IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, OKWENGU & WARSAME, JJ.A)

CRIMINAL APPEAL NO. 112 OF 2017

BETWEEN

JUSTINE MASOLO NYAKUNDI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi

(G.W. Ngenye-Macharia, J.) dated 7th *December, 2016*

in

HC. CR.A. NO. 229 OF 2013)

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JUDGMENT OF THE COURT

1. The appellant Justine Masolo Nyakundi was tried and convicted by the Chief Magistrate's Court at Kibera for the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code**. He was sentenced to life imprisonment. Being dissatisfied with the judgment he appealed to the High Court against his conviction. Upon hearing the appeal, the learned judge of the High Court found that the prosecution case was proved and the appellant's conviction and sentence was proper. She therefore dismissed the appeal.

2. The appellant is now before us in this second appeal. In the grounds of the appeal that the appellant filed in person, the appellant has raised five grounds in which he contends that his right to fair trial under Articles 25(c) and 50(2)(a) of the Constitution was violated. He also faults the learned judge: in upholding the decision of the lower court; in failing to find that the prosecution case was not proved to the required standard; in failing to find that the charge was defective and contravened section 214 of the Penal Code; in convicting the appellant on a duplex charge; and in shifting the burden of proof to the appellant.

3. During the hearing of the appeal the appellant who was represented by counsel filed written submissions and amended grounds of appeal. In the amended grounds the appellant contended that the learned judge of the High Court erred in failing to find that the charge sheet was defective, as it did not disclose any particulars of a dangerous weapon. The appellant also blamed the learned judge for failing to comply with Article 50(2) of the Constitution; failing to find that the elements of the offence of robbery with violence were not established; failing to resolve the apparent contradictions in the prosecution case in favour of the appellant; and failing to find that essential witnesses were not called to testify thereby leaving a *lacuna* in the prosecution case.

4. In the written submissions the appellant collapsed his grounds of appeal into two main grounds, that is, violation of his right to fair trial under the Constitution; and the failure by the prosecution to prove the case against him to the required standards. The appellant faulted the two lower courts for failing to find: that the elements of the offence of robbery with violence were not proved; that the charge against the appellant was defective; that section 163 of the Evidence Act was breached; that there was inconsistencies in the prosecution evidence; and that crucial witnesses were not called.

5. The appellant cited the case of ***David Odhiambo & Anor vs. Republic [2005] eKLR,*** where the case of ***Johanna Ndungu vs. Republic*** Criminal Appeal No. 116 of 1995 (unreported) was relied upon in regard to the elements of the charge of robbery with violence that must be established. It was submitted that where it was alleged that an accused person was armed, the particulars must indicate that the instrument or

weapon with which the person was armed was a dangerous or offensive weapon. It was argued that although the appellant was said to have had a pen knife, a knife was not inherently dangerous or offensive and the particulars of the charge ought to have stated the purpose for which the knife was used such as to make it dangerous or offensive.

6. In addition the appellant complained that the charge against him which read: **"Robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code,**" was defective as it amounted to the appellant being charged with an offence of robbery under section 295 of the Penal Code, and the offence of robbery with violence under section 296(2) of the Penal Code. The appellant pointed out that there was variance between the charge sheet and the evidence that was adduced. For instance, the charge sheet alleged that the appellant stole a Nokia phone while in the evidence it was stated that the phone was a Samsung make.

7. Further the appellant submitted that there was duplicity in the charge such that it was not clear what the appellant was convicted of, and this contravened the appellant's right to a fair trial. The evidence in regard to the appellant's alleged possession of a pen knife was castigated as contradictory, and the credibility of the complainant and the police officer who arrested the appellant was dismissed as doubtful. It was pointed out that crucial evidence was not adduced. For example, a phone that the appellant was alleged to be using was not produced in evidence, nor was any member of the Group 45 Security crew who took the appellant to Muthangari police station, called to testify.

8. The appellant submitted that there was no evidence of any common intention between him and any other person in regard to the commission of the alleged robbery; and that the two lower courts failed to comply with the provisions of section 169 (1) & (2) of the Criminal Procedure Code as they did not identify the law relating to the issues before them nor did they give reasons for convicting the appellant or upholding the conviction. Finally, without prejudice to the submissions he had already made, the appellant urged the Court, to consider the Supreme Court decision in ***Francis Karioko Muruatetu & Another vs. Republic***.

9. Ms. Matiru Senior Principal Prosecuting Counsel urged the court to uphold the appellant's conviction. She pointed out that there was no injustice that was occasioned to the appellant by the Charge as framed. This was because the appellant was very clear on the Charge that he was facing. Counsel submitted that the appellant was identified in broad daylight and that the prosecution evidence was well corroborated; that under section 143 of the Evidence Act no particular number of witnesses is necessary to prove a Charge.

10. As already stated the charge against the appellant was stated as: "Robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code. The learned judge in considering whether the charge was defective rendered herself as follows:

> **"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:**
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> "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."
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> **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:**
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> "[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.
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> ..."

