**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, JJ.A)**

**CRIMINAL APPEAL NO 36 OF 2016**

**BETWEEN**

**PHILEMON KIPKOSGEI KIMAIYO .....APPELLANT**

**AND**

**REPUBLIC...............................................RESPONDENT**

(An appeal from the judgment and order of the High Court of Kenya at Eldoret, (Kimondo & Ngenye-Macharia, JJ) dated 2nd October 2014 in H.C.Cr. A No 218 of 2011)

****************

**JUDGMENT OF THE COURT**

**Background**

**[1] Philemon Kipkosgei Kimaiyo**, (the appellant) was charged and convicted by the Chief Magistrate's Court at Eldoret with the offence of robbery with violence contrary to section 296(2) of the Penal Code, Chapter 63 of the Laws of Kenya.

[2] The particulars of the offence were that on the 23rd day of November, 2010 at Komamu Village in Keiyo South District within the Rift Valley Province while armed with offensive weapon namely a stone he robbed **Joseph Cherotich *(Joseph)*** of Kshs. 11,500/- and immediately before the time of such robbery used actual violence to the said Joseph Cherotich.

[3] The evidence led in support of this charge was that on 23rd November 2010, **Joseph** who is the complainant was at the Kabyemit Centre collecting revenue as part of his duties as a revenue clerk at the Keiyo County Council. While on his way to a different location, **Joseph** took a short cut through Nyaru. He then met the appellant and another man, who offered to show **Joseph** the way to his destination. As they were walking their way there, the appellant hit **Joseph** on the head with a stone; then grabbed Joseph's jacket which contained Kshs 12,500.00 in cash and ran away with the jacket.

**[4] Joseph** boarded a vehicle and went to the hospital and thereafter reported the incident to Police Constable **Samuel Waithangu (PC Waithangu)** of the Chepkorio Police Post. **Joseph** indicated that he knew who had attacked him. Based on this, a search for the appellant was commenced which culminated in his arrest in December 2010. **Joseph** was treated by **Michael Kipkoech (Michael)** a clinical officer based at the Chepkorio Water Centre. **Michael's** examination revealed that **Joseph** had been attacked by a blunt weapon – his face was swollen and was painful, and he had pain in the back of the neck. The degree of injury was classified as harm.

[5] When placed on his defence, the appellant denied the charge made against him. He claimed that on 23rd November 2010, he went to chop trees and thereafter went to a drinking place where he found **Joseph**; that he left **Joseph** at the drinking place, and that he was subsequently arrested and charged with violently robbing **Joseph**.

[6] After reviewing the evidence, the trial court found that the prosecution witnesses were consistent and that the evidence adduced proved beyond reasonable doubt that the appellant violently robbed **Joseph**. The appellant was therefore convicted of the offence as charged and sentenced to suffer death as provided in the Penal Code.

[7] The appellant was aggrieved by his conviction and sentence, and he filed a first appeal to the High Court. In that appeal, he alleged that: the trial court erred in relying on uncorroborated evidence of a single intoxicated witness; that the charge was duplex as it was based on section 295 and 296(2) of the Penal Code; that the ingredients of the offence of robbery with violence were not proved to the required standard; that the investigations were not properly conducted; and that the trial court contravened section 169(1) of the Criminal Procedure

Code by failing to consider his defence.

[8] After re-evaluation of the evidence tendered before the trial court, the first appellate court found that even though the charge was based on both section 295 and 296(2) of the Penal Code, there was no prejudice suffered by the appellant; that the evidence adduced by the four (4) prosecution witnesses was sufficient to establish that the appellant committed the offence of robbery with violence.

[9] Undeterred, the appellant appealed to this Court in this second appeal, urging us to set aside his conviction and sentence. In his grounds of appeal and the supplementary grounds of appeal, he has urged that the first appellate court erred in law by: upholding his conviction and failing to consider that the ingredients of robbery with violence were not proved as he was the only one arrested and charged; failing to note that the charge against him was duplex; failing to consider that the language used at the trial by the witnesses was not recorded in the court proceedings; failing to consider that the particulars of the charge and the evidence tendered by prosecution witnesses were at variance; and further failing to find that the charge sheet was defective as although the evidence indicates that the appellant was in the company of another person, the drafter of the charge failed to use the words *"jointly with another not before the court"* contrary to section 134 of the Criminal Procedure Code.

[10] These grounds of appeal were expounded on by the appellant in his written submissions which were argued on his behalf by learned counsel, **Ms Kipyego.** Counsel submitted that the ingredients for the offence of robbery with violence were not proved, as although it was alleged that the appellant was in the company of another person, he was charged alone; that the evidence against the appellant did not disclose the offence, or prove that he was the person who committed the offence; and that the identification of the appellant was based on the testimony of a single identifying witness. Counsel also faulted the two lower courts for failing to analyse the circumstances of the appellant's arrest. She maintained that the evidence adduced was contradictory as Joseph gave no description of the person who attacked him, while the investigating officer testified that they arrested the appellant on the basis of identification by a witness.

[11] In addition, counsel for the appellant submitted that the evidence adduced by the prosecution was insufficient as the weapon that was allegedly used to attack Joseph, said to be a stone, was not produced in evidence; that the evidence that was produced by the clinical officer contradicted the evidence adduced by Joseph; that Joseph testified that he was attacked at 10:00am and hit on the head and the face; and that this was inconsistent with the P3 form which indicated that he had been hit at the back of the head at 3:00pm.

[12] Counsel submitted further that the appellant's trial was conducted in violation of his constitutional rights; that while the appellant had indicated that he understood Kiswahili, the trial court did not record the language that was used during the trial. For these reasons, counsel urged us to allow the appeal, quash the conviction and set aside the sentence meted on the appellant.

**[13] Ms Oduor,** the Principal Prosecution Counsel, who appeared for the State opposed the appeal submitting that the evidence led by the prosecution was credible, consistent and well corroborated, and linked the appellant to the offence; that all the ingredients of the offence of robbery with violence were proved; that the appellant was positively recognized since the circumstances for recognition were favourable; that the appellant was known to Joseph and the incident took place at 10:00 am in the morning when there was enough light and Joseph had ample time and opportunity to identify the appellant.

**[14] Ms Oduor** further submitted that the investigations conducted established that the appellant and Joseph knew each other; and that the appellant committed the offence and then fled the village, and was subsequently arrested one month later. On the issue of language, learned counsel contended that it was apparent that the appellant understood the language of the court; that he did not raise the issue at the trial court that he did not understand the proceedings, and it was evident that he participated in his trial as he cross-examined the witnesses in person which was an indication that he understood the language that the court used; that when he was placed on his defence, the court explained the provisions of section 211 of the Criminal Procedure Code to him, and that this was translated from English to Kiswahili; that he opted to give sworn evidence, and his defence was properly considered by both the trial court and the first appellate court. Counsel urged us to find that the grounds of appeal had no merit, and dismiss this appeal.

**Determination**

[15] This is a second appeal. Our mandate is confined to consideration of matters of law only. In ***Dzombo Mataza v Republic*** ***[2014] eKLR (Criminal Appeal No. 22 of 2013)*** this duty was spelt out by this Court in the following terms:

> **"As already stated, this is but a second appeal. Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court …. By dint of the provisions of section 361(1)(a) of the Criminal Procedure Code our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong."**

[16] The first issue of law for consideration is whether the charge was duplex. In the charge sheet, the statement of the charge against the appellant was that he committed robbery with violence *"contrary to section 295 and 296(2) of the Penal Code"*. According to the appellant, the trial court erred by convicting him on this charge as it was duplex. Section 295 of the Penal Code defines the offence of robbery as follows:

> **295. 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.**

[17] On the other hand, section 296(2) of the Penal Code provides for the offence of robbery with violence. It provides that:

> **(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.**

[18] From the provisions of law quoted above, it is clear that section 295 creates the offence of simple robbery, the punishment for which is outlined in section 296(1). However, section 296(2) provides for a different offence, that of aggravated robbery, by providing that where during the commission of a robbery the offender is armed, is in the company of another person, and either uses or threatens to use violence, then the punishment is death.

[19] In **Paul Katana Njuguna v Republic** ***[2016] eKLR (Criminal Appeal No 37 of 2015)*** this Court was faced with similar issues, and considered a line of authorities on duplicity of charges and held that:

> **Having considered the law on duplicity as it has evolved, can we say that the charge as framed in the appeal before us was so defective as to have occasioned a failure of justice? Can it be said with any certainty that the said defect is incurable under Section 382 of the Penal Code. We observe that the offence under Section 295 and 296 (2) were not framed in the alternative. So, following the decisions in Cherere s/o Gakuli -v- R(supra) Laban Koti -v- R. (supra) and Dickson Muchino Mahero v R. (supra), the defect in the charge herein is not necessarily fatal. (Emphasis added)**

[20] We agree with this holding. It is important to consider whether or not any prejudice was suffered by the appellant, whether he understood the charge against him in order to properly mount a defence and overall, whether there was a failure of justice that was occasioned. This Court in ***Paul Katana Njuguna v Republic (supra)*** stated as follows:

> **"40. In the matter before us, we are unable to detect any prejudice which the appellant suffered. The record shows that the appellant suffered no confusion when the charge, as framed, was read to him and when the witnesses testified, he fully cross-examined them. He raised no complaint before both the trial court and before the High Court. So, while it would be undesirable to charge an accused person under both sections in the alternative, it would not be prejudicial to that accused person if the offences are not framed in the alternative. As we have already noted the rule against duplicity is to enable an accused know the case has to meet. We accept as the correct position in law that uncertainty in the mind of the accused is the vice at which the rule against duplicity is aimed. If there is no risk of confusion in the mind of the accused as to the charge framed and evidence presented, a charge which may be duplex will not be found to be fatally defective.**

[21] Our consideration of the charge as well as the evidence leads us to conclude that Joseph did not suffer any prejudice. He fully understood the case that was against him, and we note from the record that he fully participated in the trial. As a result, the duplicity of the charge was not fatal and as such, this ground of appeal fails.

[22] We turn to consider whether or not the charge was defective for not including the words "jointly with another not before the court" and therefore was contrary to section 134 of the Criminal Procedure Code. This section provides that:

> **"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."**

[23] The evidence that was led before the court was that Joseph while in the company of another person, attacked the complainant by hitting him with a stone and then robbed him. The particulars of the charge contained sufficient information on the offence that he was charged with, and fully complied with section 134 of the Criminal Procedure Code. These facts sufficiently prove that the appellant committed the offence for which he was charged with as the ingredients of the offence of robbery with violence were present. In ***Johana Ndungu v Republic [1996] eKLR (Criminal Appeal No 116 of 1995)*** where the Court held with respect to section 296(2) of the Penal Code 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 s.295 of the Penal Code. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property 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 s.296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:**
>
> > **i. If the offender is armed with any dangerous or offensive weapon or instrument, or**
> >
> > **ii. If he is in company with one or more other person or persons, or**
> >
> > **ii. 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."**

[24] In the instant appeal, it is clear that the appellant committed the offence of robbery, he was in the company of another person and at the time of the robbery he struck the complainant with a stone. The ingredients of the offence of robbery with violence were therefore present. As such, the claim that the offence of robbery with violence was not proved to the required standard is without merit.

[25] The appellant claimed that his constitutional rights were violated as the trial court did not indicate what language it used during the trial. It is trite that where an accused person or appellant does not understand the proceedings in a trial against him or appeal on account of the language that is used, particularly where he is representing himself as was the case here, a violation of his rights to a fair trial may in the circumstances of the case be found to have occurred. However, as the Court in ***George Mbugua Thiongo v Republic*** ***[2013] eKLR***

***(Criminal Appeal No 302 of 2007)*** stated:

> **"For the court to nullify proceedings on account of lack of language used during the trial, it should be clear from the record that the accused did not at all understand what went on during his trial."**

[26] A careful consideration of the record of appeal shows that when the appellant was first presented to court to plead to the charge, there was interpretation of English to Kiswahili. In the course of the trial, the court did not indicate what language was used. What is evident however is that the appellant fully participated in the trial. He cross-examined all the witnesses and when he was placed on his defence, he gave a sworn statement. We agree with counsel for the State that this challenge on his conviction is merely an afterthought.

[27] On the issue whether or not the particulars of the charge were at variance with the evidence rendered by the prosecution witnesses, the appellant faulted his identification by Joseph and the circumstances of his arrest. However, Joseph testified that he knew the appellant and therefore this was identification by recognition.

[28] We are satisfied that the recognition of the appellant by Joseph was sound as his account was corroborated by the evidence of **Christopher Kipkoech (Christopher)** who testified that he was with Joseph when the appellant and another person offered to show Joseph a shortcut to his destination and he left Joseph with the appellant and his companion; that after one hour Joseph informed him **(Christopher)** that the appellant had attacked him; and that he had seen the appellant before the incident but did not know his name. Similarly, we find no fault with the circumstances of the appellant's arrest as it is clear from the evidence that the complainant informed the investigating officer that it was the appellant who had robbed him.

[29] As regards the sentence, the appellant was given an opportunity to mitigate and all he said was that he has a family which relies on him. The trial court considered the mitigation but stated that the prescribed sentence for the offence of robbery with violence was the death sentence. In the recent Supreme Court decision in Francis Karioko Muruatetu & Another vs Republic [2017] eK

[30] LR, Petition No. 15 of 2015, declared the mandatory nature of the death sentence provided under section 204 of the Penal Code as unconstitutional.

The Supreme Court stated as follows:

> **"[48] Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust, and unfair. The mandatory nature deprives the courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has nonetheless to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Article 25 of the Constitution; an absolute right."**

[31] Section 204 of the Penal Code is similar to section 296(2) of the Penal Code that provides a mandatory death sentence. Accordingly, the arguments in the Muruatetu decision can be extended to cases of robbery with violence under section 296(2) of the Penal Code. In **William Okungu Kittiny vs Republic,** Civil Appeal No. 56 of 2013 (unreported), where applying the Muruatetu decision, this Court held as follows:

> **"…the findings and holding of the Supreme Court particularly in paragraph 69 applies mutatis mutandis to section 296(2) and 297 (2) of the Penal Code. Thus, the sentence of death under section 296(2) and 297(2) of the Penal Code is a discretionary maximum punishment. To the extent that section 296 (2) and 297(2) of the Penal Code provides for mandatory death sentence the sections are inconsistent with the Constitution."**

**[32]** For this reason we find it appropriate to interfere with the death sentence imposed on the appellant by the 1st appellate court. Given the circumstances of the offence and the mitigation offered by the appellant, a sentence of fifteen (15) years imprisonment would be appropriate.

**[33]** The upshot is that we dismiss the appellant's appeal against conviction but allow his appeal against the sentence. Accordingly, we set aside the death sentence imposed upon him and substitute thereto a sentence of 15 years imprisonment to take effect from 3rd November, 2011 when the appellant was sentenced.

**Dated and delivered at Eldoret this 6th day of June, 2019.**

**E. M. GITHINJI**

**………….……………….**

**JUDGE OF APPEAL**

**HANNAH OKWENGU**

**…………………………….**

**JUDGE OF APPEAL**

**J. MOHAMMED**

**…………………………………………..**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR.**