REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

(CORAM: KIMONDO & NGENYE-MACHARIA JJ)

CRIMINAL APPEAL NO. 45 OF 2010

VICTOR HOSEA MASAI……..……..APPELLANT

VERSUS

REPUBLIC…….……..……....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 5388 of 2009 Republic vs Victor Hosea Masai in the Senior Resident Magistrate's Court at Eldoret by D. K. Kemei, Senior Resident Magistrate dated 26th March 2010)

JUDGMENT

1. The appellant was convicted on one count of robbery with violence contrary to section 296 (2) of the Penal Code. He was sentenced to death. The appellant has appealed against the conviction and sentence.
2. The particulars of the charge were as follows-

   "On the night of 29th August 2009 at Kapsoya Gardens, Eldoret Town in Uasin-Gishu District within the Rift Valley Province, jointly with others not before court, while armed with pangas and rungus, robbed Rohit Keshauji Shah of cash Kshs. 20,000/- and two mobile phones make Nokia valued at Kshs. 16,000/- all valued at Kshs. 36,000/- and at or immediately before the time of such robbery threatened to use actual violence to the said Rohit Keshauji Shah".

3. The primary grounds in the appeal can be condensed into four. First, that the trial Magistrate failed to consider that none of the witnesses gave sufficient evidence to link the appellant to the crime; secondly, that no medical expert was called or any P3 form to prove the alleged injuries by the complainant; thirdly, that the exhibits produced at the trial were recovered in a dubious manner. On that point, the appellant's position is that the exhibits were planted on him after he was booked for the offence. Fourthly, that the trial court failed to consider the appellant's *alibi*. In his written submissions, the appellant also contends that there was variance between the charge sheet and the particulars. In a nutshell, the appellant's case is that the charge was not proved beyond reasonable doubt.
4. The State contests the appeal. The position of the state is that all the key ingredients of the offence were proved beyond reasonable doubt. In particular, the appellant was discovered hiding under the bed in the complainant's house by security guards from KK Security Company who were called to the scene. The evidence of PW1 was corroborated by PW2 and PW3. It was not fatal to fail to call to the stand the security guards from KK Security Company. The learned State counsel submitted there was no defect in the charge sheet; and, that even assuming there was a flaw, it amounted to a

procedural slip curable by section 382 of the Criminal Procedure Code.

5. This is a first appeal to the High Court. We are required to re-evaluate all the evidence on record and to draw our own conclusions. In doing so, we have been careful because we have neither seen nor heard the witnesses. See *Pandya v Republic* [1957] E.A 336, *Ruwalla v Republic* [1957] E.A 570, *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190.
6. PW1 Rohit Keshauji Khah was the complainant. On the material night, the complainant and his family were asleep. At about 2.00am, some robbers cut the windows grilles in the sitting room and gained access into the house. They used a metal cutter (exhibit 2). They left three pairs of shoes below the window where they had climbed into the sitting room (exhibits 1A, B and C). He called his brother who alerted KK Security guards. In the meantime, the robbery took place. The accused was flushed out hiding under the complainant's bed without his shoes.
7. We think it is important to set out PW1's evidence verbatim-

"On the night of 29th August, 2009 at 2.00am I was at my residence at Kapsoya sleeping with my family when I heard noise. I woke up and saw some spot lights. I called my brother Rajesh Shah and alerted him that thugs were inside our compound. I saw two thugs. My brother called KK Security guards. The thugs stormed into the bedroom. They were with clubs and pangas. They wore jackets. They had torches. They ordered us to surrender money. I opened a drawer and gave them 10,000/- they also took another similar sum from my brother. There were electricity lights. The thugs took my mobile make Nokia. The thugs then ordered us to enter my father-in-law's bedroom where they threatened to kill us if we raised alarm. There they took a sum of Shs. 7000. [The] thugs locked us in that bedroom and left. KK security guards arrived. I sensed one of the thugs was still around and we searched and found him under my bed in my bedroom. Police were called and they came and took him away. That suspect is the accused herein. He was one of the thugs who had earlier terrorized us and robbed us of our property. He is the one who took my ten thousand shillings and Nokia mobile phone. The thugs did not injure me and my family but they threatened to kill us if we did not co-operate."

8. That evidence was confirmed in all material aspects by PW2, the complainant's wife. PW3, the investigating officer was alerted of the robbery by KK Security guards. He rushed to the scene. He found the appellant tied with some ropes by the guards. The appellant was bare foot. He took the appellant to the police station. PW3 carried the metal cutter, the shoes and sisal rope and produced them as exhibits at the trial.
9. We have then considered the sworn evidence proffered by the appellant at his trial. He stated as follows-

"I am a resident of Huruma Estate in Eldoret and sell second hand clothes. I do recall on 29/8/2009 I left town at 10pm in company of a friend. As we reached Telecom we met a group of four people who attacked us. I got hit on the head and robbed of a mobile phone. I was kicked in the ribs. Suddenly a vehicle belonging to KK Security appeared at the scene and claimed we were thugs. They demanded for money and my friend coughed out [sic] some money but I did not have. The thugs managed to disappear. My friend was whipped and ordered to leave while I was ordered to board their vehicle which took me to Juma Hajee building where I was detained. Later in the night a radio call came and reported that some people had been robbed in Kapsoya area. I was ordered into the vehicle and the security guards again demanded that I give them five hundred shillings but I did not have. They tied my hand and called the police and told them that they had picked me up from Kapsoya loitering. The police took me to the cells. Later P.C. Gichuki demanded to know the whereabouts of my alleged accomplices. The following day I was taken to Huruma Estate and searched [sic] my house and also interrogated my friend who was also picked up. However my friend was later released by the police. The police interrogated me and ordered me to disclose where I had spent the evening enjoying myself. They ordered me to take them there which I did. We went to Murenchu bar within Eldoret town and the waiters and the manager confirmed seeing me and my friends the previous night."

10. The learned trial Magistrate did not believe the appellant's version of events or that he was framed

up. We agree. Upon re-evaluating the evidence, we have reached the conclusion that the appellant was caught red handed. The evidence of PW1 was corroborated by PW2 and PW3. The appellant was one of the robbers who robbed the complainant. He was identified clearly by PW1 and PW2. There was electricity lighting in the house. The appellant was apprehended at the scene hiding under the complainant's bed and bare footed. Three pairs of shoes were found below the window where the robbers had gained access by cutting the metal grilles. The metal cutter was recovered and tendered in evidence. We disagree with the appellant's submissions that the evidence was doubtful; or, that the exhibits were planted on him by the police or KK Security guards.

11. The key ingredients for a robbery with violence charge are found in section 296(2) of the Penal Code. It provides 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".

12. In this case the appellant was in the company of other persons. They threatened to kill the complainant or his wife. They had clubs and pangas. They robbed the complainant of money and mobile phones particularized in the charge sheet. We thus find that at, during or immediately after the robbery, the appellant and his accomplices threatened to use violence against the complainants. The appellant was positively identified and arrested at the *locus in quo*. All the ingredients of robbery with violence were thus present. When juxtaposed against the clear evidence of the prosecution, the defence of the appellant was feeble and unbelievable.
13. The appellant contends that the trial court did not consider his defence of an *alibi*. When *alibi* evidence is proffered, the prosecution is obligated to investigate it. The appellant had not given any notice that he would raise it. It was being set up well after the close of the prosecution's case. It was thus open to the trial court to weigh it against the evidence already tendered. See *Wang'ombe v Republic* [1976-80] KLR 1683. We have found that he learned trial Magistrate considered the *alibi* and reached a proper finding that it was a red herring. He found as follows-

"I am not convinced by the accused's assertion that he was arrested elsewhere in town and driven to the complainant's house to be made [sic] one of the robbers who had robbed the complainant of cash and other property"

14. We agree with the appellant that valuable evidence of the watchman (who was alleged to have been tied up and injured in the attack) and the security guards from KK Security was not presented at the trial. Since the watchman was not called to the stand, the argument by the appellant that the P3 form was not produced is neither here nor there. PW1 and PW2 were unhurt in the robbery. Like we have stated, the appellant was caught red handed hiding under the bed of the complainant. He was arrested by the investigating officer (PW3) at the scene. He was in the company of other persons. During the robbery, the appellant or his accomplices threatened to kill the complainants. The robbers had clubs and pangas. The appellant was clearly identified by PW1. There was electric light. The key ingredients of the offence were thus well established by the evidence of PW1, PW2 and PW3. That evidence was not shaken by cross examination or discounted by the defence put forth by the appellant.
15. We also remain alive that under section 143 of the Evidence Act, no particular number of witnesses is necessary to establish a fact. See *Joseph Njuguna Mwaura and others v Republic* Court of Appeal Criminal appeal 5 of 2008 [2013] eKLR, *Bernard Kiprotich Kamama v Republic*, High Court, Eldoret, Criminal Appeal 123 of 2010 [2013] eKLR. The appellant did not convince us that a witness who could have given exculpating evidence was left out.
16. There was no material variance between the charge sheet and particulars. True, the charge sheet put the value of the stolen items at Kshs. 36,000. PW1 said in evidence that the value of the two phones was Kshs. 10,000 and Kshs.15,000 each; and the total cash stolen was Kshs. 27,000. That would make the total value Kshs 52,000. In cross examination, PW2, the wife of the complainant put the values at Kshs 42,000. We think those are not material variations. There was no doubt that two mobile phones and some cash were stolen from the complainants. The variations of the values

between the charge sheet and the evidence did not invalidate the charge or cause any prejudice to the appellant. It is a slip that is curable by section 382 of the Criminal Procedure Code.

17. In *Joseph Maina Mwangi vs. Republic* Criminal Appeal No. 73 of 1993**,** the Court of Appeal held:-

"*In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of 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 sentences."*

18. In the end we have reached the conclusion that all the ingredients of the offence of robbery with violence were proved beyond reasonable doubt. The mandatory sentence is death. There is no discretion. See *Joseph Njuguna Mwaura and others v Republic* Nairobi, Court of Appeal, Criminal Appeal 5 of 2008 [2013] eKLR.
19. The upshot is that the entire appeal lacks merit. It is hereby dismissed.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 2nd day of October 2014

GEORGE KANYI KIMONDO **G.W. NGENYE-MACHARIA**

JUDGE **JUDGE**

Judgment read in open court in the presence of-

The appellant.

Ms. B. A. Oduor for the State.

Mr. Kemboi, Court clerk.