**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NUMBER 221 OF 2013.**

**MUYENDET LEKUMO SIARA…...……….APPELLANT**

**VERSUS**

**REPUBLIC ……………………………….RESPONDENT**

*(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara Cr. Case No.2237 OF 2011 delivered by Hon. E.K Nyutu, Ag PM on 29th August, 2013).*

**JUDGMENT**

**BACKGROUND**

Muyendet Lekumo Siara, the Appellant herein was charged alongside two others for committing the offence of robbery with violence. The particulars were that on 14th May, 2011 at around 9:00 p.m. in Thome Estate, Nairobi within Nairobi County, with others not before the court, while armed with a firearm, robbed Meshack Achieng, 3 welding machines, 2 grinders, 2 extension cables, 77 bags of cement, 12 gate valves, 11 ball valves, a mobile phone(Nokia 1200), a roll of manila thread, a hacksaw and a hammer. The items were all valued at Kshs. 210,600 and at or immediately before or after such robbery threatened to use actual violence on the aforementioned Meshack Achieng.

The Appellant was convicted accordingly and sentenced to death. His co- accused were acquitted for lack of sufficient evidence. He was dissatisfied with both the conviction and the sentence and he preferred the appeal herein. In a Supplementary Petition of Appeal he raised eleven grounds of appeal which when condensed are, that the Appellant was dissatisfied that he was convicted on a defective charge sheet, that he was not properly identified, that this constitutional right to a fair trial under Article 50 was violated, that crucial witnesses were not called in proof of the prosecution case, that it was not proved that the he was an employee of the complainant, that the trial court shifted the burden of prove upon him and that on the whole, the evidence adduced did not prove the offence of robbery with violence beyond a reasonable doubt.

**SUBMISSIONS.**

The appeal was canvassed by way of oral submissions. Learned Counsel, Ms. Odembo for the Appellant submitted that the charge was speculative and defective as it did not disclose the owner of the stolen items. She submitted that this was in contravention of Section 137 of the Criminal Procedure Code. She took issue with the proceedings which she said were flawed since they did not disclose the language of the court. This meant that the Appellant who was illiterate did not understand the proceedings. She

submitted that the Appellant had only been afforded an interpreter once. She further submitted that when the charge sheet was substituted the court did not comply with Section 214 of the Criminal procedure Code.

She submitted that the Appellant was not afforded legal representation which was a violation of his constitutional right under Article 50(2)(g). She relied on **David Njoroge Macharia v. Republic[2011] eKLR** to buttress this submission. She also faulted the fact that the list of items stolen as set out in PW1's testimony did not tally with the list in the charge sheet. This then put into question how the value of the items was arrived at particularly in the absence of an inventory. Furthermore, PW1 was not able to single out the items that were stolen. Her further submission was that the prosecution did not prove that the Appellant was employed as a watchman. She went on to state that the Appellant was not identified as one of the robbers more particularly because the robbery occurred at night when the conditions of identification were difficult. Further, that the person who gave information that led to the arrest of the Appellant was not called as a witness which rendered a fatal blow to the prosecution’s case. She summed up the submission by adding that the case had not been proven beyond a reasonable doubt and that the burden of proof was shifted to the Appellant to prove his innocence. She submitted that given the serious nature of the offence the Appellant should have been subjected to an age assessment.

Ms. Atina, for the Respondent submitted that the Appellant could not have been accorded legal representation because during the trial the Legal Aid Act, 2016 had not become operational. On whether the Appellant understood the language of the court, she submitted that the Appellant opted to use Kiswahili language which he understood. And that he participated in all the proceedings without raising a concern that he did not understand the language of the court.

She submitted that the charge sheet as initially drafted was defective but the defect was corrected by an amendment and substitution. The prosecution was thereafter able to prove all the elements of the offence. With regard to the identification of the Appellant, she submitted that PW2 had ample time with the Appellant and they even conversed on several occasions as they carried out their duties. As such, he was not a stranger to PW2 and his identification was by way of recognition. She further submitted that the fact that PW2 did not know what items were stolen was because he had been engaged in the employment on the same day. On whether the prosecution did not call crucial witnesses she submitted that Section 143 of the Evidence Act was clear that all that the prosecution was required to do was to call sufficient witnesses to prove their case. She was of the view that the case was proved beyond a reasonable doubt.

**EVIDENCE.**

This being a first appellate court is mandated to reevaluate the evidence on record as a whole and come to its independent conclusion. See: **Nzivo v. Republic[2005] 1 KLR 699.**

The prosecution's case was that the Appellant undertook to take over temporarily, his brother's position as a night watchman on a construction site. The contractor decided to also bring in another guard as reinforcement. The latter guard who was the complainant would work in tandem with the Appellant. On the complainant's first day on the job at about 7.00 p.m., the Appellant informed him that he had to go buy vegetables. When he returned he was in the company of two others whom he introduced to the Appellant as his brothers. He did not however come with the vegetables. The complainant let them in and he could see them roaming the compound by help of their torches. In the course of the evening a lorry appeared at the gate and the complainant being new on the job consulted the Appellant on whether he should let the lorry into the compound. The Appellant gave him the go ahead and as soon as the lorry was in the compound the complainant was attack. After investigations, police located the Appellant in Tanzania. His co-accused were arrested in Kenya.

**PW1, Teresia Soita Taniu** testified that she was a contractor and the owner of the site in Thome Estate where the robbery took place. The site was guarded by one Meshack Achieng, the complainant herein (PW2) who was seconded from Amaka Security Company. She recalled that on 14$^{th}$ May, 2011, the Appellant was the usual guard. It was also the day she brought PW2 to the site to take over sentry duties the next day. She was informed that a robbery had occurred at the site and she went to find out what had

happened. She found that the store doors were broken and open and the items therein stolen. These were; 3 welding machines, 2 grinders, 77 bags of cement, 12 gate valves and other items. She testified that the value of the items was Kshs. 207,160/-. She also found that the complainant had been injured and taken to hospital for medication. The Appellant was traced in Tanzania. The items stolen were never recovered.

**PW2, Meshack Owira Achieng** was the complainant. His evidence forms the basis of the summary of the prosecution case. In addition, he testified that one of the men accompanying the Appellant took his phone while another opened the gate and a man emerged from the lorry holding a pistol which he proceeded to aim at him with. He was tied to a pillar. One of the men stood guard holding a sword against his neck. He then heard the truck get into the compound and being loaded. Thereafter, he heard the lorry drive away. He was later able to untie himself after which he reported the matter to the police. He sustained injuries on his wrists from being tied up. He identified the Appellant as his fellow guard. He testified that he saw him well when he was introduced to him during the day and they spent time together.

**PW3, PC Joshua Eyanai** of Kasarani Police Station visited the scene of crime on 15th May, 2011. He was accompanied by **PW4, P.C Noah Kosgei**. They found the owner, PW1 who informed him that 77 bags of cement, welding machines, grinders and other assorted construction items had been stolen. They confirmed that the store had been broken into. They also found a guard named Shadrack. He observed injuries to his hands and he learnt that he had been tied to a pillar by the robbers. This guard informed him that the robbery was perpetrated by his fellow guard, the Appellant herein.

On 17th May, 2013 PW4 received information that the suspects were seen in Magadi Area. He proceeded to the area and was directed to Tanzania, Pingungi area , Loliondo Location. The local chief, one Mategwa, recognized the name of the Appellant and assisted them in tracing him. They arrested him and brought him to Kenya. He testified that the Appellant was the brother to a guard working at the PW1's property.

After the close of the prosecution case, the court ruled that a prima facie case had been established to warrant the Appellant tender a defence. He gave an unsworn statement of defence.

He recalled that on 12th May, 2011 he traveled home to attend to his children and that on 17th May, at about 3:30 p.m. four people arrived at his place of work where he was employed to milk cows. He identified one of them as one Patrick Ndulo. He welcomed them into his house whereupon the man he recognized informed him that they had been sent to fetch him and also conduct a search on his house. They carried out the search and found nothing. He was taken to Kasarani Police Station. He was charged on 23rd May, 2011. He denied any involvement in the crime.

**DETERMINATION**

Having summarized the evidence, I have arrived at the issues for determination to be; whether the charge sheet was defective, whether the Appellant’s constitutional right to a fair hearing was violated by not being provided with legal representation and an interpreter, whether the Appellant was properly identified, whether the prosecution did not call crucial witnesses and whether the offence was proved beyond a reasonable doubt.

The Appellant submitted that the charge sheet as drawn was speculative and also defective due to the fact that the owner of the goods stolen was not disclosed. Ms. Odembo, for the Appellant submitted that this meant the charge contravened Section 137 of the Criminal Procedure Code. The record shows that the first charge sheet named Teresiah Soinda Tanin as the complainant. It was later substituted and the complainant named as Meshack Achieng. It was substituted with one that set out the complainant as Meshack Achieng (PW2). It is true that the actual owner of the stolen goods was PW1 and nor PW2. However, the person who was robbed was PW2 who PW1 had left to guard the premises. He was therefore the special owner of the goods at the time of the robbery and for purposes of Section 137(c)(i). Under the provision, no onus is placed on the drafter of the charge sheet for purposes of describing the offence to name the actual owner. The requirement is that the property that is subject of the offence must be described. The provision also behooves that either the actual or the special owner be named. In my

view then, all that was required was for the prosecution to establish that the robbery was committed against the person named in the charge sheet and to prove the elements of the offence to that extent. And as I shall hereafter demonstrate, this burden was clearly discharged. For purposes of precision, Section 137(c)(i) which is the relevant part provides as under;

> **"the description of property in charge or information shall be in ordinary language, and shall indicate with reasonable cleanliness the property referred to, and, if the property is so described, it shall not be necessary (except when required for the purpose of describing an offence depending on any special ownership of property or special value of property) to name the person to whom the property belongs or the value of the property."**

Therefore, no injustice was occasioned to the Appellant by the failure to name the actual owner of the stolen goods. After all, she is not the person against whom the robbery was committed.

The Appellant faulted the trial court for not complying with Section 214 of the Criminal Procedure Code after the charge sheet was substituted. I understood him to imply that after the substitution of the charge sheet, he was not called to plead afresh to the substituted charge as provided under sub-section (1)(i) of the provision. The record does however attest a different scenario. The initial plea was taken on 19th May, 2011. The charge sheet was substituted on 2nd August, 2011. It is clear that each of the accused was called afresh to plead and all of them pleaded not guilty. As such, that submission is without merit.

The next issue that this court must determine involves the Appellant's submission that his right to a fair hearing as set out under Article 50(2)(g) of the Constitution was infringed when he was not accorded free legal representation. He relied on **David Njoroge Macharia v. Republic [2011] eKLR** to buttress this point. The Respondent submitted that free legal representation as set out under the Constitution had not been implemented when the Appellant was tried and only came into operation with the coming into force of the Legal Aid Act in 2016. That therefore, the State was not bound to offer him legal representation. I entirely concur with the position taken by the learned State Counsel as is buttressed in the case of **David Njoroge Macharia[supra]** in which the Court of Appeal delivered itself as follows:

> **"Under the new Constitution, state funded legal representation is a right in certain instances. Article 50(1) provides that an accused shall have an advocate assigned to him by the State and at state expense, <u>if substantial injustice would otherwise result</u> (emphasis added).**
>
> **…**
>
> **We are of the considered view that I addition to situations where "substantial injustice would otherwise result", persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense. We would not go so far as to suggest that every accused person <u>convicted</u> of a capital offence since the coming into effect of the new Constitution would automatically be entitled to a re-trial where no such legal representation was provided. The reasons are that, firstly, the provisions of the new Constitution will not be applied retroactively, and secondly every case must be described on its own merit to determine if there was serious prejudice occasioned by reason of such omission."**

This particular holding must however be looked at in conjunction with the Appellant's further submission that he was illiterate and was not accorded a translator to ensure that he understand the language of the court. It is true that it was not in all the instances that the court sat that the language of the court was indicated. Where this was done, the language interpretation was English to Kiswahili. The Appellant's advocate submitted that this was the only time an interpreter was called. But again, it is clear that the Appellant was fluent in Kiswahili language which he used to tender his unsworn defence statement. Coupled with the fact that PW1, PW2 and PW3 all gave sworn statements in Kiswahili and the Appellant cross examined them, vindicates the Respondent's submission that the Appellant understood the Kiswahili language which was generally used in the trial. PW4 however testified in English but the record

is clear that on the date in question, there was translation from English to Kiswahili. Further. The Appellant cross examined the witness after his testimony.

From the above summary, it is safe to conclude that the Appellant was not in any way prejudiced as he understood the language of the court. Further, his constitutional right to a fair hearing was not violated as the State was under no mandate to provide him with free legal representation.

On identification of the Appellant, PW2 testified that it was his first day of work and was shown the site at around 5.00 p.m. by his supervisor. That is when he met the Appellant who would be his workmate. He immersed himself in work until the Appellant asked him to let him out as he needed to buy some vegetables for his supper. PW2 let him leave and the Appellant returned in the company of two others who he said were his friends/brothers who had come for a short visit. The complainant let them in but he noticed that the Appellant had not procured the vegetables he had supposedly left to purchase. He continued performing his duties and could spy the Appellant and his friends walking around the property with their torches. Then a motor vehicle arrived and being unsure whether it was authorized entry he sought out the Appellant who informed him that the vehicle belonged to the proprietor of the property. Suddenly though, the Appellant and his friends attacked him and subdued him before tying him up against a pillar. They then let the motor vehicle in and he could hear it being loaded.

It cannot be gain said then that the identification the Appellant was by recognition which is more assuring and convincing. He closely associated with PW2 before it was dark. When he later arrived back in the yard after going to the shop, the two chatted before the Appellant told him that he had been accompanied by friends; the friends who turned robbers. He was not at all a stranger to PW2. It is factual that no identification parade was conducted. I emphasize that an identification parade is conducted for purposes of erasing doubt that the person that the victim saw during a robbery is the person who was arrested. In those instances, the robbery is committed in difficult conditions of identification. The present case presents a different scenario. The Appellant was well known to PW2 and so an identification parade would not have served any purpose. I therefore conclude that the Appellant was well identified as one of the robbers who attacked PW2 and align myself with the holding in **Anjononi & others v. Republic[1980] KLR 59** in which it was held that:

> **"This was, however a case of recognition, not identification, of the assailant; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."**

The Appellant also raised in his submissions the ground that crucial witnesses were not called. This was with regards to the informant who led to the arrest of the Appellant. There is no requirement under Section 143 of the Evidence Act that the prosecution should call a particular number of witnesses. What is paramount is whether the witnesses called are sufficient to prove the case for the prosecution. In the present case, the prosecution called the number of witnesses they thought would establish their case. I see no hidden agenda in not calling the police informant.

The Appellant further raised the issue that the prosecution did not prove that the Appellant was an employee of the complainant. As I noted earlier in this judgment, the person named as the complainant was the special custodian of the goods that were stolen. As testified by PW1, PW2 who was the special owner of the goods. He had temporarily come on duty to replace his brother who was a guard in the premises. He is the person who was attacked and from whom the goods he was guarding were robbed. Besides, the case at hand involves the offence of robbery with violence. It did not matter in what capacity the Appellant was in the yard. What was paramount and has been discharged was proof that the Appellant robbed PW2. Although both PW1 and 2 may not have named all the goods that were stolen, it was demonstrated that amongst the stolen goods were those named in the charge sheet. And PW1, the actual owner confirmed as much. I also hold and find that an inventory of the stolen goods was not necessary. It is trite that an inventory serves the purpose of ascertaining any recovered goods. In the instant case, no goods were recovered from the Appellant and what was stolen was demonstrated by PW1.

I now determine whether the elements of the offence of robbery with violence were proved beyond a reasonable doubt. The elements of the offence are set out under Section 296(2) of the Penal Code as follows;

> **"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."**

It is clear that the Appellant was accompanied by more than one person. One of the attackers was armed with a pistol. Actual violence was used against PW2 who sustained injuries to the wrist. Goods were stolen from the premises PW2 was guarding. A proof of any of these elements provided above is sufficient to establish the offence. I thus hold that the case was proved beyond a reasonable doubt.

In the end, I find that the appeal lacks merit. I dismiss it. I uphold both the conviction and sentence. It is so ordered.

**Dated and Delivered at Nairobi this 3rd day of November, 2016.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

***In the presence of;***

1. *M/s Seline Odembo for the Appellant.*
2. *Ms. Atina for the Respondent.*