REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KIAGE & M'INOTI, JJA)

CRIMINAL APPEAL NO. 106 OF 2016

BETWEEN

MICHAEL SAA WAMBUA ……....1ST APPELLANT

JAMES MATATA WAMBUA…….2ND APPELLANT

AND

REPUBLIC ……..…….....RESPONDENT

(*Appeals from the Conviction of the High Court of Kenya at Nairobi (Ngugi & Achode, JJ) Dated 10th December, 2013* in H.C.R.CA. NO. 54 of 2011 As Consolidated with Criminal Appeal No. 55 of 2011
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JUDGMENT OF THE COURT

The appellants **Michael Saa Wambua (Michael),** and **James Matata Wambua (James),** were arraigned before the Chief Magistrate's court at Thika for the offence of Robbery with violence contrary to section 296 (2) of the Penal Code. The particulars of the offence were that, on the 10th day of October, 2008 at Muthesya Sub-location, Yatta District, within Eastern Province (as it was then known) jointly robbed **Charles Mbuvi Ndavi** (the deceased) of his unknown amount of money, and a mobile phone make Nokia 2600 valued at Kshs. 3,500/= and immediately after the time of such robbery killed the deceased. The appellants denied the offence prompting a trial in which the prosecution called eight (8) witnesses in support of its case, while the appellants gave unsworn evidence and called no witnesses.

The brief background to the appeal is that the deceased owned a bar at Muthesya Market. At 7.30pm, on the material date the deceaseds' brothers, **Robert Mutunga Ndavi,** (**Robert**) and **Raphael Mutinda Ndavi, (Raphael)** (the Ndavi brothers) walked into the bar and were served with drinks. They were joined shortly thereafter at 8.00pm by **Michael** and **James**, who are also brothers and related to the **Ndavis** by marriage. At about 10.00pm the appellants went out to smoke bhang. The **Ndavi** brothers who knew the appellants as violent persons after smoking bhang, advised the deceased to close the bar, as they themselves hastened home. On the way, they were ambushed by persons whom they recognized as the appellants, who tried to rob them but they successfully fought off the robbery attempt, save that **Michael** stabbed **Robert** on the right forearm in the course of the attempted robbery. The two **Ndavi** brothers however managed to escape into the bushes as the appellants pelted them with stones.

Sensing danger to the deceased from the appellants, the **Ndavi** brothers turned back and on nearing the market, they heard the deceased crying out for help, telling **Michael** not to harm him. The **Ndavi** brothers fearing for their lives, stood at a distance and helplessly watched as **Michael** stabbed the deceased twice with the two knives. **James** also joined in the assault on the deceased using a *rungu.* The two **Ndavi** brothers raised an alarm but it was too late as the deceased soon died of excessive bleeding. A teacher by the name of **Richard** reported the incident to the assistant chief, **Alloyce Mwongela Antohny (Alloyce)** and the senior chief, **Musyoka Wambua (Musyoka).** The two, (**Alloyce** and **Musyoka)** visited the scene and while in the company of the two **Ndavi** brothers **and** other persons arrested the appellants and recovered the deceased's Nokia phone from **Michael.**

When arraigned in Court, both appellants gave *alibi* defences denying any involvement in the robbery, alleging that they left the deceaseds' bar leaving him behind in the company of his two brothers **Robert** and **Raphael,** and that they never went back to the said bar.

At the conclusion of the trial, the learned trial magistrate (**B.A. Owino SRM)** found the prosecution's case proved to the required threshold of proof beyond reasonable doubt, found both appellants guilty of the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code, convicted them as charged and sentenced each of them to suffer the only sentence provided for in law for this offence namely – death. The appellants appealed to the High Court raising various grounds. In the impugned judgment dated the 10th day of November, 2013, the High Court (**Mumbi Ngugi & Lydia Achode,JJ)** dismissed their appeals.

The appellants are now before us on a second appeal relying on the grounds of appeal raised in the supplementary grounds of appeal. With the exception of one ground which is peculiar to **James**, the rest are similar in material particulars. These are that the learned Judges of the High Court erred when they failed to appreciate that the charge sheet was defective; when they upheld convictions and sentences based on contradictory evidence; when they failed to appreciate that the prosecution case had not been proved beyond reasonable doubt; when they failed to properly re-evaluate and re-appraise the appellants' strong *alibi* defences; and, lastly for **James,** when they failed to appreciate that no DNA test was conducted to link him to the alleged blood stained clothes or even the knife purportedly used to stab the deceased.

In her submissions before us, learned counsel **Miss Auka** instructed by the firm of **S. Ndege and Company Advocates** submitted on behalf of the appellants that the charge sheet was defective for failing to indicate the time when the offence was committed; that the evidence in support of the prosecution case was full of contradictions which were never reconciled by the two courts below; that a crucial witness was not called to testify; that no photographs of the scene of the crime were taken; and, lastly, that the appellants' *alibis* were never rebutted by the prosecution.

To buttress her submissions, **Miss Auka** cited **sections 134, 214** and **309,** of the Criminal Procedure Code; **sections 63 (1) (2) (a) (b) (c) (d**) and **107 (1) and 110** of the Evidence Act Cap 80 Laws of Kenya all for the propositions that failure to indicate in the charge sheet the time when the offence was committed; failure to seek leave of Court to amend the said charge sheet to reflect the time when the offence was committed; and, the failure to call evidence to rebut the appellants' *alibis* was not only prejudicial to the appellants, but was also fatal to the prosecution's case.

Turning to case law, **Joseph Munyoki Kimatu versus Republic [2014] eKLR** was cited for the proposition that failure to call a crucial witness should lead to an adverse inference against the prosecution that had such a witness been called, his evidence would have been adverse to the prosecution; and, second that failure to rebut an appellants' *alibi* leads to only one conclusion namely; that the appellant was either not identified or recognized in connection with the commission of the offence and should therefore be acquitted of the offence charged. The case of **Victor Mwendwa Mulinge versus Republic [2014] eKLR** was on the other hand cited for the proposition that the burden of proving the falsity or otherwise of an *alibi* lies on the prosecution, and where that burden has not been discharged, an appellant is entitled to an acquittal.

In opposition to the appeal, **Miss Maina**, learned senior Prosecution for the State submitted that the charge sheet was neither defective, nor fatal, simply for the failure to indicate the time when the offence was committed; that the prosecution's case was proved beyond reasonable doubt as the appellants were placed at the scene of the robbery; that there were no contradictions or inconsistencies in the prosecution's case, and if any existed, it was inconsequential and did not operate to oust the strong prosecution's case based on the recognition of the appellants at the scene of the robbery by **Robert** and **Raphael** and the recovery of the deceased's phone from **Michael.** Lastly, that both courts below considered the appellants *alibi* defences and rejected, having been rebutted by the prosecution evidence that placed them at the scene of the robbery.

This being a second appeal, our mandate is as set out in a long line of cases namely that as a second appellate court, we must confine ourselves both to the interrogation and determination of points of law only, and we should not interfere with the concurrent findings of fact arrived at in the two courts below unless we are convinced that these were based on no evidence. The test we are enjoined to apply is to determine whether there was any evidence on the basis of which the trial court and the 1st appellate court could find as they did (See **Reuben Kariri Slo Karanja versus Republic [1956] 17EA CA 146** as approved in **Karingo versus Republic [1982] KLR 213.)**

The approach the learned Judges of the High Court took in determining the appeal before them was to re-evaluate the totality of the evidence before them in the light of the grounds of appeal raised by the appellants , the submissions of either side for and against the said grounds of appeal and then drew out three issues for determination namely:-

> ***1. Whether there was proper identification of the appellants to warrant their conviction.***
>
> ***2. Whether the prosecution proved its case beyond reasonable doubt; and,***
>
> ***3. Whether the trial court considered the appellants' defences.***

The learned judges then proceeded to make findings on those issues as hereunder:

> ***"11. The evidence on record, both from the persecution witnesses and appellants in their statements, is that the appellants and the deceased and his two brothers were well known to each other, being in-laws. They were together in the bar between 8.00p.m and 10.00 p.m or thereabouts. The bar was lit with a solar panel, and there were other lights which were on outside the bar. The evidence of PW1 is that when the appellants attacked them on the way home, they demanded to see the deceased; and the 1st appellant was seen as he stabbed the deceased while the 2nd appellant stood guard.***
>
> ***12. From the evidence, it is clear that the first and second prosecution witnesses did not leave the place where the attack occurred; that they spoke to the appellants immediately before the attack when the appellants sought to see the deceased. We agree with the finding of the trial magistrate that in the circumstances, there was no room for mistaken identify.***
>
> **<u>Proof beyond reasonable doubt.</u>**
>
> ***13. As we have stated above, there was no doubt about the identity of the assailants who attacked and occasioned the death of the deceased. Further, the 1st accused was found, hours after the incident, in possession of the deceased's phone. More importantly, the evidence indicates that the appellants' blood stained clothes, which they had been wearing on the night the offence was committed, were found in their houses. The clothes that the 1st appellant was wearing were more blood stained than those of the 2nd appellant, who the witnesses testified stood guard while the 1st appellant stabbed the deceased with two knives. The totality of the evidence therefore, in our view, was sufficient to meet the threshold required from the prosecution, and we agree with the findings of the trial magistrate that the prosecution had proved its case beyond reasonable doubt.***

14. Before leaving this issue, it is important to advert to the appellants' ground of appeal with regard to DNA.

They complain that DNA was not done to certain whether the blood on their clothes was that of the deceased. We agree with the State that this ground really has no merit. The appellants were seen as they attacked the deceased; his phone was found with the 1st appellant. There was therefore no basis for supposing that the blood on the appellants' clothes was other than that of the deceased. In the circumstances, we find no merit in this ground.

Failure to Consider the Appellants' Defences.

15. The appellants complain that the trial court failed to consider their respective defences, and that it shifted the burden of proof to them. A reading of the judgment of the Court shows these complaints to be without merit. The court noted that it had considered the defences, which we have set out briefly above, and concluded that they are unbelievable given the strong and corroborated evidence of the two eye witnesses, PW1 and PW2."

It is the above reasoning and findings that the appellants have invited us to interfere with. We have considered them in light of the rival submissions set out above, as well as the provisions of the law and case law cited by the appellants to buttress their submissions. In our view, the following are the issues that fall for our determination:

1. Whether the charge sheet was defective, and if so whether it was fatal to the prosecution's case;

2. Whether the appellants' conviction is initiated by the failure of the prosecution to call a material witness.

3. Whether the appellants' *alibis* were rebutted by the prosecution evidence.

In response to issue number 1, it is not disputed that the charge sheet as framed does not indicate the time when the offence was committed. **Sections 134** sets out the prerequisites of any criminal charge while **section 214** provides for curative procedures for any defective charge through an amendment and or substitution.

In **Kimeu versus Republic [2002] 1KLR 756** the Court held *inter alia* that:

"The position in law is that it is not every conflict between the particulars of the charge and the evidence which will vitiate a conviction especially with conflicts that are minor or of such nature that no discernible prejudice is caused on the accused."

In the instant appeal, the appellants have not demonstrated in their submissions before us what prejudice they suffered due to the failure to indicate in the charge sheet the time when the offence was committed.

In view of the clear provisions of **section 382 CPC** no prejudice or injustice was occasioned to the appellants by the failure of the prosecution to indicate in the charge sheet the time the offence was committed, especially when there is undisputed evidence from both sides, that appellants had been drinking in the deceased's bar on the very night when the deceased was robbed and murdered. The evidence tendered by either side demonstrated clearly that the incident occurred at night. We also note that the issue was never raised before the two courts below. It is being raised for the first time before us. We are not therefore persuaded that the appellants are genuinely aggrieved by this omission. It has definitely come as an afterthought. We find no merit in it and it is accordingly rejected.

In response to issue number 2, the position in law is that the prosecution determines which witness. See **Mwangi versus Republic [1984] KLR 595** wherein the Court stated that:

"***Whether a witness should be called by the prosecution is a matter within the discretion of the***

prosecution and the Court will not interfere with that discretion unless it may be shown that the prosecution was influenced by some oblique motive."

Section 134 of the Evidence Act Cap 80 laws of Kenya is explicit that no particular number of witnesses, in the absence of any provision of law to the contrary, is required to prove any fact. In **Bukenya & Others versus Uganda [1972] EA 549,** the predecessor of the Court stated that the prosecution has an obligation to make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent. Second, that the Court also has the right and the duty to call witnesses whose evidence appears essential to the just decision of the case; and third, that where the evidence called is barely adequate the court may infer that the evidence of the uncalled witnesses if it had been tended, would have been adverse to the prosecution.

The power of the prosecution and the Court to call witnesses is no licence to call a superfluity of witnesses. That power exists solely for purposes of calling only such witnesses as are sufficient to establish the charge beyond any reasonable doubt. See **Keter versus Republic [2007] 1EA 135** and **Njuguna versus Republic [2003] 1EA 206** wherein, the Court declined to draw an adverse inference against the prosecution for the failure to call one of the arresting officers.

The witnesses that the appellants complain were crucial witnesses but who were never called were the teacher named **Richard** who reported the incident to the area assistant chief, **Alloyce** and the senior chief **Musyoka**; and the mother and sister of the appellants who were involved in the recovery of exhibits. We agree the teacher, mother and sister of the appellants were all compellable witnesses. Had they been called as witnesses, their role would have been simply, for the teacher, to state that he is the one who reported the incident to both the assistant chief and chief, while that of the sister and mother of the appellants would have been to state that they assisted in the recovery of the exhibits, both of which were not in indispute.

What was in dispute was who robbed and in the furtherance of the said robbery killed the deceased. We therefore find that the prosecution's failure to call the teacher, mother and sister of the appellants as witnesses was not prejudicial to the prosecution case. The two Courts below relied on the testimonies of **Robert** and **Raphael** to place the appellants at the scene of the robbery. These are the witnesses the two Courts below concurrently found to be truthful and credible. Being findings based on the credibility of witnesses, we are enjoined by law not to interfere with them unless it is demonstrated that no reasonable tribunal could have made such findings; or that the two courts below erred in their findings or that they acted on wrong principles or misapprehended both the law and facts, matters not raised by the appellants in their supplementary grounds of appeal or submission of **Miss. Auka** (See **Republic versus Oyier [1985] KLR 553).**

With regard to the alleged inconsistencies and contradictions in the prosecution evidence, the position in law is that, existence of these do not *per se* vitiate the prosecution's case. See the case of **Njuki & 4 Others versus Republic [2002] 1KLR 771**, where the Court stated clearly that where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies.

In the instant appeal, apart from **Miss. Auka** asserting in her submissions that there were contradictions in the prosecution's case, none were pointed out to us. There were none to be reconciled by the two courts below. We therefore find that the concurrent finding by the two courts below, that the prosecution proved its case beyond reasonable doubt was based on sound evidence on record which supported the charge to the required threshold.

Turning to the last issue, it is not disputed that **section 309** of the Criminal Procedure Code enjoins the prosecution to rebut any *alibi* raised by an accused person for the first time in his defence. It provides:-

"***309 if the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen. The court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.***

In **Njuki & 4 Others versus Republic** (supra) the Court stated that an accused person does not assume the burden of proving a defence of *alibi* he may put forward as his defence, and that in criminal cases, the burden lies squarely on the prosecution to prove a criminal charge beyond reasonable doubt, except in those cases where the section creating the offence specifically places some burden on the accused to establish a fact; and second, that it is the duty of the prosecution to disprove any alibi defence an accused puts forward as his defence, unless it appears to the court that the alibi cannot be sustained.

Our construction of **section 309** of the Criminal Procedure Code and understanding of the principle in the **Njuki & 4 Others versus Republic** case, (supra) is that there are two ways in which an *alibi* defence put forth by an accused person may be rebutted. One of them is for the presentation to call evidence in rebuttal. The second is for the court to weigh it against the totality of the prosecution case. The two courts below weighed the appellants' *alibis* against the totality of the prosecution evidence, and found the prosecution's evidence especially that tendered through the two eye witnesses **Robert** and **Raphael** truthful, credible and therefore ousted the appellants *alibi* defences. We therefore find no error in the two courts below rejecting the appellants' defences. We affirm that rejection.

In the result, we find no merit in these appeals. They are dismissed in their entirety.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF OCTOBER, 2017.

R.N. NAMBUYE

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR