REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 78 Of 2015

ONESMUS KAMAU……..……..……APPELLANT.

AND

REPUBLIC ……..……...…….RESPONDENT.

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Kikuyu Criminal Case 17 of 2012 delivered by Hon. A.W.Mwangi, Ag SPM on 1st April, 2014.)

JUDGMENT

BACKGROUND

The Appellant was charged in the first count with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on 12th March, 2010 at Kikuyu Township in Kikuyu District within Kiambu County jointly with others not before, while armed with a dangerous weapon namely pistol, robbed Mirriam Muthoni Ngunjiri a handbag, ATM card for Equity Bank, National Identity card, calculator and cash Kshs. 10,000/= all valued at Ksh 13,000/= and immediately before or immediately after the time of such robbery threatened to use actual violence to Mirriam Muthoni Ngunjiru and wounded Paul Ng'ang'a Mungai.

He was charged in the second count with sending offensive messages by means of licensed telecommunication system contrary to Section 29(a) of the Kenya Information and Communications Act No. 2 of 1998. The particulars of the offense were that on 31st March, 2010 at 01:03:14 pm, at known place within the Republic of Kenya, by means of licensed telecommunications, namely Safaricom Limited through mobile number 0726380928 registered in the names of Onesmus Kamau Mwai sent a message to number [Number Withheld] registered in the names of Mirriam Muthoni Mungai using grossly offensive language to wit “Do this seed us 30k ama tucm 4 u, we cm first ad we did. So do it now halaka sana ad know whe u stay plz usijifiche we are watching u”, a matter that could cause pain and panic to the said Mirriam Muthoni Mungai.

He was convicted him on both charges. He was sentenced to death on the first count while for the second count, the sentence was held in abeyance. Being dissatisfied by the decision of that court he decided to lodge an appeal to this court.

The Appellant's Amended Petition set out the following grounds of appeal:

1. ***That the court erred in relying on a defective charge sheet.***

2. That the ingredients of the offence were never proven.

3. That the evidence adduced in court was at variance with the charges preferred against the Appellant.

4. That the court erred in failing to note that there was no proper identification.

5. That the court erred in failing to note the Appellant's constitutional rights under Article 49 and 50 of the Constitution were violated.

6. That the court erred in failing to note the gaps, inconsistencies and material contradictions in the prosecution's case.

7. That the court erred in failing to consider the defence of alibi put forth by the Appellant.

8. That the court failed to note that telephone line 0726380928 was never found on the Appellant or his possessions.

9. That court erred in failing to note that the offence was never proved beyond a reasonable doubt.

SUBMISSIONS.

The appeal was canvassed by way of written submissions with an opportunity to highlight the same. In his written submissions the Appellant stated that the charge sheet as drawn was fatally defective for duplicity, having named two complainants. He further submitted that the identification parades that were carried out on the Appellant contravened Section 6(4)(d) of the Police Force Standing Orders since only one parade was carried in respect of two witnesses. He further stated that the identification in the parade could have been mistaken as PW1 was attacked when she was in a state of panic. She taken her husband to hospital and they had been rejected by a number of hospitals as a result of which her state of mind was not stable.

He submitted that the trial court breached the rules of evidence by relying on hearsay and inadmissible evidence. He stated that exhibit 4(d) was produced without a certificate contrary to Section 65(8) of the Evidence Act. Further that exhibits 5(b) and 5(c) were produced by PW7 who was a liaison officer at Safaricom and was not the maker of the documents. Furthermore, Sections 33 and 77 of the Evidence Act were not invoked to allow the witness to produce the same.

He concluded by submitting that his alibi defence was ignored by the trial court. He stated that the fact that PW5 testified that he (Appellant) was using a duplicate Identification Card supported his alibi defence that he had lost his mobile phone long before the robbery. He could not therefore have been connected with the robbery, particularly to have sent PW3 an offensive text.

The Respondent relied on written submissions filed by learned State Counsel, Ms. Wario on 20th June, 2016. She submitted that the charge sheet was neither duplex nor bad in law. In support of this submission, she relied on the cases of ***Reuben Nyakango Mose & another v Republic[2013] eKLR, Laban Koti v R[1962] EA 439, Kababi v R[1980] KLR 95*** *and* ***Mahero v R[2002] 2 KLR 496.***

On identification, Miss Wario submitted that the Appellant was properly identified since the conditions of identification at the locus in quo were conducive. Further that the identification parade could not be faulted and conformed with the Police Force Standing Orders.

She went on to submit that the Appellant's assertion that the exhibits were inadmissible for non-compliance with Section 65(8) of the Evidence Act was not feasible as the production was in accordance with Section 78A of the Evidence Act. She submitted that the contention that the Appellant's defence was not considered was baseless as a look at the trial magistrate's judgment showed that the same had been

considered greatly before being dismissed. Finally, she submitted that the offence had been proven beyond a reasonable doubt. She therefore prayed for the appeal to be dismissed.

EVIDENCE.

This being a first appeal, the court is under an obligation to weigh the evidence as a whole and reach its own independent conclusion. See **Njoroge v Republic (1987) e KLR 19.**

The summary of the prosecution's case was set out by the evidence of PW1, Paul Nganga Mungai and PW3 Mirriam Muthoni Mungai, the latter being the wife to the former. It was to the effect that the Appellant and another met PW1 at around 6.30 pm on the corridor of his residential apartment. He was on his way from the lavatory and they asked for directions to Muthoni's house. This was incidentally his wife's name but he did not give them directions. He returned to his house and told his wife about it and she left to talk to the men but they started walking away. PW1 then enquired on whether they had seen Muthoni to which they replied they would be coming back later.

At around 7.00 pm that evening, PW1 who was in the company of his wife, PW3, Mirriam Muthoni Ngunjiri, heard a knock on the door. PW3 proceeded to open the door and found two men. From his vantage point, PW1 could see it was the men who had earlier inquired for directions. They had a short conversation with PW1 in which they alluded to being sent by her aunt. She could not make head or tail of what they were talking about and she called her husband, PW1, to try and decipher what they wanted. PW1 then went to the door to try and assist the men. They were a short dark man and a tall dark man.

As he was trying to enquire on the reason for their visit, the short man jumped on him and toppled him to the ground and started choking him. Seeing this PW3 started screaming for help. The short man was now demanding money and PW3 was still screaming. Realizing that their plan was in disarray he grabbed PW3's bag and ran out of the door. PW3 gave chase passing the tall man at the door. PW1 woke up and was confronted by the tall man who then brandished a gun and asked him what it was. However, before he could utter a word he was shot in the neck region. PW3 who was outside screaming for the persons on the ground floor to arrest the fleeing man heard the gun shot and ran back to the house where she found PW1 on the floor bleeding from the neck. The neighbours to PW1 and 3 having heard the screams started streaming towards the locus in quo but the tall man who was trying to make his escape shot in the air and managed to escape.

PW1 was then taken to several hospitals before receiving help at Nairobi Hospital. A report was made at Kikuyu Police Station by PW3. On 31st March, 2010 mobile number 0726380928 sent a text message to PW3's phone asking her to send money or they would come back since they knew where she and her family lived. They tracked the number and finally arrested the Appellant as the blackmailer's phone number was registered to his name, one Onesmus Kamau Mwai.

At the time of his testimony, PW1 was on a wheelchair following the gunshot wound. The bullet that hit him was lodged on his back. It left him paralysed. He was in hospital for almost a month but could not walk after the discharge. On 19th October 2013, he participated in an identification parade in which he identified the Appellant as the man who shot him.

***PW3,** in emphasizing her evidence testified that the man in the house started demanding money in a very violent tone and she started screaming "Thief! Thief!. The man then took her handbag and dashed out and she gave chase. The handbag had cash Kshs. 10,000/=, an ATM card, National identification card and a big calculator. Their house was on the first floor and she was screaming to alert people on the ground floor so they could effect arrest. She then heard a gunshot emanating from the direction of their house. The man who had gotten into the house when she chased after the other one came out of the house and shot into the air to warn off the neighbours who had answered to her alarm. They ran off and when she entered the house she found her husband on the ground bleeding from the right side of his neck. She screamed and people came to her house and they helped her get her husband to Thogoto Hospital. She identified the man who had shot her husband as the Appellant on the dock. She further stated that he looked the same way he looked that day. From Thogoto they were referred to MP Shah Hospital but they*

did not have the required deposit and they proceeded to Kenyatta National Hospital then to Coptic Hospital and finally Nairobi Hospital where PW1 was admitted for 1 month and 2 weeks.

On 31st March, 2010 she received a text message from 0726380928 stating that she should send Ksh. 30,000/= failing which she would face dire consequences. She showed it to her husband as she was at the hospital with him. The following day she went to the CID offices at Kikuyu where she reported the matter and recorded a statement. On 19th October, 2012 she took part in an Identification Parade where she was asked to identify the person who shot her husband.

***PW2, IP CHRISTOPHER KIMITI** conducted the identification parades in respect of the Appellant on 19th October 2010. The witnesses were PW1 and PW3 respectively. Both witnesses identified the suspect who is the Appellant. They indicated that they identified him as the man who shot PW1. The members of the .parade were the same. The Appellant indicated that he was satisfied with the manner in which the parade was carried out.*

***PW4, Doctor PETER KAMAU WANYOIKE** of Kenyatta National Hospital recalled that sometime in 2010 he attended to PW1 and signed a P3 form on 14th February, 2012. He found a wound on his neck without an exit wound. PW1 had a bullet lodged behind the chest. His upper limbs were paraplegic and he had total paralysis of the lower limbs. He indicated that the wound was by a penetrating missile injury. He treated him by opening the spine at the back and removing the bullet lodged in the back of the chest which was whole. He prepared a medical report which he did not produce. He assessed the degree of the injury as grievous harm.*

***PW5, EVANS OYORI** was a fingerprint officer working at the department of registration in Nairobi. He testified he was requested by CID Kikuuyu to provide them with details of identity card number 24825425 issued to one Onesmus Kamau Mwai. The details, which he obtained from the register disclosed that the person was born on 7th November 1986 and hailed from Nyeri District. He produced an identification report that he had created on 1st July, 2010 together with a report to certify that he was the maker of the report.*

***PW6, PC HANNINGTON CHUMBA** was attached to the Cyber Crime Unit. He testified that on 11th February, 2012 his office received a mobile phone Nokia 6070 marked as S/No. 356292010376153053677 2 which was accompanied by an exhibit memo dated 10th February, 2012. The phone had a SIM card S/No. 89254027051003354167. He was asked to extract the messages sent to No. 0722315965. He subjected the exhibit to a universal forensic extraction device and extracted a message dated 31st March, 2010 sent by 0726380928. He produced a report to the effect.*

***PW7, IP WYCLIFFE WANDERA** worked as a law enforcement liaison officer with Safaricom. A request was made from Kikuyu CID in writing via a letter, dated 14th April 2010, requesting any data or information in respect of No.0726380928. The CID wanted the subscriber details, registered owner, location and any other information in respect of that number. He printed out the extract of the phone's history. This showed the state of registration and all IMEI numbers that had used the phone number. They also got another printout showing the subscriber details. He stated that he was not the one who had printed out the details but that he had a certificate under Section 65(8) of the Evidence Act confirming that he worked with Safaricom and the printout documents were authentic and not altered in any way.*

***PW8, PC KEN MWENGE** of CID in Kikuyu recalled that on 8th May, 2012 he took over the investigations in the matter in question from C.I Okello who was transferred from the station. He summed the evidence of the prosecution witnesses. After compilation of the evidence, the Appellant was found culpable and charged accordingly.*

*After the close of the prosecution case, the learned trial magistrate ruled that the Appellant had a case to answer and was put on his defence. He gave a sworn statement of defence. He testified as **DW1**. His testimony was that he had come to Nairobi in the year 2008 to visit his brother who had agreed to help him get some meaningful employment. As he awaited the job opportunity he decided to visit his sister in*

Bahati. On his way there he was accosted by thieves who had robbed him of his mobile phone, wallet, national identity card and Kshs. 60/-. He went to his sister's place and on the next day he left for Naromoru. On arrival, he reported the theft at his local police station and received an abstract to renew his identity card. He however never renewed his SIM card given the high price, Kshs. 150, and had instead opted on buying a new line which was cheaper.

On the following year, he enrolled at a local mechanic school and upon completion he started working at a garage in Mweiga where the investigating officer found him. He was arrested and taken to Kikuyu Police Station where he was charged accordingly.

***DW2, GRACE WANJA MWAI** a business lady from Njabini in Nyandarua was a younger sister to the Appellant. She recalled that in the year 2008 the Appellant was living with their brother in Huruma where he was visiting having been informed by their brother of an opportunity to be a car washer at Double M company. It was his first time to visit Nairobi. On 23rd August, 2008 the Appellant informed her that he wanted to visit her. By 7.00 pm the Appellant had not arrived. She became nervous and called her other brother as the Appellant's phone was off. He informed her that the Appellant had already left. At around 8.00 pm the Appellant arrived without shoes and with a bleeding cut wound to his head. He informed her that he had been robbed of his wallet, ID card and phone and to make matters worse beaten up. She escorted him to a local chemist where he received some first aid. The cut was not very deep and he was given pain killers and they went home.*

On the following day the Appellant informed her he was going back to Narumoru and he appeared very fearful. She bought the accused a pair of sandals and escorted him to Tea Room bus stage where he boarded a matatu and returned to Narumoru. She advised him to report the matter in Narumoru as she knew the area where she lived was crime prone and she saw no point in reporting at Nairobi. The Appellant never visited Nairobi again.

DETERMINATION

This court having considered the submissions finds the following issues as arising for determination:

1. ***Whether the charge sheet was fatally defective.***

2. ***Whether the charge was proved beyond reasonable doubt.***

I will first address the question of whether the charge sheet was defective. The contention by the Appellant is that it was duplex as count I named two complainants. It was drafted as follows;

> ***ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE.***
>
> ***ONESMUS KAMAU MWAI: On the 12th day of March 2010 at Kikuyu Township in Kikuyu District within Kiambu County, jointly with others not before, while armed with dangerous weapon namely pistol robbed MIRRIAM MUTHONI NGUNJIRI a handbag, ATM card for Equity Bank, National Identity card, Calculator and cash Kshs. 10,000/= all valued at Kshs. 13,000/= and the immediate before or immediately after the time of such Robbery threatened to use actual violence to MIRRIAM MUTHONI NGUNJIRU and wounded PAUL NG'ANG'A MUNGAI.***

The Black's Law Dictionary, 9th Edition defines duplicity as,

> ***"The charging of the same offence in more than one count of an indictment or the pleading of two or more distinct grounds of complaint or defence for the same issue."***

Section 134 of the Criminal procedure Code also spells out what constitutes a good charge as follows;

> ***"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."

Duplicity is therefore about counts and not charges. A good example is where two counts are charged in one. Each offence must be spelt out on its own in a count. This is affirmed by Section 135(2) of the Criminal Procedure Code which provides that;

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

Duplicity is clearly reflected in the instant case. It sets out two complaints in one count in the words that, ‘’***threatened to use actual violence to Mirriam Muthoni Ngunjiri''*** and ‘’***wounded Paul Ng'ang'a''.*** From these words, in the respect of Mirriam Muthoni Ngunjuri who testified as PW3, the proper charge that ought to have been preferred was of attempted robbery with violence contrary to Section 297(2) of the Penal Code which provides that;

"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 assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."

The actual elements of the offence of attempted robbery with violence are defined under Sub-section 1 of Section 297 thus;

"Any person who assaults any person with intent to steal anything, and, at or immediately before or immediately after the time of the assault, uses or threatens to use actual violence to any person or property in order to obtain the thing intended to be stolen, or to prevent or overcome resistance to its being stolen, is guilty of a felony and is liable to imprisonment for seven years."

But since the assailants were armed with a dangerous weapon namely, a pistol, were more than one in number and used actual violence on PW3, the offence that should have been preferred is as provided under Section 297(2). Suffice it to say, proof of any of these elements properly establishes the offence provided thereunder.

The offence of robbery with violence on the other hand is set out under Section 296(2) of the Penal Code as:

"(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."

Whilst the penalties for both offences under Sections 292(2) and 297(2) of the Penal Code are similar (death), each offence is provided for under a separate provision as the elements of each offence are distinct. It my view then the offence of robbery with violence against Paul Ng'ang'a ought to have been separated from that of attempted robbery with violence in the respect of Mirriam Muthoni Ngunjiri. That is to say, that each of the offences ought to have constituted a separate count.

But again, not all defective charges render the trial a nullity. Where a charge is duplex, the test is whether the duplicity prejudiced the Appellant and occasioned a miscarriage of justice. The combination of both counts in one meant that the Appellant, upon taking the plea, was not in a position to decipher whether he was confronted with one or both counts and which one between the two he was required to defend. It did not matter that the evidence adduced in respect of the complainants disclosed offences of robbery with violence. What was crucial was that the Appellant pleaded to charges that he would have been able to

defend. In the instant case, he was prejudiced as he could not deduce whether he was required to defend the offence of robbery with violence or attempted robbery with violence. The confusion certainly prejudiced him and resulted in a miscarriage of justice. In so finding, I echo the words in **Laban Koti v Republic[1962] EA** at page 440 that:

> ***"In Cherere s/o Gukuli v R. (1) (1955), 22 E.A.C.A. 478 the Court of Appeal reviewed the cases on the subject of a charge which is duplex on the point as to whether a conviction pursuant to such a charge must necessarily be set aside or whether, on the other hand, it could be cured where no prejudice has resulted. It is there stated at p. 482:***
>
> ***"… the test … which we must apply to answer the question, what has been the effect of the defect in the charge on the trial and conviction of the Appellant, must be whether there has in fact been a failure of justice"***

But at p. 483 the judgment proceeds:

> ***"In Odda Tore's case this court said: 'Unless this court is able to say without hesitation that the accused has not been prejudiced by the duplicity there will be no other course open to it than to quash the conviction'. We think it is impossible to say, and certainly no court has so far as we are aware ever yet said, that an accused person is not prejudiced when offences are charged in one count in the alternative; he does not know precisely with what he is charged, nor of what offence he has been convicted. It is indeed, very difficult to say that a breach of an elementary principle of criminal procedure had not occasioned a failure of justice."***

This last extract certainly suggests strongly that duplicity in a charge is nearly always a fatal defect but in our view it does not go so far as to state that it is always necessarily fatal. It says that it is very difficult, not that it is always impossible to say, that a breach of the elementary principle of criminal procedure has not occasioned a failure of justice. The test still remains as to whether or not a failure of justice has occurred.''

This court in ***Alistide Brillant Nkoumondo v Republic(2016) e KLR*** *stated:*

> ***"It is the view of this court that the rationale for the principle of duplicity is that when a charge is duplex, and an accused person goes through a trial, the fairness of the process is fundamentally compromised. The obvious reason to this is that it would not be clear to him/her what the exact charges do confront him or her. In the end, he/she would not be in position to prepare himself/herself for a proper defence. This may not only be prejudicial but ultimately amounts to a failure in justice."***

Therefore, the duplicity and effectively defectiveness in a charge is at the core of the right to a fair trial as set out in Article 50 of the Constitution. It must be critically evaluated to test whether it occasions a miscarriage of justice to an accused. And where the court finds affirmatively for an accused, an acquittal should not be an option.

Notwithstanding that the charge was bad for duplicity, it is important to note that the evidence on identification was not sufficient to warrant a conviction. The description of the robbers by both complainants was contradictory. In cross examination, PW3 stated that the man who had the pistol was tall and slim. She further described him as a man with a hunch back and stooping shoulders. His accomplice was described as one who was in a cap and a bit plump. Unfortunately, the description given by PW1 Paul Ng'ang'a Mungai was different. He described one of the attacking men as dark and had protruding eyes. The other man, he said, was shorter and dark. When PW3 testified, the trial magistrate made a note that the Appellant was tall, dark and slim. With the contradictory descriptions, it is my view that the Appellant was not identified as one of the robbers. Although he was arrested on account that his mobile phone had written a text message to PW3 demanding for money, he gave a plausible explanation that as at the time the text was written, he was not in possession of his mobile phone. He explained that the same had been stolen long before the robbery. In that respect, count II could not also stand as it was

not proved that the Appellant was in possession of his mobile phone at the time the offensive words were sent to PW3.

Accordingly, I also find on account of lack of proper identification, the prosecution did not prove the case beyond a reasonable doubt. In the result, I allow the appeal, quash the conviction and set aside the death sentence. I order that the Appellant be and is hereby forthwith set free unless otherwise lawfully held. It is so ordered.

DATED AND DELIVERED THIS 18TH DAY OF JULY, 2016

GRACE W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Appellant in person.

2. Miss Sigei for the Respondent.