11. It is evident from the above extract that the learned judge properly directed herself on the law. Moreover, section 295 of the Penal Code states as follows:

> **"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."**

12. Section 296(2) of the Penal Code states:

> **"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."**

13. Thus section 295 defines "Robbery" and gives the ingredients of the offence of simple robbery, while in section 296(2) the offence of simple robbery is graduated to the more serious offence of "Robbery with violence," where there are aggravating circumstances. The aggravating circumstances are provided in that provision as any one or more of the following: either the offender is armed with any dangerous or offensive weapon; or the offender is in company with one or more other person or persons; or the offender at or immediately before or after the robbery, wounds, beats, strikes or uses any other personal violence to any person.

14. There is no doubt that the charge against the appellant was not elegantly drafted. Nevertheless, the particulars of the charge stated clearly that:

> **"JUSTICE MASOLO NYAKUNDI: on the 29*th* May 2012 at Kawagware 46 area within Nairobi country, jointly with others not before court while armed with offensive weapon namely, knife, robbed Clive Cetewayo cash Kshs. 35,000 and mobile phone make nokia 2310 valued at Kshs. 2,500 or valued at Kshs, 37,500 and immediately before such time of robbery threatened to use actual violence to the said Clive Cetewayo."**

15. Therefore, although the statement of the charge as framed made reference to two distinct offences and could be considered bad for duplicity, it was clear from the statement of the charge read together with the particulars, that the appellant was charged with the aggravated offence of robbery with violence as the particulars alleged fitted within **section 296(2)** of the **Penal Code**. The appellant was not in any way prejudiced nor did the defect occasion any failure of justice. The defect can therefore be cured under section 382 of the Criminal Procedure Code.

16. We are therefore in entire agreement with the learned Judge who properly addressed the issue as follows:

> **"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."**

17. As regards the evidence the complainant Clive Cetewayo (also referred to in the proceedings as Clive Chetewso Mutiso) testified and explained how the appellant and three others jumped into his matatu posing as "makangas" or "rodi" people (people who work in matatus). At that time Clive had just collected the matatu from the garage and was on his way to the KBS depot. Apart from Clive there was only the driver of the matatu in the vehicle. Shortly after the four men entered the vehicle, one attempted to take control of the motor vehicle by instructing the driver to take a different road from the road leading to the depot. When Clive stood up to protest, he was held by two of the men whilst a third one threatened him with a knife and ordered him to hand over his money. The man ripped Clive's trouser pocket and stole Kshs 35,000/- from him. At some stage Clive noticed that the man with the knife had dropped his guard and was trying to pick up a piece of paper. He kicked the man and he fell out of the moving vehicle. Clive continued struggling with the remaining two men. One managed to escape but he held on to the last one until they got into the KBS depot. This last person was the appellant who was subjected to mob justice until he was rescued by security guards who took him to Muthangari police station. As a result of the struggle Clive suffered a broken small finger and soft tissue injuries.

18. It is clear that the issue of mistaken identification cannot arise. Both the two lower courts believed and accepted the evidence of Clive who was positive that the appellant was one of his assailants, as he held on to him until they arrived at the depot. Although there were minor inconsistencies that the appellant attempted to capitalize on, such as the issue of the knife and the issue of the make of the phone which the appellant was alleged to have stolen, these inconsistencies were inconsequential.

19. The learned judge addressed the inconsistencies and properly concluded as follows:

> **"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:**
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> "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."

20. Clive was clear in his evidence that the appellant was one of the three people who attacked him and robbed him of his money and a mobile phone. It is also evident that one of the robbers had a knife which he put to dangerous use, and that Clive was injured during the robbery. These facts were sufficient to establish the charge of robbery with violence under section 296(2) of the Penal Code, and the inconsistent facts such as the make of the phone, and how the knife was held were not germane to the charge. The learned judge was right in finding the charge proved, rejecting the appellant's defence, and upholding the appellant's conviction.

21. As regards the sentence, the trial magistrate in exercising her discretion, noted that the offence was a serious and prevalent offence and sentenced the appellant to life imprisonment. The learned judge of the High Court misapprehended the sentence imposed as one of death. However, in her judgment she did not address the issue of sentence.

22. The appellant has drawn the attention of this Court to the Supreme Court decision of Francis ***Karioko Muruatetu & Anor vs. Republic [2017] eKLR***. We appreciate that in that decision the Supreme Court deplored the mandatory nature of the death sentence and underscored the importance of the trial court exercising its discretion in sentencing, taking into account the circumstances of the particular case. That was precisely the position adopted by the trial magistrate who ignored the death sentence provided under **section 296(2)** of the **Penal Code** and imposed a sentence of life imprisonment on the appellant. In the circumstances and taking into consideration, the mitigation on record we do not find any justification for interfering with the sentence imposed on the appellant.

23. For the above reasons we find no merit in this appeal. It is accordingly dismissed in its entirety.

Dated and Delivered at Nairobi this 27th day of September, 2019. P. N. WAKI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR