IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CRIMINAL APPEAL NO. 12 OF 2017

BETWEEN

MBONIKA PAUL.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Malindi

(Chitembwe, J.) dated 30th May, 2016

in

***H.C.CR.A No. 54 of 2014.*)**

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JUDGMENT OF THE COURT

1. Mbonika Paul, (the appellant) was arraigned before the Malindi Chief Magistrate's Court on 9th December, 2013 to answer a charge of robbery with violence contrary to Section 296 (2) as read with Section 295 of the Penal Code. The particulars of the charge stated that on 7th December, 2012 at Casuarina area of Malindi Town, jointly with another not before court, while armed with rungus, they robbed Elkana Omondi (the complainant) of his motorcycle registration No. KMCT 334R valued at Kshs.95,000 and used violence on him at the time of the robbery.

2. He denied the charge and the matter went to hearing with the prosecution concluding its case after calling six witnesses. After being placed onto his defence, the appellant made an unsworn statement of defence and called no witnesses.

3.The brief circumstances leading to the arrest of the appellant and arraignment in court were as follows. The complainant who is a boda boda operator woke up early on the morning in question and proceeded to the place where he used to wait for customers. Before long a customer approached him and after negotiating and agreeing on the amount to be charged to be dropped at Casuarina, the customer boarded the motorcycle and he was taken to Casuarina. After arriving at his destination, he asked the complainant to stop. Instead of alighting from the motorcycle as expected, the customer, who the complainant identified as the appellant herein grabbed his neck from behind and another person emerged from the nearby bushes and attacked the complainant. The two overpowered the complainant and left with the motorcycle.

4. According to the complainant, one of his assailants dropped his wallet at the scene as they struggled. The complainant collected the said wallet and together with his brother (PW2), who he had called to the scene took it to the police station where they reported the matter.

5. The motorcycle was recovered after three days under circumstances that were not clear as whoever recovered the motorcycle in question did not testify before the trial court. The investigating officer, P.C. Mohammed Ali, said he received the motorcycle from Inspector Kimanzi, PW3, who nonetheless told the court that the motorcycle was taken to him by other police officers who had recovered it from some people who had ran away on seeing the police officers.

6. The appellant is said to have been arrested one year later at a dumpsite at Casuarina. An identification parade was conducted by Inspector Kimanzi, in which the appellant was picked out by the complainant. The appellant protested that the complainant only picked him out because he had been pointed out to him by a police officer, and also shown his identification documents.

7. In his defence, the appellant told the court he was stopped by some police officers while on his way home from work on 5th December, 2013. He was asked to identify himself and he gave them his national identification card as well as his work identification card which was from a Tanzanian company. He said he was asked for a bribe but he did not have money. He was taken to the police station and locked up. The following day he was removed from cells and he was shown to a person who was a total stranger to him. The said person picked him out at the identification parade that was conducted the following day. The said person turned out to be the complainant in the robbery charge. He denied having committed the robbery as alleged.

8. The learned trial magistrate considered this evidence, believed the prosecution witnesses and disbelieved the appellant's evidence. Consequently, she convicted the appellant and sentenced him to death. As would be expected, the appellant moved to the High Court on first appeal but his appeal was dismissed.

9. The High Court, (**Chitembwe & Ongeri, JJ.)** after re-analysing the evidence presented before the trial court found that the conviction was based on the evidence of a single witness, i.e. the complainant. The court however, found the said evidence had found corroboration in the recovery of the appellant's pouch, which the Judges like the trial court found was recovered from the scene of the robbery. The said pouch contained the appellant's photograph and identity cards which had his photographs on them.

10. The learned Judges further found that the identification parade had been properly conducted and also that the complainant had no grudge with the appellant before and he had no reason to fabricate the case against him. The learned Judges concluded that the evidence against the appellant was "watertight" and proceeded to dismiss the appeal. It is that dismissal that the appellant has challenged in this Court through the memorandum of appeal dated 23rd March, 2017 filed by Nyongesa & Company Advocates, in which he has proffered five grounds of appeal.

