IN THE COURT OF APPEAL

AT NAKURU

(CORAM:.WAKI, NAMBUYE & KIAGE, JJ.A))

CRIMINAL APPEAL NO. 62 OF 2015

BETWEEN

SIMON NDUNGU KINUTHIA..APPELLANT

AND

REPUBLIC...RESPONDENT

*(Being an appeal from a conviction and sentence of the High Court of Kenya at Nakuru (**Wendoh & Mabeya, JJ**.) dated 8th April, 2014*

in

H.C.CR.C. No. 1071 of 2011)

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JUDGMENT OF THE COURT

The appellant **Simon Ndungu Kinuthia (Kinuthia)** was arraigned in the Principal Magistrate's court at Molo on a charge of robbery with violence contrary to section **296(2)** of the **Penal Code**. The particulars of the offence were that on the 6th day of June, 2011 at Kenyatta Phase II Molo District within Nakuru County, jointly with another not before court while armed with a dangerous weapon namely a metal rod he robbed Samuel Kamanjara Macharia of one (1) wrist watch (2) one pair of slippers (3) a sandal shoe, all valued at two thousand and one hundred and forty only 2,140/= and at or immediately before or immediately after the time of such robbery did beat the said Samuel Kamanjara Macharia.

The appellant denied the charge prompting a trial in which the prosecution called five (5) witnesses in support of its case. The complainant Samuel Kamanjara Macharia was at the material time residing at Kenyatta phase II in Molo town. He left his house in the morning of 6th June, 2011 to attend to personal issues and upon his return at about 11.00 a.m., he noticed two people standing at his gate. He became suspicious of the two as there had been thefts in the area. One of the two, identified as the appellant, pretended to be talking to somebody on phone only for PW1 to realize that in fact he had no phone. PW1 passed his gate and no sooner had he done so than the two entered his compound and they struggled with the door to his house. He came back quickly and confronted them. He grabbed the appellant and struggled with him. The two had already picked a pair of slippers and a shoe belonging to PW1's grandchild and already placed them in a paper bag. He had left these items outside his house to dry. The appellant's companion joined in the struggle trying to free the appellant from the complainant's grip and

in the process snatched the complainant's wrist watch.

The complainant raised alarm attracting the attention of Joseph Nthiga Mugambi (PW2) and Yabesh Ogega (PW3) who responded to the distress call. As the two approached the scene of the struggle, the appellant's companion fled. They helped PW1 to subdue the appellant, tied him up and then called the police. PW4 PC George Kamau, responded to the report on the instructions of the OCS Molo police station. On arrival at the scene he found the appellant tied with ropes with a mob baying for his blood. He rescued the appellant from the mob. He was handed a paper bag containing a pair of slippers and shoe items allegedly stolen from the complainant by the appellant and his companion. PW4 also recovered a metal rod and a pair of pliers alleged to have been in the possession of the appellant. PW1 was issued with a P3 form and referred for treatment as he had been injured in the course of the struggle. He was examined by Macharia Mwangi a clinical officer who found tenderness on the back of the head; the nasal bridge, which was also swollen; on the abdomen, left ankle joint and knee joint. PW5 filled the P3, classified the injuries as harm and later produced the P3 form in court as an exhibit.

When put to his defence the appellant gave an unsworn statement that on the material date he went to Kenyatta water point in the locality to look for an unnamed person he had commissioned to deliver water to him. On arrival, he met an old man who called him a thief. A woman in the company of the said old man started screaming. A crowd gathered and started beating him up and tied him before he was collected from the scene by the police.

In a judgment delivered by H.N. Nyaga SPM, the appellant was found guilty of the offence of attempted robbery with violence contrary to **section 297(2)** of the **Penal Code**, convicted and sentenced to serve seven (7) years imprisonment. He appealed to the High Court against that decision raising various grounds. In a judgment dated the 8th day of April, 2014 R.P.V. Wendoh and A. Mabeya, JJ dismissed the appellant's appeal, found the offence of robbery with violence proved to the required threshold, quashed the conviction for the offence of attempted robbery with violence contrary to **section 297(2)** of the **Penal Code**, substituted therefor a conviction for the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code** and imposed the sentence of death for the disclosed offence.

The appellant is now before this Court on a second appeal. He relies on four out of the six (6) grounds of appeal raised in his supplementary grounds of appeal dated and filed on his behalf on the 3rd day of June, 2016 by Messrs Maragia Ogaro & Co. Advocates, having abandoned those he had filed earlier on. The appellant's complaints are that the learned judges erred in law:-

- in failing to note that the circumstances obtaining at the scene of crime could not have amounted to an offence of robbery with violence.
- in failing to note that there were no weapons described by the complainant as having been used by the assailants.
- in failing to note that the appellant was greatly prejudiced in his trial in contravention of the provisions of **Article 50(2)(9)** of the **Constitution of Kenya 2010**
- in failing to note that the prejudice suffered by the appellant at the trial was incurable under the provisions of **section 382** of the **Criminal Procedure Code Cap 75**

In support of grounds 1 and 2 learned counsel Mr. Maragia submitted that neither the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code** nor the offence of attempted robbery with violence contrary to **section 297(2)** of the **Penal Code** were disclosed on the record. In his view, what was disclosed was an attempted theft which had not even matured as it is the complainant who confronted the appellant and his companion on suspecting them to be thieves. The reaction of the appellant and his companion was not to accost the complainant but to flee. This was sufficient proof that the appellant and his companion had not premeditated to cause any violence on the complainant. Since premeditated cause of violence is an important ingredient in the commission of the offence of robbery with violence, its absence operates to negate the commission of the offence. Mr. Maragia conceded proof of a struggle between the appellant and the complainant but it was his argument that this was not in furtherance of any premeditated violence on the complainant by the appellant, but it was as a result of the complainant intercepting the appellant in a bid to prevent him from fleeing. He contended further that the moment the

trial court which was in a better position to gauge the demeanor of the witnesses discounted the evidence on the snatching of the wrist watch from the complainant, the learned judges were not justified in overturning that finding and then substituting it with their own that in fact a wrist watch had been snatched from the complainant and then using it as proof of the commission of the offence of robbery with violence against the appellant.

Turning to ground 3 and 6, Mr. Maragia submitted that the appellant was greatly prejudiced in his defence for the state's failure to accord him free legal representation and for which reason the default should be resolved in his favour. He urged us to reverse the learned judges' decision and allow the appeal.

To buttress his submission Mr. Maragia cited the case of **Douglas Kinyua Njeru versus Republic** **Nyeri Criminal Appeal no. 28 of 2013** (unreported) for the proposition that the right to legal representation is integral to the realization of a fair trial, more so in capital offences.

In response to the appellants' submissions, Miss Mary Oundo the learned Senior Assistant Director of Public Prosecutions submitted that the offence substituted by the learned judges was proved to the required threshold as the appellant was in the company of another; violence was used on the complainant after the theft borne out by the content of the P3 form which indicated that the complainant suffered harm; theft was proved as the items removed from where PW1 had left them to dry had been put in a paper bag ready to be carted away. In her view, the High Court was right in finding that PW1's wrist watch had been robbed as there was no basis for the learned trial magistrate's doubt as to the complainant's testimony that he was robbed of a wrist watch; the complainant was also assaulted with a view to retaining the stolen items one of which was a wrist watch which was never recovered. The two courts below having concurrently believed PW1, PW2 and PW3 as truthful witnesses, there is no basis for overturning their concurrent findings on the appellant's culpability.

Turning to ground 3 and 6, the learned SADPP submitted that no prejudice or miscarriage of justice was occasioned to the appellant during his trial as he has not cited any provisions of law that existed then that required the state to provide him with free legal services. Second, the decision in the cited case of **Douglas Kinyua Njeru** (supra) did not say that the state must provide free legal services to persons facing capital offences, but that the state should legislate for the provision of such free legal services for those facing capital offences.

In reply Mr. Maragia urged the court to be guided by the holding in **Njoroge Macharia versus Republic Criminal Appeal no. 497 of 2007** (unreported) and find that substantial injustice does result in the cause of the trial of persons accused of capital offences in instances where such persons are not provided with free legal representation at the state expense at trial.

This is a second appeal. By dint of the provisions of **section 361** of the **Criminal Procedure Code**, the jurisdiction of the court is limited to dealing with matters of law only. See **Karingo versus Republic** **[1982] KLR 213**, for the holding that:-

> **"A second appeal must be conferred 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 evidence on which the final court could find as it did."**

We have considered the record in the light of the above rival arguments. In our view, only two issues arise for our consideration namely:-

(1) whether the learned first appellate judges erred in law when they substituted the appellant's conviction for the offence of attempted robbery with violence contrary to **section 297(2)** of **Criminal Procedure Code** with that of robbery with violence contrary to **section 296(2)** of the **Penal Code**

(2) Whether the appellant was prejudiced in his trial by the state's failure to provide him with free legal service and if the answer is in the affirmative then which is the appropriate remedy for that

breach.

Before arriving at the finding that the offence of robbery with violence had been disclosed and proved to the required threshold the learned first appellate court judges reasoned thus:-

> "**Whether the evidence supported the charge: An offence of robbery will violence is committed:-**
>
> > **(i) If the offender while armed with any dangerous or offensive weapon or instrument uses or threatens to use violence against any person or property at or immediately before or after time of the act of stealing; or**
> >
> > **(ii) If the offender commits the robbery while in company of one or more person or persons; or**
> >
> > **(iii) If the offence immediately before or after the time of the robbery wounds, beats, strikes or uses any other violence to any person**.
>
> **The Court of Appeal in Mneni Ngumbao Mangi v Republic 141 of 2005, considered what constitutes an offence of robbery with violence when it said:-**
>
> > **"As already stated, there are three ingredients, any of which is sufficient to constitute the offence of robbery with violence under section 296(2) of the Penal Code. If the offender is armed with any dangerous or offensive weapon or instrument, that would be sufficient to constitute an offence. Secondly, if one is in company with more than one or more other person or persons that would be evidence of the offence too. And lastly, 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, that would be yet another set to constitute the offence."**
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> > **In the instant case, the appellant was with one other person who managed to escape; the two were armed with a metal rod at the time of the robbery and they did inflict actual violence on the complainant. The complainant lost a wrist watch in the process while the other items were recovered. We are satisfied beyond any doubt that an offence of robbery with violence was proved. The prosecution only needed to prove existence of one of the ingredients. The trial court found that the appellant had taken some items from the complainant's compound but had not left with them, contrary to what the complainant clearly stated that his wrist watch was stolen. Besides, the evidence disclosed that all the three ingredients under section 296(2) existed. In our view, the trial court erred when it found the appellant guilty of a lesser offence of attempted robbery with violence.**
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> > **The appellant complained that the evidence did not support the charge because whereas PW1, PW2 and PW3 talked of a pliers having been recovered, it was not mentioned in the charge sheet. PW1 told the court that he found the appellant with the pair of pliers. PW1's evidence was corroborated by PW2 and PW3 who came to the scene to rescue PW1. PW4 who re-arrested the appellant found the pliers at the scene and took it into his possession as an exhibit. Even though the pliers was not mentioned in the charge which we believe was the omission by the police officer who drafted the charge sheet, other items are mentioned and in our view, that omission does not weaken the prosecution evidence nor does it prejudice the defence case.**
> >
> > **The appellant alleges that his defence was not considered. We have considered the appellant's defence, we find that the defence was a bare denial, in which he said that he was just a passerby when PW1 alleged that he had stolen from him. The magistrate did consider the said defence and did not believe him. We have no reason to find otherwise.**

We have in the circumstances given due consideration to the above reasoning and find that it is sound as it was anchored on both the law and the record. As submitted by the learned SADPP, it was not mandatory that all the possible elements of the offence of robbery with violence be present before the offence could be established. It was sufficient to demonstrate that even only one was established as the list of those elements is disjunctive, not conjunctive. Herein several were established as set out by the learned judges in the above reasoning. As for the issue of the robbed wrist watch, learned judges were obligated to re-evaluate the record before them, analyse it and draw their own conclusions on the matter. See the case of **<u>Okeno versus Republic</u> [1972] EA 32** for the holding *inter alia* that:-

> **"It is the duty of a first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld."**

In the instant appeal, it is our view that the first appellate court properly exercised its mandate by revisiting the record with regard to the evidence on proof of robbery with violence of the wrist watch from the complainant and reversed the trial courts findings that no wrist watch was robbed. The trial court simply stated that it did not believe that the complainant had a wrist watch, but never pointed out evidence on the record that showed that PW1 had no wrist watch on as had been testified by him. We therefore affirm the finding of the first appellate court that PW1 had a wrist watch on that material date which was robbed from him by the appellant and his companion. We also find that the violence meted on the complainant was in the assailant's attempt to prevent the complainant from thwarting the said robbery. A reading of the elements for the commission of the offence of robbery with violence set out above by the learned judges with which we respectfully agree, indicates that violence may either be premeditated or it may arise in the course of resisting or the thwarting of the commission of the offence. The latter was the position herein. We are therefore satisfied beyond reasonable doubt that the offence of robbery with violence had not only been disclosed but was also proved to the required threshold.

Turning to the issue of prejudice for non provision of free legal services at his trial, it is correct as was submitted by the learned SADPP that it was not mandatory. That is why the court in **Douglas Kinyua Njeru** case (supra) stated that Parliament has to legislate for such provision. It is not in dispute that as at the time the appellant was arraigned in court no such legislation had been enacted. No obligation therefore lay on the State to provide the appellant with such services. It may well be he was prejudiced but in the absence of legislation at the time, compelling the state to make such provision, the State cannot be faulted for not providing. We find nothing in the said **Douglas Kinyua Njeru** case (supra) to suggest that non-provision would automatically entitle an accused person or appellant to an absolution from blame for the offence committed by him. The position in law is that due process had to be followed for the proof or otherwise of the offence charged. In the instant appeal due process of the law was followed and the offence established and proved to required threshold against the appellant. We cannot therefore, interfere with their concurrent findings on guilt and punishment.

In the result we find no merit in this appeal. It is dismissed in its entirety.

Delivered and Dated at Nakuru this 17th day of November, 2016

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR