is no dispute that the offence was committed on 25th July, 2012. According to **PW1, Fred Kiprotich Sambu** and **PW2, Peter Kuria Njoroge** they reported the incident to the police on the day following the incident. The Appellant disputes that any report was made on this day, on the ground that he would not have been released when he was arrested. The Appellant initially requested for the production of the OB entry for 26th July, 2012 and later requested for OB no. 53/1/8/2012 and PL no. 214/302/2012. The requested OB entry was provided and the Appellant filed Amended Grounds of Appeal. He relies on this record to state that the first report could only have been made on 1st August, 2012. We find no reason to doubt PW1 and PW2's claim that they reported the incident to the police. What is not certain is whether the report was entered in the police records.

The charge sheet refers to an OB entry no. 53/1/8/2012. The Appellant challenged that no first report was made in which a description of the attackers was given. We find no supporting evidence other than PW1 and PW2's accounts that they reported to the police on the day following the incident. **PW4, Police Constable Alexander Miriti** the investigating officer testified that the complainant went to report on 1st August, 2012 at about 2.00 p.m. The prosecution did not call any other officer who may have received the complainants when they reported in the first instance. We however, observe that whether or not the report by the complainants was recorded by the police, the evidence by the complainants is that they spotted one of the attackers and informed the police who came and arrested him. This ground alone would not defeat the charges against the Appellant. The police acted upon information by PW1 and PW2 that they had spotted the Appellant. The determinant factor is whether or not the identification of the Appellant was positive as to be sufficiently relied on. In addition, we must resolve the issue regarding the circumstances of the Appellant's arrest.

It is not in doubt that the Appellant had been arrested in different circumstances. He stated in his testimony that he was arrested on 30th July, 2012. This was also corroborated by the investigating officer, PW4. This arrest was on suspicion of commission of other offences. The dispute is to the question as to whether the Appellant was released following his initial arrest. The Appellant maintained that he was arrested just as he was about to be released on 1st August, 2012. This account is disputed by PW4 who testified that the Appellant was released on 1.8.2012 at around 9.00 a.m. after being warned. PW1 stated

that he spotted the Appellant on 1.8.2012 at around 1.00 p.m. at a butchery. PW2 supported this account, when he stated that they saw the Appellant on the same date outside the butchery. He stated in cross-examination that the Appellant was arrested at 3.00 p.m. We find this discrepancy on the description on the time immaterial. The contention is whether or not the Appellant was in custody at the time PW1 and PW2 indicated they had spotted him. PW4 stated that he is the one who released him. By virtue of the fact that he had initially been arrested on suspicion of committing another offence, does not lessen the fact that PW1 and 2 at the same time went to the Police Station to report about the robbery. We have already found that the Appellant's identification was positive, more particularly because when PW1 and 2 made their initial report, they described one of the attackers as a person with dreadlocks. This was corroborated by PW4. It is also what led to his arrest.

In the end we find that this appeal lacks merit and the same is dismissed. We uphold the conviction and sentence of the trial court. It is so ordered

DATED and **DELIVERED** in Nairobi this **1st day** of **March, 2016.**

L. KIMARU

JUDGE

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Appellant present in person*
2. *M/s Aluda Respondent.*