11. The learned Judges are faulted for convicting the appellant on a defective charge sheet; failing to re-evaluate the evidence before the trial court; convicting on improper identification; relying on contradictory evidence and for disregarding the appellant's submissions.

12. In his oral submissions before us, Mr. Nyongesa expounded the above grounds. On the issue of duplicity of the charge, he referred us to this Court's decision in **Joseph Njuguna Mwaura v R [2013] eKLR**, where this Court expressed that :-

> **".. It would not be correct to frame a charge for the offence of robbery under section 295 and 296 (2) as this would amount to a duplex charge."**

The Court however notes that even in the **Mwaura case** (supra), the conviction was not set aside on account of duplicity of the charge. The appeal was actually dismissed for being devoid of merit.

13. The issue of duplicity of the charge was more substantively and elaborately discussed in the case of **Paul Katana Njuguna v R [2016] eKLR,** where the Court considered several other decisions of this Court on that subject. There are two opposing arguments advanced by parties in respect of the framing of a robbery charge which includes section 295 together with 296(1) or 296(2) of the Penal Code in the same charge; and those that complain that section 296(1) and 296(2) do not create an offence and must be read together with section 295 of the Penal Code.

14. This Court in **Paul Katana Njuguna** (*supra*) dealt with both situations and analysed and cited cases for and against each position. The conclusion was as follows:-

> **"The particulars as stated are clear and do support the offence of aggravated robbery. The defect is alleged to be in the statement of the charge in the count in which the appellant was charged with robbery with violence contrary to *Section 295* as read with *Section 296 (2)*. Is that fatal? We think not.**

The Court went further and stated as follows in conclusion:-

> **"In this appeal, the appellant was fully aware of the case he was to meet when he was charged before the trial court and the charge as framed did not lead to a failure of justice. We must, therefore, reject the appellant's belated complaint that the alleged duplicity in count one of the charge caused him prejudice. We find that the defect if any, was in any event, curable under *Section 382 of the Criminal Procedure Code."***

15. As can be seen from the above pronouncement, the test as to whether a defect in the charge sheet is fatal or not is whether any prejudice was occasioned by the charge as it was. In the appeal before us, what we need to determine is whether the charge as framed caused any prejudice to the appellant. Was he able to understand the charge facing him and was he able to defend himself adequately? From the proceedings before the trial court and the degree of participation of the appellant in the same, in our view there was no prejudice occasioned to the appellant and the duplicity was curable under **section 382** of the Criminal Procedure Code.

16. On the issue of material contradictions, Mr. Nyongesa said that there was contradiction on the dates of recovery of the motorbike. Was it 3 days after the robbery or on 6th October, 2013? Furthermore, according to Mr. Nyongesa, the evidence as to who recovered the motorcycle was also not clear. Evidence on the recovery of the pouch was also said to be contradictory. In counsel's view had the High Court properly re-analysed this evidence, it would have arrived at a different verdict.

17. On identification, learned counsel stated that the circumstances prevailing at the scene were not conducive to a flawless identification. He urged us to allow the appeal and set the appellant at liberty.

18. In reply, Mr. Fedha, learned Senior Prosecution Counsel submitted that the issue of the defect in the charge sheet was never raised in the

two courts below. He stated further that the appellant had not been prejudiced by the said duplicity as he understood clearly what he had been charged with. He added that the learned Judges had re-evaluated the evidence as they were supposed to and captured the contradictions, and inconsistencies. He agreed with the learned Judges' finding that the appellant's pouch was recovered at the scene and maintained that the identification was proper. He urged us to dismiss the appeal.

19. We have considered all the material placed before us including the rival submissions of counsel. We start by appreciating that this being a second appeal, our jurisdiction must be exercised within the constraint set out in **section 361** of the Criminal Procedure Code. We must therefore deal with only matters of law. (See **Kaingo vs Republic, [1982] KLR 219** where this Court pronounced itself as follows;

> **"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari C/O Karanja v. R (1956) 17 EACA 146)"**

The court on second appeal will also be wary of upsetting concurrent findings of fact from the two courts below unless it is apparent that on the evidence presented and accepted by the trial court, no reasonable tribunal could have reached that conclusion. Additionally, the Court has loyalty to accept the concurrent findings of fact of the two courts below provided they are based on clear evidence which was adduced at the trial. See **Bernard Mutua Matheka vs Republic (Criminal Appeal No. 155 of 2009** unreported**).**

20. We remind ourselves further, as expressed in a litany of our decisions that we must as much as possible defer to the concurrent findings of fact by the two courts below. In **Boniface Kamande & 2 Others vs R [2010] eKLR**, this Court pronounced itself as follows:-

> ***"On a second appeal to the Court, …., we are under legal duty to pay proper homage to the concurrent findings of facts by the two courts below and we would only be entitled to interfere if and only if, we were satisfied that there was no evidence at all upon which such findings were based or if there was evidence, that it was of such a nature that no reasonable tribunal could be expected to base any decision upon it."***

21. We have earlier in this judgment addressed the issue of duplicity of the charge. We are satisfied that the appellant was not prejudiced in any way by the charge. Although that issue was raised before this Court for the first time, we reiterate that a point of law can be raised at any point, but it is preferable that it be raised at the earliest opportunity to enable the courts below determine the issue so that it can come to this Court on appeal. Part of the reasoning behind this is that if the court below was to find that the charge sheet was defective, and the appellant was entitled to an acquittal, then, he would have been saved from spending time in prison. It is also prudent to allow the other courts seized of the matter, to consider all the pertinent issues before it before making its determination. That said, as we have already stated, the appellant was not prejudiced by the said duplicity, the same was curable under **section 382** of the Criminal Procedure Code and he is not entitled to an acquittal on that basis.

22. The grounds of identification and inconsistencies, are in our view subsumed under the head of re-evaluation of the evidence by the High Court and we shall deal with them together. As this Court has stated before in several decisions, it is not enough for the first appellate court to proclaim or pronounce that it has re-evaluated the evidence tendered before it. The said re-evaluation must be evident in the determination of the issues before the Court. A first appeal is in the nature of a retrial. The first appellate court must therefore reconsider critically the evidence adduced before the trial court and arrive at its independent conclusion. Is that what happened in this case?

23. As pointed out earlier, the motorcycle is said to have been recovered 3 days after the robbery incident. The person who recovered it did not testify. The circumstances under which it was recovered were not clear. PW4, who took photographs of the motorcycle did so one year later, yet according to PW2, the motorcycle was released to him after it was recovered. How then would the court satisfy itself that this was the same motorcycle that the appellant had been robbed of one year earlier?

24. The evidence of the appellant's arrest was also important. Although he was said to have been arrested at a dumping site one year after the robbery, the arresting officer was not called to testify and state how he had been identified and who had pointed him out. Even assuming they had his identifying documents and photograph, it was important for the court to know how they bumped into him at a dumping site when they happened to be carrying his identification documents, which must have been lying at the police station for one year, if their evidence was to be believed.

25. The absence of the officer who recovered the motorcycle, and the one who arrested the appellant is in our view critical given the fact that the appellant gave a consistent story from the beginning about how his pouch ended up in the hands of the police officers.

26. The identification parade was also in our view a charade. If the complainant had seen the appellant's photograph and other identification papers, how could he have failed to identify him at the identification parade? He also in his evidence said he used to see the appellant before the incident. We hold the view that all these are issues that the first appellate court failed to consider in its re-appraisal of the evidence. Moreover, the appellant in his written submissions before the High Court had raised serious issues but there is no evidence on record to show that the High Court considered the same before arriving at its conclusion. Indeed, the first appellate court did not re-appraise the evidence at all and dealt with the matter in a very perfunctory manner.

27. It is our view therefore that the first appellate court failed in its sacrosanct duty to re-evaluate the evidence tendered before the trial court before arriving at its conclusion. We are not persuaded that the appellant's conviction was safe in view of the foregoing. We allow this appeal and order that the appellant be set at liberty unless he is otherwise lawfully held.

Dated and delivered at Mombasa this 17th day of May, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR