IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI, P.C.A, OKWENGU & AZANGALALA, JJ.A.)

CRIMINAL APPEAL NO. 37 OF 2015

PAUL KATANA NJUGUNA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the Judgment, Conviction and Sentence of the

High Court of Kenya at Nairobi (Ogola & Kamau, JJ.)

dated 13th November, 2014

in

(H.CR. A. No. 263 of 2010)

****

JUDGMENT OF THE COURT

1. The appellant, **PAUL KATANA NJUGUNA**, was charged before the Magistrate's Court at Thika with robbery with violence contrary to **Section 295** as read with **Section 296(2)** of the **Penal Code** and attempted robbery with violence contrary to **Section 297 (2)** of the **Penal Code**. He was tried and convicted of both counts and sentenced to suffer death. Being aggrieved by his conviction and sentence, the appellant lodged an appeal in the High Court. The High Court, ***(Ogola & Kamau, JJ.),*** dismissed the appeal. The appellant has now brought a further appeal to this Court. Initially, the appellant filed a memorandum of appeal and grounds of appeal in person. Subsequently, his advocate filed a supplementary memorandum of appeal under ***Rule 65(2)*** of the Rules of this Court.

2. During the hearing of the appeal, learned counsel, ***Paul Mugwe Nyaga***, who appeared for the appellant relied mainly on the supplementary grounds of appeal and the list of authorities that had also been filed. In brief, the grounds were that the 1st appellate court erred in failing to examine and re-evaluate the evidence afresh. In particular, the appellant faulted the learned Judges in the 1st appellant court for failing; to address the duplicity of the charge preferred against the appellant; to note that the appellant's rights to a fair hearing were infringed; to note that the prosecution did not summon crucial witnesses; to note that the evidence did not support the finding that the appellant was in possession of the alleged stolen goods; to properly consider the appellant's defence.

3. In arguing the appeal, ***Mr. Nyaga*** submitted that the charge against the appellant was duplex as he was

charged under both ***Sections 295*** and ***296 (2)*** of the ***Penal Code***. Referring to ***Simon Materu Munyaru -v- Republic, [2007] eKLR***, quoted in ***Joseph Njuguna Mwaura & 2 Others -v- Republic, [2013], eKLR***, counsel submitted that it was wrong to charge the appellant with the offence of robbery under ***Section 295*** as read with ***Section 296 (2),*** as that rendered the charge duplex and created a confusion. In addition, counsel noted that the charge sheet and the evidence adduced were at variance as the charge sheet only mentioned a wallet whilst the complainant testified that his wallet had Kshs.30,000/= that was not recovered.

4. ***Mr. Nyaga*** further pointed out that the prosecution's failure to produce the Occurrence Book (OB) and witness statements that were sought by the appellant was prejudicial to the appellant in the preparation of his defence. He noted that the circumstances in which the offence was committed, in particular the fact that it was at night, that the lighting was poor, and that there was a commotion, created a possibility of mistaken identification. Counsel argued that the 1st appellate court did not re-evaluate the evidence or consider the anomalies identified and, therefore, came to a wrong conclusion. He, therefore, urged the Court to allow the appeal.

5. ***Mr. Moses Omirera***, Senior Assistant Director of Public Prosecutions, who appeared for the State, opposed the appeal and urged the court to dismiss the same. In regard to the alleged defect in the charge, ***Mr. Omirera*** submitted that ***Section 295*** of the ***Penal Code*** was simply a definition section, and although charging an accused under both ***Sections 295*** and ***296 (2)*** was undesirable, doing so did not amount to a fatal defect in the prosecution's case as the same could easily be cured by invoking ***Section 382*** of the ***Penal Code***. In regard to the discrepancy between the evidence of the complainant who alleged he lost a wallet containing Kshs.30,000/=, and a charge sheet that only mentioned the wallet, ***Mr. Omirera*** argued that the omission was neither prejudicial nor fatal to the prosecution case as it was clear that a robbery did take place. He urged the court to cure that omission under ***Section 382*** of the ***Criminal Procedure Code***. Finally, ***Mr. Omirera,*** submitted that the evidence adduced by the prosecution witnesses who included the driver, the conductor and passengers in the bus, was sufficient to support the findings of the two lower courts. He, therefore, urged the court to dismiss the appeal.

6. This being a second appeal, our mandate is limited under ***Section 361*** of the ***Criminal Procedure Code*** to consideration of matters of law only. In ***Karingo v Republic [1982 KLR 213***, the Court restated the principles upon which such an appeal is considered 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 s/o Karanja versus Republic [1950] 17 (EACA 146)".***

7. The appellant has raised an issue concerning the propriety of the charge upon which he was convicted. This is an issue of law. He has also raised an issue concerning the failure by the first appellate court to fulfill its obligation of examining and re-evaluating the evidence afresh and coming to its own conclusion. In this regard, the following dicta in ***Okeno -vs- Republic [1972] EA 32,*** is instructive on the duty of a first appellant court:

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya -vs-R [1957], EA 336), and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala - vs- R [1975], EA 570. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported".***

8. Thus, there is an obligation on the part of the first appellate court to re-evaluate the evidence afresh, and this creates a corresponding right to which an appellant has a legitimate expectation. Consequently, the issue whether the first appellate court fulfilled this obligation is also one of law. Further, the appellant

has raised an issue regarding the infringement of his constitutional right to a fair trial which clearly is an issue of law. These then are the issues that this Court is required to address in this appeal.

9. Given the anxiety this appeal has caused us, it is appropriate that we set out, in summary, how the appellant became a target of law enforcement agencies. On 28th January, 2009, at about 7.00 p.m., ***Thomas Kyalo Mutie, (PW 2), (Mutie)***, boarded motor vehicle registration number KBE 651P at Matuu area. He had just attended a funeral at a place called Sofia in Matuu area of the then Yatta District and was on his way to Ekalakala area. He took a back seat. There were other passengers in the motor vehicle. ***Danson Nzuki Masila (PW 4), (Masila)***, boarded the same motor vehicle at Nairobi. He was travelling to Ekalakala area in Masinga. He took a right hand seat somewhere in front of ***Mutie***. On the way, some passengers alighted as others boarded the motor vehicle. When they had passed a place called ***Kiruguni***, some men who had been travelling with them as passengers sprung up ordering everyone to raise their hands and hand over to them mobile phones and money. ***Masila*** was slapped on the face since he had not raised his hands. The person who had slapped him took his wallet which he said had Kshs. 30,000/=. ***Mutie*** witnessed **Masila** being slapped and threw his wallet under the vehicle seats. ***James Mwaura Kahara (PW 1)***, ***(Kahara),*** was the motor vehicle conductor and saw another thug wielding a pistol. As the thugs continued to relieve other passengers of their valuables, ***Musila*** and other passengers, after the initial scare, got courage and pounced on the thug who had just robbed him of his wallet and held him. The other thugs escaped as ***Stephen Kioni Kenya (PW 3), Kioni*** who was the driver drove to Ekalakala Police Post where they took the thug who had been held in the motor vehicle. ***Mutie*** and ***Musila*** identified the appellant as the person who had been apprehended in the motor vehicle.

10. ***PC Kipkoech Howard, (PW 5), (Kipkoech)***, of Matuu Police Station re-arrested the appellant on 28th January, 2009, who was charged as already stated. Put on his defence, the appellant, in an unsworn statement, stated that he was at the material time, a livestock broker and went to Ekalakala in Matuu area to buy goats on 28th January, 2009. He travelled by the evening bus. He was charged Kshs.60/-for the journey and gave ***Kahara*** a note of Kshs. 100/-. When he asked for his change, the conductor refused to give him whereupon an argument ensued. The conductor then told ***Kioni*** to drive to the police station where he was detained. He stayed there for four (4) days before being taken to court. He denied the charges.

11. After reviewing the entire prosecution case against the defence offered by the appellant, the learned trial magistrate came to the conclusion that the defence offered was a mere denial and was not an answer to the prosecution case. It was, indeed, the trial court's finding that the appellant was arrested red handed.

In the first appeal to the High Court, the appellant complained: that he was a victim of mistaken identification; that he was convicted on insufficient, uncorroborated and contradictory evidence; that crucial witnesses were not called and that ***Section 169 (1)*** of the ***Criminal Procedure Code*** was contravened.

12. The first appellate court, after considering the arguments proffered by the appellant, did not agree with him. It found that the evidence against the appellant, was consistent and that he was positively identified by ***Mutie*** and ***Musila***. That conclusion in fact meant that the Court upheld the finding that the appellant was arrested red handed and that his defence was a sham. The provisions of ***Section 169 (1)*** of the ***Criminal Procedure Code*** were, according to the 1st appellate court, satisfied. The appellant's appeal was, therefore, dismissed in its entirety.

That decision triggered this appeal premised on the grounds already referred to above. We, still consider the issues of law raised seriatim.

13. The appellant has complained about the propriety of the charge. We, however, note that although he complained that the first appellant court did not consider this, it was not a ground that was raised by the appellate before that court. He did not also complain about the charge before the trial court. Be that as it may, the issue is an issue of law which we are obliged to address. ***Section 295*** of the ***Penal Code*** provides 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".

14. Although the side note describes ***Section 295*** as definition of robbery, it is evident that the section goes beyond mere definition and creates a felony termed robbery by setting out clearly the elements of that felony.

On the other hand, ***Section 296*** of the ***Penal Code*** states as follows:

"(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other 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".

15. Thus, ***Section 296*** of the ***Penal Code*** has two provisions. This is ***subsection (1)*** that is a penal provision providing the sentence for the felony of robbery; and ***subsection (2)*** that creates the offence of aggravated robbery and provides a stiffer penalty of capital punishment. Neither ***Section 295*** nor ***Section 296*** refers to an offence of *"robbery with violence"*. Indeed, the felony termed robbery as described under ***Section 295*** of the ***Penal Code*** may involve use of actual violence or threat to use violence, while the aggravated offence of robbery as described under ***Section 296 (2)*** of the ***Penal Code*** may be complete with use of violence or no use of violence as long as there has been a theft and the offenders are either armed with offensive weapons or offenders are more than one. (See ***Oluoch v Republic [1985] KLR 549***).

16. We are alive to the fact that the First Schedule to the Criminal Procedure Code lists the offence of robbery under ***Section 296(1)*** of the ***Penal Code***; the offence of robbery with violence, under ***Section 296(2)*** of the ***Penal Code***; the offence of attempted robbery under ***Section 297(1)*** of the ***Penal Code***; and the offence of attempted robbery with violence under ***Section 297(2)*** of the ***Penal Code***. It may well be that this schedule is what the prosecution relied on in drafting the charges. It is illustrative, however, that at the commencement of that First Schedule, the following caution is given: -

"The entries in the second and fourth columns of this Schedule headed respectively 'offence' and 'punishment under the Penal Code', are not intended as definitions of the offences and punishments described in the several corresponding sections of the Penal Code, or even as abstracts of those sections, but merely as references to the subject of the section, the number of which is given in the first column".

17. As we have already noted, the offence of robbery is created under ***Section 295*** although the side note refers to the section as a definition section.

Section 296 (1) provides the punishment for the offence of robbery while ***Section 296 (2)*** provides for a situation where the robbery as defined in ***Section 295*** is aggravated and sets out what makes it aggravated whilst spelling out a more severe sentence for the aggravated circumstances.

18. In ***Johana Ndung'u -vs- Republic [Criminal Appeal No. 116 of 1995] UR***, we succinctly set out the ingredients of the offence of robbery with violence as opposed to that of simple robbery. We stated, *inter alia*, that in considering the offence under ***Section 296(2)*** of the ***Penal Code***, it was necessary to have regard to the definition of the offence of robbery as contained in ***Section 295***. We stated:

"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 Section 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 aforedescribed ingredients constituting robbery are pre-supplied in the three sets of circumstances prescribed in Section 296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:

1. ***If the offender is armed with any dangerous or offensive weapon or instrument, or***

2. ***If he is in company with one or more other person or persons, or***

3. ***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".***

(Underlining ours).

19. This Court has on several occasions had to deal with difficulties presented in considering the true purport and intendment of ***Sections 295, 296 (1)*** and ***296 (2)*** of the ***Penal Code***. In ***Joseph Onyango Owuor & Another -v- Republic [Criminal Appeal No. 353 of 2008] (UR)***, the appellant complained that ***Section 296 (2)*** under which he was charged did not create an offence. He argued that ***Section 296 (2)*** cannot, therefore, stand on its own. In his view, a charge under ***Section 296 (2)*** could only be sustained if read with ***Section 295*** of the ***Penal Code***. We rejected that argument in the following words:

"Likewise, the submission that the violence envisaged under 296 (2) is different from that envisaged under Section 295 of the Penal Code is untenable. Section 295, does not deal with the decree of violence being merely a definition section. It is analogous to Section 268 of the Penal Code which deals with definition of "stealing" and subsequent sections which deal with different categories of offence of stealing. Section 296 (1) and Section 296 (2) of the Penal Code deal with the specific degrees of the offence of robbery and have been framed as such".

(Underling ours).

20. We find further analogies in ***Sections 202, and 205; and 203 and 204*** which deal with the offences of manslaughter and murder, and ***Sections 8(1), (2), (3),*** and ***(4)*** of the ***Sexual Offences Act*** which deal with defilement.

21. In ***Joseph Njuguna Mwaura & 2 Others v Republic [2013] eKLR,*** in a five Bench decision of this Court, the Court, after considering a number of cases, stated as follows:

"We reiterate what has been stated by this Court (sic) in various cases before us: the offence of robbery with violence ought to be charged under Section 296 (2) of the Penal Code. This is the section that provides the ingredients of the offence, which are either the offender is armed with a dangerous weapon, is in the company of others, or if he uses personal violence to any person. The offence of robbery with violence is totally different from the offence defined under Section 295 of the Penal Code, which provides that 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 steal. 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".

To put the decision of the court in proper perspective, it is important to consider the position taken by the appellant in that case. It was submitted on behalf of the appellant that the charge as framed was defective because only ***Section 296 (2)*** had been cited as the section contravened. In the appellant's view, the appellant should have been charged under ***Section 295*** as read with ***Section 296 (1)*** and ***(2)*** of the ***Penal Code***. That is, indeed, the proportion which the appellant in ***Joseph Onyango Owuor & Another -v- Republic (supra),*** had made in urging that his appeal be allowed. It is significant to note that in the two cases, the issue of duplicity was not raised by the appellants, and the court did not determine that a charge framed as the one we are considering should result in setting aside the conviction entered. The court could not, indeed, so find as the appellants were the ones complaining that they were prejudiced by failing to

cite ***Section 295*** in a charge under ***Section 296(2).***

22. In this case, the particulars of count one as stated in the charge sheet were as follows:

> ***"PAUL KATANA NJUGUNA - on the 28th day of January, 2009 at Kwa-wanzilu area, Ekalakala Location in Yatta District within Eastern Province jointly with others not before court while armed with offensive weapons namely rungus, and man-made pistol robbed from DANSON NZUKI MWASIA of a wallet and immediately before he used personal violence to the said DANSON NZUKI MWASIA".***

23. 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. In ***Joseph Onyango Owuor & Another -v- R (supra)*** this Court found that when dealing with the offence under ***Section 296 (2)*** of the ***Penal Code*** the statement of the offence has to be read as referring to the aggravated circumstances of the offence of robbery provided for under ***Section 296 (1)*** of the same code. The Court further concluded that "*the submission that the violence envisaged under* ***Section 296(2)*** *is different from that envisaged under* ***Section 295*** *of the* ***Penal Code*** *is untenable.* ***Section 295****, does not deal with the degree of violence being merely a definition section".*

24. In ***Joseph Njuguna Mwaura & 2 Others -v- R (supra)***, which followed ***Joseph Onyango Owuor & Another -v- R*** *(supra),* the Court concluded that "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.

In ***Simon Miteru Munialu -v- Republic [2007] eKLR***, the appellant like the appellants in the immediately preceding appeals complained that the charge he faced was defective as the section cited ***(296 (2)*** was that for the punishment of the offence whereas the section which should have been cited was ***Section 295*** which was the section creating the offence. The Court did not agree with the appellant as it did in the appeals already referred to above. The Court stated:

> ***"In short Section 296 (2) is not only a punishment section, but it also incorporates the ingredients for the offence which attracts the punishment".***

25. The court went further to state that it would be wrong to charge an accused person facing a charge of aggravated robbery "*with robbery under* ***Section 295*** *as read with* ***Section 296 (2)*** *of the* ***Penal Code****", as that would not contain the ingredients that are in* ***Section 296 (2)*** *of the* ***Penal Code*** *and might create confusion*". Significantly, again the appellant did not raise the issue of duplicity nor did he suggest that framing a charge as he proposed would cause confusion. It was the Court which opined that an accused could be confused.

26. In any event in the end, all the three appeals: ***Joseph Onyango Owuor Another -v- R***. (supra), ***Joseph Njuguna Mwaura and 2 Others -v- R*** (supra) and ***Simon Materu Manialu -v- R***. were dismissed, a clear indication that duplicity of the charge was not central to those decisions.

27. We have considered the law on duplicity in charges as expounded in case law and academic treatises and find an interesting trend which seems to have emerged. In ***Laban Koti -v- R. [1962] 1 EA 439 (SCK)***, the appellant was charged with and convicted of wrongfully attempting to interfere with or influence witnesses in a judicial proceeding, either before or after they had given evidence contrary to ***Section 121 (1)*** of the ***Penal Code***. On appeal, it was suggested that the charge might be bad for duplicity firstly because it alleged that the appellant "wrongfully attempted to interfere with or influence" *witnesses, and secondly, because it alleged that such attempt occurred either before or after*", the witness had given evidence.

28. The Court cited with approval the case of ***Cherere s/o Gakuli -v- R. [1955] 622 EACA,*** where the predecessor of this Court reviewed the cases on the subject of the effect of a charge which is found to be duplex and concluded that "*The test still remains as to whether or not a failure of justice has occurred. In*

our opinion, the result of the application of this test must depend to some extent upon the circumstances of the case and the nature of the duplicity".

29. In that case, the court held that the appellant was left in no doubt from the time when the first prosecution witness testified, as to the case which he had to meet and he could not, therefore, be said to have been prejudiced in any way.

30. The circumstances were different in ***Ombogo -v- Republic [1983] eKLR***. There, the appellant, an account's clerk, was charged with two counts: fraudulent false accounting contrary to ***Section 331*** of the ***Penal Code*** and stealing by a person employed in the public service contrary to ***Section 280*** of the ***Penal Code***. The trial court convicted the appellant as charged which conviction was confirmed by the High Court. On appeal, the Court held, *inter alia*:

> ***"(1) Where an accused person is alleged to have falsely accounted by making false entries there should be a separate court for each false entry.***
>
> ***2. An omnibus charge relating to false accounting over an extended period of time on different occasions is incurably defective.***
>
> ***3. .....***
>
> ***4. Injustice will be occasioned where evidence is called relating to many separate acts all contained in one charge because the accused cannot possibly know what offence exactly he is charged with.***
>
> ***5. ....."***

31. Further, a field in ***Amos -v- DPP [1988] RTR 198 DC***, the Court held that uncertainty in the mind of the accused person is the "*vice at which the rule against duplicity is aimed and to counter a true risk that there may be confusion in the presenting and meeting of charges which are mixed up and uncertain*".

Back home, in ***Mwaniki v Republic [2001], EA 158 (CAK)***, this Court held as follows:

> "***Where two or more offences were charged in the alternative in one count, the charge was bad for duplicity and a substantial defect was created that must be assumed to be embarrassing or prejudicial to an accused as he would not know what he was charged for and if convicted, of what he had been convicted***".

32. There, the appellant was charged and convicted on a charge of causing death by dangerous driving contrary to ***Section 46*** of the ***Traffic Act (Cap 403 Laws of Kenya)***. The charge stated that he drove the vehicle in question recklessly or in a manner that was dangerous to the public. The trial court convicted the appellant and the High Court confirmed the conviction. On appeal, this Court found that it was not possible to determine which offence the appellant had committed as several offences had been charged in the alternative, the Court stated:

> ***"These clearly were separate offences charged alternatively in one count and in our view, we would respectively follow the decision of the Court of Appeal for Eastern Africa in Cherere's case which correctly set out the law when the court held that to charge two or more offences in the alternative in one count is not merely a formal but substantial defect and that in such a situation, an accused person must be taken to have been embarrassed or prejudiced as he does not know what he is charged with, and if convicted, of what he has been convicted".***

33. The Court in the end determined that there was a clear distinction between charging an accused person with two offences in the alternative in one count and "*the situation where the conjunctive "and" is used so that though the charge is duplex, an accused person is not necessarily embarrassed or prejudiced. In the latter, the duplicity is not necessarily fatal; in the former, it must be necessarily fatal*

for the reasons given in Cherere's case, and it does not appear to matter that the accused", was represented by an advocate right from the beginning of the trial and that the advocate should have raised objection to the charge.

34. The issue of duplicity of a charge also came up in ***Dickson Muchiro Mahero -v- Republic [2002] eKLR***. There, the appellant was charged under the same ***Section 46*** of the ***Traffic Act.*** The particulars alleged that the appellant on a particular date at a particular place "*being the driver of motor vehicle Registration No. KAJ 768H, Isuzu Mini Bus drove the said motor vehicle at a speed or in a manner which was dangerous to the public and other road users, having regard to all the circumstances of the case, including the nature, condition and use of the road and the amount of traffic which was actually at the time or which might reasonably be expected to be on the road and caused the death of Herman Onyango"*.

35. The Court found that, indeed, causing death is a distinct offence from dangerous or careless driving or obstruction and that particulars of any charge under ***Section 46*** are offences in themselves. With regard to the appellant's argument that the charge as framed alleged two offences in one count namely, first, causing death by driving a motor vehicle at a speed and second, by driving a motor vehicle in a manner which was dangerous, the Court held that the particulars were merely intended to give the appellant reasonable information as to the nature of the offence he faced. After considering the record before it, the Court was satisfied that the appellant understood the charge he faced and was in no way prejudiced.

36. The Court in that case cited with approval the English case of ***Ministry of Agriculture & Fisheries and Food -v- Nunn [1978] Ltd [1990], Cr. LR 268 DC***, where the court emphasized that the question of duplicity is one of fact and degree; and that the purpose of the duplex rule is to enable the accused to know the case he has to meet. The same proposition was stated in ***Amos -v- DPP*** (supra).

37. The final case we shall refer to involved, *inter alia*, a charge under ***Section 304 (2)*** and ***Section 279 (b)*** of the ***Penal Code***. That is the case of ***Reuben Nyakango Mose and Another -v- Republic [2013] eKLR,*** there the charge which is alleged to duplex stated as follows:

> ***"Charge - Burglary contrary to Section 304 (2) and Stealing contrary to Section 279 (b) of the Penal Code".***

The said charge carried the following particulars: -

> ***"(1) Reuben Nyakango Mose (2) James Kiriago Osiemo, on the 24th day of March, 2004 at around 9:30 p.m. at Boisanga Sub-Location Nyamira District within Nyanza Province, jointly with others not before court broke and entered a dwelling house of George Mwaniki with intent to steal and did steal from therein (1) One mattress***
>
> ***(2) Two blankets (3) Two bed sheets (4) Pairs of slippers red in colour, the property of the said George Mwaniki being of the value of Kshs.3,600/=".***

38 The appellant therein argued, *inter alia*, that the charge was defective as it was duplex because the offences of burglary and stealing were combined in one count. We rejected this argument in the following words:

> ***"It will in any event be seen that the framing of the charge of burglary in the Criminal Procedure Code envisages that another offence may be committed in the cause of burglary. That is why the relevant form is couched to include burglary and stealing in the same charge".***

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 decision 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.

39. We appreciate that ***Section 296 (2)*** of the ***Penal Code*** creates the offence of robbery with violence or aggravated robbery. In our view, the offence of robbery must first be demonstrated before proceeding to demonstrate the ingredients provided in ***Section 296 (2)*** of the ***Penal Code***. As a corollary to this proposition, an accused person facing those charges would in defence seek to demonstrate that no offence of robbery was committed and that the ingredients alleged under ***Section 296 (2)*** were absent or were not demonstrated by the prosecution.

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.

41. 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***.

42. We turn to the related complaint that the evidence did not support the charge. In his evidence before the trial court, ***DANSON NZUKI MWASIA (Danson),*** testified that he was robbed of a wallet that contained Kshs. 30,000/=. Although the charge sheet does not mention the sum of Kshs. 30,000/= which was alleged to have been in the wallet, the charge sheet alleges that the complainant was robbed of a wallet, and the evidence confirmed that the complainant was robbed of a wallet in addition to the money. We are satisfied that the offence of robbery with violence was complete the minute the wallet was taken whether it was empty or with money. The inconsistency regarding the sum of Kshs. 30,000/-does not, therefore, have any impact on the propriety of the charge, but could only have had impact in determining the veracity of the evidence of the complainant.

43. In addition to count one, the appellant faced a second count of attempted robbery with violence contrary to ***Section 297 (2)*** of the ***Penal Code***. The statement of the offence in this count was stated as "*attempted robbery with violence contrary to* ***Section 297 (2)*** *of the* ***Penal Code***". The statement of the offence clearly described the offence and made reference to the section creating the offence, and thus, the requirements of ***Section 137 (a) (ii),*** of the ***Criminal Procedure Code*** were complied with.

44. Further, the particulars of the charge in relation to count two, stated as follows:

> ***"PAUL KATANA NJUGUNA: On the 28th day of January, 2009, at Kwa-Wanzilu, Ekalakala location in Yatta District within Eastern Province jointly with others not before court while armed with offensive weapons namely: rungus, and man-made pistol, attempted to rob from MWAURA KIHARA JAMES and during the time of such attempt, used personal violence to the said MWAURA KIHARA JAMES"***.

In our view, the particulars are clear on the offence and the elements of that offence. We are satisfied that count 2 was properly framed. Indeed, the appellant has not complained of any defect with regard to this count.

45 Another ground that was raised by the appellant was the failure by the first appellate court to reconsider and re-evaluated the evidence. The question is whether the High Court as the first appellate

court discharged its obligations in accordance with the parameters set out in ***Okeno v Republic*** (supra). A perusal of the High Court judgment reveals that the High Court set out the evidence of all the witnesses before concluding as follows:

> ***"We are satisfied that the evidence before the trial magistrate leading to the conviction of the appellant was consistent. What we now must consider are the grounds of appeal the appellant has put forth. After carefully considering the grounds of appeal, we are satisfied that the appellant was properly identified. He was actually arrested by the passengers and handed over to the police. We accept as true evidence of PW 2 and PW 4. In addition, we have reviewed the entire evidence and we find as true that there is consistency in the evidence used by the trial court to convict the appellant (sic).***
>
> ***We have also reviewed the defence put forth by the appellant... It must be had in mind that the appellant was in a group of other robbers. While others managed to escape, the appellant was apprehended by passengers and handed over to the police. We do not find that the appellant had a defence in this matter and the trial court did the right thing in holding that the appellant's defence was a sham"***.

46 In ***David Njuguna Wairimu v Republic [2010] eKLR***, this Court noted that there is no set format for re-evaluation of evidence by a first appellant court, nor is it necessary for the appellate court to use the words re-evaluate, consider or analyze in order to fulfill its duty. In our view, in line with ***Okeno v Republic*** (supra), the judgment of the High Court must demonstrate that the evidence has been reconsidered by the first appellate court and subjected to an in-depth and meticulous re-evaluation. Our reading of the salient parts of the judgment reveals that although there was re-evaluation of the evidence, the same could have been done more exhaustively. For instance, the inconsistency regarding ***Masila*** having been robbed of a wallet only *vis a vis* a wallet containing Kshs.30,000/= was neither addressed nor resolved. Nonetheless, we are satisfied that the appellant did not suffer any prejudice from the failure to exhaustively analyze the evidence. For had the learned Judges exhaustively re-analyzed the evidence they would have come to the same conclusion as there was the evidence of the three eyewitnesses who identified the appellant as one of the passengers in the bus, who accosted and robbed other passengers. ***Masila*** who was robbed of his wallet and money gave clear evidence as prosecution witness 4, as to how he was robbed, and how he pounced on the appellant and with the assistance of other passengers pinned the appellant down, as the appellant's accomplices escaped. The evidence of ***Masila*** was consistent with that of ***(Mutie)***, another passenger in the bus who testified as Prosecution Witness 2 and ***Kihara***, ***(Mwaura)*** the bus conductor who testified as Prosecution Witness 1. Both were in the Bus and witnessed the appellant and his colleagues order everybody in the bus to produce their wallets and mobile phones. It is apparent that the appellant and his accomplices intended to, and tried to rob all the passengers in the bus including ***Mutie*** and ***Kihara*** of wallets and mobile phones. The attempts to rob all passengers were thwarted by the quick action of ***Masila***, who resisted after he was robbed of his wallet containing Kshs. 30,000/=, and managed to apprehend the appellant with the assistance of other passengers. The trial magistrate found ***Masila*** a credible witness and we have no reason to doubt his evidence in that regard.

47. There was overwhelming evidence against the appellant as he was caught red handed and this ruled out any possibility of mistaken identification. In the circumstances, his defence imputing bad blood between him and the bus conductor resulting from a disagreement over change, was rightly rejected. We are, therefore, satisfied that there was sufficient evidence to support the conviction of the appellant.

48. As regards the sentence meted out on the appellant, ***Section 361 (1)*** of ***Criminal Procedure Code,*** provides that severity of sentence is a matter of fact. We cannot, therefore, entertain the appeal in regard to severity of sentence. However, we do note that the trial magistrate did not specify which offence the sentence of death was imposed on. This was important as the appellant ought to have been sentenced to the death penalty in regard to one count, and the sentence in regard to the second count held to remain in abeyance. This is a matter that the High Court ought to have addressed, but failed to do so.

49 In the end, we confirm the conviction of the appellant on both counts one (1) and two (2) and the sentence of death which we clarify is in respect of count one (1).

The upshot of the above is that this appeal has no merit and is accordingly dismissed in its entirety.

This judgment has been delivered under ***rule 32(2)*** of this Court's Rules.

Dated and Delivered at Nairobi this 14th day of October, 2016.

P. KIHARA KARIUKI (P.C.A.)

.....

JUDGE OF APPEAL

H. M. OKWENGU

.....

JUDGE OF APPEAL

F. AZANGALALA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR