REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 229 of 2013.

BETWEEN

JUSTINE MASOLO NYAKUNDI…..…………………APPELLANT.

AND

REPUBLIC ……………………...………………..RESPONDENT.

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera in Cr. Case No. 2662 of 2012 delivered by Hon. J. Wanjala ,CM on 6th November, 2013).

JUDGMENT.

BACKGROUND.

Justine Masolo Nyakundi, the Appellant herein was charged with the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code. The particulars of the charge were that on 29th May, 2012 at Kawangware 46 Area within Nairobi County, jointly with others not before court, while armed with an offensive weapon namely a knife robbed Clive Celewayo of cash Kshs. 35,000/- and a mobile phone make Nokia 2310 valued at Kshs. 2,500/- all valued at Kshs. 37,500 and immediately before the time of such robbery threatened to use actual violence against him.

The Appellant was arraigned in court and he pleaded not guilty to the charge. After the trial he was found guilty, convicted and sentenced to death. He was dissatisfied with both the conviction and sentence as a result of which he lodged this appeal. I duplicate his grounds of appeal as follows;

1. ***That the trial magistrate erred when he convicted the Appellant on a duplex charge.***

2. ***That the learned magistrate erred when he convicted the Appellant on evidence that was both contradictory and inconsistent.***

3. ***That the trial magistrate erred when he convicted the Appellant without noting that the investigations carried out in the case were shoddy.***

4. ***That the learned magistrate erred in rejecting the Appellant's alibi without giving a cogent reason as required under section 169(1) of the Criminal procedure code.***

SUBMISSIONS.

The Appellant relied on written submissions filed on 15th November, 2016. The Appellant submitted that the charge sheet as drawn was duplex as it was drawn both under Sections 295 and 296(2). He relied on the case of **Joseph Njuguna Mwaura & 2 others v. Republic[2013] eKLR** in support of this submission. He submitted that the entire prosecution case was propelled by malice and was based on fabrications. He submitted that this was clear from the fact that investigations carried out in the case were shoddy. He submitted that there was an attempt by the prosecution to sneak in a P3 form by the complainant onto the record when he had earlier testified that none was filled in his respect. He submitted that this was a clear indication of the fabricated nature of the evidence adduced in the matter. He further submitted that his alibi defence was not considered pursuant to Section 169(1) of the Criminal Procedure Code. He submitted that once he raised an alibi defence the onus to disprove it fell on the prosecution. Instead, the learned magistrate erred in shifting the onus of proving the same on him. He urged the court to allow the appeal, quash the conviction and set aside the sentence aside.

Learned State Counsel, Miss Atina for the Respondent conceded to the appeal on ground that the charge was bad for duplicity having been drawn under both Sections 295 and 296(2) of the Penal Code.

EVIDENCE.

It is now the onerous duty of this court to reevaluate the evidence and come up with its independent decision. **See Okeno v. Republic[1972] EA 32.**

The prosecution's case was that the complainant and his driver were driving towards the KBS bus depot when they encountered a traffic snarl up at the Congo stage. While stuck in the traffic three young men let themselves into the back of the minibus where the complainant was seated while another got to the front where the driver was. They intimated that they were heading to the depot as well. En route the man at the front tried to commandeer the vehicle but the driver fought him off and he bolted. Concurrently the three men at the back attacked the complainant and he was able to fight off two but held on to one, the Appellant. On arrival at the depot, the Appellant was handed over to the authorities and charged accordingly.

PW1, Clive Cetewayo Mutiso recalled that on 29th May, 2012 his minibus matatu, registration number KAX 590L, was undergoing repairs and the mechanic called him and informed him to pick it up on Jogoo road. At around 6.00 p.m. he called his driver, one Simon Macharia and they agreed to meet at the Agip petrol station at around 7.00 p.m. He got to the petrol station and met with the driver and mechanic. The driver took charge of the vehicle while he sat on the front passenger seat and they headed to the KBS depot. They decided to use Mbagathi Road and as they approached the Nyayo Stadium roundabout the vehicle stalled and he had to alight to push it. When the car got moving he got at the back and they proceeded to their destination. When they got to Kawangware, at the Congo stage, they encountered a traffic jam. That is when three men pushed the back door and got in. He was seated opposite the driver and one of this men sat behind the driver, the other at the conductor’s seat while the last one stood at the door. From his seat he noticed another person get into the front seat next to the driver.

The traffic receded and they started moving when one of the men asked him what the matatu was doing on its non-designated route. He informed him they were on their way to the bus depot. They engaged in a bit of small talk and when they reached route 46 bus terminus, he heard a struggle at the front where his driver was being asked to drive to the right instead of the left where the depot was. He stood up and the man who sat behind the driver and the one on the conductor's seat held his hands. Another pulled a knife from under his belt and asked him to hand over the money and also instructed the driver to follow their orders.

He came up to him and ripped off his trouser pocket and took the money he had, Kshs. 35,000/-, in an envelope. While this was happening he heard something shatter at the front followed by a scream. The car then started moving up the hill towards the depot. He noticed that the knife was pointed to the ground as the man who had ripped his pocket was trying to pick up a piece of paper. He took the chance to kick the man who fell out of the moving car. He then began fighting the two remaining assailants. He was trying to hold them in place but one escaped his grip but he held the other on the neck.

The driver drove them towards the depot. One of the men still in the matatu jumped out of the matatu but he held onto one until they were in the depot. The man he was holding on to was beaten up by a mob before being saved by the security guards and put into a room. The security guards called for back-up and they took him to the police station where they were asked to record statements after which they went home. He went back to the station the following day and he was requested to take his assailant to hospital. He too and the driver received treatment. He suffered a broken small finger in his right hand and soft tissue injuries. He submitted that he did not fill in a P3 form.

PW2, Simon Macharia, was the driver accompanying PW1 at the time of the robbery. He entirely corroborated the evidence of PW1. **PW3, Kennedy David Makeri,** was a security officer with Kenya Bus management. He too corroborated the evidence of PW1. He confirmed that the Appellant was taken to the depot after being arrested by PW1. He testified that he was escorted in PW1's matatu under the arrest of PW1 whilst PW2 drove the vehicle into the depot hooting to attract attention. He re-arrested the Appellant and with the help of other people took him to the police station.

PW4, No. 78463 Constable Daniel Nderitu, of Muthangari Police Station was the investigating officer. He summed up the evidence of all the witnesses. In addition, he issued the Appellant with a P3 Form as he had injuries. He testified that the Appellant too had some injuries sustained in a mob justice.

After the close of the prosecution case, the trial court ruled that a prima facie case had been established and put the Appellant on his defence. He gave an unsworn statement of defence. He stated that he lived in Waithaka and was in the business of selling clothes in Ngara. On the fateful evening he was on his way home and alighted to Kawangware where he bought some medication. While crossing the road a small vehicle had to apply emergency brakes after almost hitting him which infuriated the occupants who alighted and started beating him up. Members of the public enquired why they were beating him and they forced the people to take him to hospital since he was bleeding. He boarded the car but instead of being taken to hospital, he was taken to Muthangari Police Station. He knew why he was in the police station after taking plea.

DETERMINATION.

I have accordingly considered the evidence on record and the respective submissions. There are only two main issues for determination; whether the charge was bad for duplicity and whether the case was proved beyond a reasonable doubt.

On whether the charge was bad for duplicity, the Appellant submitted that this was occasioned by the fact that the charge sheet was drawn both under Section 295 and 296(2) of the Penal Code. This court agrees with the Appellant because both sections of the law provide for two distinct offences; of robbery and robbery with violence respectively. The Court of Appeal said as much in **Joseph Njuguna Mwaura v. Republic[2013] eKLR,** to wit:

> ***"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."***

The question however is whether the duplicity was fatal to the prosecution case. The test to be applied is whether the duplicity occasioned any injustice to the accused. The then Court of Appeal for East Africa in **Cherere s/o Gukuli v. Reginam[1955] EACA 478,** held that:

> **"[T]he test therefore 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.**
>
> **...**
>
> **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**

that to quash the conviction."

In **Laban Koti v. Republic[1962] EA 439** the test above was also applied by the Supreme Court of Kenya, to wit:

> **"This … suggests 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."**

In the present case, the Appellant pleaded to one offence, of robbery with violence. The particulars of the robbery were in consonance with the offence of robbery with violence. He set up a defence against the charge of robbery with violence. The evidence adduced by the prosecution sought to prove only one offence, of robbery with violence. Although it is trite that duplicity is a question relating to the count and not the underlying evidence it is clear that the case put forth by the prosecution was one of robbery with violence and the Appellant was clear as to the charge he faced. Both the charge and the evidence adduced did not represent any uncertainty as to the offence the Appellant was charged with. Thus, no injustice was occasioned by the duplicity in the charge. See **Omboga v. Republic[1983] KLR 340,** where it was held that:

> **"injustice will be occasioned where the evidence is called relating to many separate counts all contained in one count because the accused cannot possibly know what offence he is charged with.'**

Also on **Amos v. DPP[1988] RTR 198,** that:

> **"uncertainty in the mind of the accused is the vice at which the rule against duplicity is aimed."**

On proof of the case, the Appellant submitted that the evidence of PW4, the investigating officer was either contradictory or false. He submitted that the investigating officer testified that he was assigned the case on 31st May, 2012. He also testified that he took the Appellant to hospital on 30th May, 2012 a day before he took over the matter. This court finds that the issue of when the investigating officer came on record and about when the Appellant was taken to the hospital was clarified by PW1 who testified that they took the Appellant to hospital the day after the incident. It must be noted that whether the Appellant was taken to hospital or not is not a fundamental part of his trial or relevant to his conviction. Some small and few discrepancies are likely to be encountered in evidence. But the fundamental question is whether they tilt the strength of the case at hand. If they are inconsequential, the court can overlook them but give reasons for that. The burden of proof would still have to be discharged by the prosecution, beyond a reasonable doubt. See **Joseph Maina Mwangi v. Republic, Criminal Appeal No. 73 of 1993,** in which it was held that:

> **"In any trial there are bound to be discrepancies. An appellate court in considering these discrepancies must be guided by the wording of section 382 of the Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."**

The Appellant further submitted that his alibi defence was not considered. The Appellant's defence was a set of events that occurred on the day in question alluding to a frame up at the behest of the complainant. The trial magistrate contrasted parts of the defence with the prosecution evidence, particularly how the Appellant got injured. In his defence he stated that the complainant had attacked him causing the injuries while the prosecution case was that a mob had set upon him after his arrest. The magistrate found the evidence of the prosecution more plausible. I note also that the Appellant gave an unsworn statement which could not be tested by the prosecution by cross examination. Nevertheless, the same as I shall hereafter demonstrate did not offset the consistent and strong prosecution evidence.

With regards to identification of the Appellant, the same was direct. He was caught red handed by the complainant at the scene after a struggle and was throughout in his grasp until he was handed over to PW3. PW1 gave a candid narrative of what transpired when he and PW2 were attacked by a gang of four. They fought off the gang and in the process PW1 was able to apprehend the Appellant. This is a case where identification was not a mistake**.** The evidence of both PW1 and 2 was direct. The gang was armed with a knife which it used in subduing PW1. In the course of the robbery, PW1 was robbed of his money and a mobile phone. He was also injured in the process. It follows then that the elements of the offence of robbery with violence as set out under Section 296(2) of the Penal Code were proved. The Appellant's defence failed entirely to dislodge the strong prosecution case.

In the result, I find that the prosecution case was proved beyond a reasonable doubt. The conviction of the Appellant was proper. I accordingly dismiss the appeal in its entirety. It is so ordered.

Dated and Delivered at Nairobi this 7th day of December, 2016.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of;

1. Appellant in person.

2. M/s Atina for the Respondent.