IN THE COURT OF APPEAL

AT NAIROBI

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

CRIMINAL APPEAL NO. 300 OF 2007

BETWEEN

DIMA DENGE DIMA & OTHERS ……..……APPELLANTS

AND

REPUBLIC ……..…….…….…….……RESPONDENT

(Being from a judgment of the High Court of Kenya at Nairobi (Makhandia & Kimaru JJ.A) dated 12th February 2004

In

H.C.CR.A NO. 754/1996

****

JUDGMENT OF THE COURT

On the night of 26th to 27th June 1995, **IBRAHIM JARSO JILLO (PW1**), his late wife **FATUMA** and their three unnamed children had retired to their beds at Butiye Manyatta in Moyale District. Their sleep was cut short at about 12.30am when there was loud knocking at their door. Some people claiming to be "Kenya Police" demanded that the door be opened for them. When **PW1** demanded that they identify themselves, the intruders, five men in all, broke the door and got into the house.

PW1 recognized all five men for they forced him to put the lantern that was in the house to full light. He had been with three of the men at the livestock market during the day. Two of them were **PW1's** neighbours for many years and he knew four of them by their multiple names. The men were armed with guns which **PW1** could clearly recognize as being what he called a "Stale Pistol" and another a Kaskob rifle (probably referring to a Kalashnikov assault rifle). **PW1** was kicked and sent sprawling on the floor before shots were fired hitting him on the shoulder. To silence his screams, PW1 was hit with a club by one of the robbers and ordered to shut up.

Neighbours who had been attracted by the screams of **PW1** and his late wife **FATUMA** rushed to the scene and the robbers shot in the air to scare them off. The robbers meanwhile started ransacking that family's two-roomed house. Entering the bedroom, they started rummage through mattresses and suit cases. All this while **PW1** was lying still, pretending to be dead from the gunshot, but he could hear the intruder's activities. As his wife **FATUMA** had recognized the robbers, one of them said she should be killed and, sure enough, as she begged them by name to spare her life, she was shot and killed at point

blank range.

Mission accomplished, and with neighbours gathering, the five men trooped out of the house taking with them PW1's sales of the previous day amounting to Kshs. 54,000, a radio, a torch, assorted clothes, plates, trays and the like. As they walked away their faces unconcealed and undisguised, the robbers were well and clearly seen by a number of PW1's neighbours who recognized them as people they knew.

A report was made to the police by PW1 and his neighbours who gave the names of the robbers who were seen in and leaving PW1's house that fateful night. It is these neighbours including **ISSACK MOHAMED ELEMA** (PW2); KOLO GODANA ALI (PW3); OSMAN NDABOSO ALI (PW4) and **MOHAMMED ISAACK** (PW8) who had found **PW1** lying unconscious in a pool of blood and had him taken to hospital. They also arranged for the removal of the lifeless body of **FATUMA** which they had interred the following day. They had seen the assailants, heard their voices and had the deceased call out the name of some of them that night of terror. They duly gave the names and description of the robbers leading to their arrest and arraignment on two counts of Robbery with Violence Contrary to **Section 296(2)** of the Penal Code against five individuals namely DIDA GALGALO (ALIAS) GUYO HALAKE WARIO; (2) WAKO SOTA (3) KUSU CHARI (4) WARIO GOLICHA (5) DIMA DENGE DIMA.

The particulars of the offences were set out as follows;

> ***COUNT 1 Jointly with others not before the court, being***
>
> ***armed with pistols and rungus robbed Ibrahim***
>
> ***Jarso Jillo of cash Kshs. 54,000, two long trousers, one radio make national and a torch all totals value Kshs. 55,910/= and at or immediately before or immediately after the time of such robbery wounded the said Ibrahim Jarso Jillo."***
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> ***COUNT II: ROBBERY WITH VIOLENCE CONTRARY TO***
>
> ***SECTION 296(2) OF THE PENAL CODE***
>
> ***PARTICULARS; DIDA GALGALO ALIAS HALAKE WARIO;***
>
> ***During the night of 26th 27th June, 1995 at Butiye in Moyale District of the Eastern Province, jointly with others already before the court, bring armed with pistols and rungus, robbed Fatuma Edin Kono of three dresses and two dish trays all valued at Kshs. 1,850/= and at or immediately before or immediately after the time or such robbery wounded the said Fatuma-Edin Kono (DECEASED)***

All the persons accused pleaded not guilty and the trial proceeded in Nairobi after a *nolle prosequi* was entered terminating earlier proceedings that had commenced before the subordinate court in Moyale. After hearing the prosecution and the defences, the learned trial magistrate **J.W. Lesiit** (SPM) (as she then was) convicted all accused persons and imposed the sentence of death as by law required.

The accused persons appealed to the High court by separate appeals which were however consolidated. After hearing the appeal and the submissions made for and against the appeal, the High court found that the conviction of the 3rd appellant before it had been based solely on the retracted statement of a co-accused and proceeded to quash it. The learned judges, however, agreed with the trial court that the case as against the rest of the appellants before them had been proved beyond reasonable doubt. It dismissed their appeals and affirmed the conviction and sentence of the trial court.

Aggrieved by the High Court's decision aforesaid, the appellants filed some home grown Grounds of Appeal. Mr. Oyalo, learned counsel for the 1st, 2nd and 3rd appellants subsequently filed a Supplementary

Memorandum of Appeal which now forms the basis of the appeal before us. To avoid any perceived or real conflict of interest, it was suggested by Mr. Oyalo and the Court (differently constituted) agreed and directed that the 4th appellant be availed separate representation. It was then that the firm of Arati & Co. Advocates came on record for the 4th appellant. They too did file a Supplementary Memorandum of Appeal which is a verbatim rendition of the one previously filed by A.O. Oyalo & Co. for the other appellants. The grounds raised in both Memoranda of Appeal are as follows;

> ***"1. That the first Appellate Court erred in law in affirming the decision of the trial court notwithstanding that the trial court did not accord the 4th Appellant a fair trial in that she did not afford him the requisite facilities to prepare his defence and did not compel his witnesses to attend before the court and give evidence on their behalf contrary to the provisions of Section 77 9(c) (e) of the former constitution.***
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> ***2. That the first Appellate Court erred in law in affirming the decision of the trial court notwithstanding that the charge was defective in several aspects namely:***
>
> > ***(a) There is no reference in the charge to the enactment creating the offence contrary to the provisions of Section 137 (a) (i) (ii) of the Criminal Procedure Code.***
> >
> > ***(b) There is no mention in the charge of creation essential element of the offence i.e. being armed with dangerous or offensive weapon or instrument.***
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> ***3. That despite several entreaties by the 4th appellant, the trial court and the first appellate failed to cause the file relating to Criminal Case No. 122 of the 1995 Moyale Magistrate's Court to be place before them, this omission was highly prejudicial to the 4th appellant in view of the provisions of Section 65 (2) of the former Constitution which conferred upon the High Court the jurisdiction to supervise criminal proceedings before a subordinate court for the purpose of ensuring that justice is duly administered by the latter court and the provisions of Section 362 of the Criminal Procedure Code.***
>
> ***4.That the first appellate court erred in fact and in law in affirming the decision of the trial court to the effect that the 4th appellant was properly and positively identified by the prosecution witness notwithstanding that the prevailing conditions at the scene of the crime were not favourable for positive identification, besides, there is no evidence on record that PW2, PW3, PW4 and PW8 gave the police the names of the 4th appellant although they told the trial court they saw them at the scene of the crime and that they knew them.***
>
> ***5. That the First Appellant Court erred in fact and in law in shifting the onus of proof to the 4th appellant contrary to the basic legal principle that the onus proof remains throughout the trial upon the prosecution to establish that the accused is guilty of the offence with which he is charged.***
>
> ***6. That the first Appellate Court did not re-evaluate the evidence a fresh as required* by law."**

When the appeal came up for hearing before us, Mr. Oyalo, learned counsel for the 1st, 2nd and 3rd Appellants, and very properly so in our opinion, abandoned grounds 4 and 6 of the Supplementary Memorandum of Appeal as set out above. These grounds had sought to challenge the identification of the appellants at the scene and the learned judges' alleged failure to re-evaluate the evidence afresh as required by law. We say Counsel properly abandoned the said grounds as it is abundantly clear from the record that the evidence of identification, which was, in fact of the more assured character of multiple recognition, was overwhelming. It is also plain to see from the record that the learned judges of the High Court meticulously and conscientiously discharged their duty as a first appellate court by thoroughly and

exhaustively re-elevating and re-assessing the evidence before arriving at their own independent conclusions.

Under Grounds 1 and 3 of the appeal, which Mr. Oyalo argued together, the appellants contend that the High Court was wrong to affirm a conviction arrived at by the trial court notwithstanding the violation of their rights to a fair trial in that they were denied the facilities to prepare their defence and the trial court failed to compel attendance of witnesses. This submission was premised upon their fair trial guaranties in **Section 77 (9) (c)** and **(e)** of the former Constitution and on the High Court's supervisory jurisdiction as was spelt out in **Section 65 (2)** of the Constitution.

It was Mr. Oyalo's submission that the 2nd Appellant, who was the 3rd Accused before the trial magistrate, did inform the court upon being placed on his defence that he wished to call one witness. There is nothing on the record to show that the 2nd Appellant, at least on that occasion, provided any particulars regarding the intended witness. He also does not make mention of a witness during his defence when he gave his unsworn statement. After hearing all the five accused give their sworn statements, the learned trial magistrate recorded on 24.4.96 as follows;

> ***"There are 2 defence witnesses to be brought. Witness summons to issue to Executive Officer Moyale Court to produce CC. M. and to Abdul Duba Wario Muli."***

On 7.5.96, the prosecutor informed the court that the witness summons were sent by mail to the Moyale DCIO but attempts to reach him on the telephone were unsuccessful and he could not tell whether the summons had been served. The same situation obtained when the case was next mentioned on 10.5.96.

When the case was next in court for further defence hearing on 22.5.96 the record shows as follows;

> ***"Prosecutor. The summons were sent through post office. Yesterday we confirmed through radio telephone that the summons have not been received. We could not therefore summon the witness (sic) – none had come.***
>
> ***2nd Accused: I will dispense with the production of the court file.***
>
> ***4th Accused: I dispense with the witness."***

As the appellants had already given their unsworn statements, this turn of events prompted the learned trial magistrate to fix a date for judgment. Mr. Oyalo contended before us that since it is the 3rd Accused who had sought to call a witness, it was not open for the 4th accused to dispense with that witness as seemed to have occurred in the case. That of course appears true but begs the question as to why the wrong accused person could have purported to dispense with a witness he never sought to call and, more important, why the proper accused person, who was himself present in court, did not say anything about the matter. In all probability what must have happened is that it is the correct accused person namely the fourth, who had earlier sought to call the witness, who later changed his mind and decided to dispense with the intended witness but an error occurred in the numerical reference to accused persons or in the typing of the record.

The foregoing is borne out by the clarity, evincing continuity, with which the learned trial magistrate referred to that aspect of the trial in her judgment. Said she;

> ***"The 2nd and 4th accused intervened to have previous Moyale case court file and one witness called respectively. Summons sent to have both attend court were not served in good time prompting the two accused persons to close their case."***

Since, therefore, the accused person who requested that a witness be called for his defence is the one who dispensed with the said intended witness, the complaint about violation of his fair trial right on that account is devoid of substance. He was afforded the facility of obtaining the attendance of his witness by

the issuance of summons by the Court but before the same could be served he changed his mind about that witness' attendance – as he was entitled to.

The aspect of the learned trial magistrate having ordered the issuance of summons for one **ABDUL DUBA WARIO MULI** (whom the accused who sought him never made mention of in his defense) and even adjourned the defence hearing on a subsequent occasion to await the fate of the summons shows the trial court's efforts at affording the accused the full rights of a fair trial under **Section 77 (2) (c)** and **(e)** of the former Constitution. She proceeded only when the 4th Accused dispensed with the witness.

That being so, the situation herein was decidedly different from **HENRY KIMATHI Vs. REPUBLIC Crim. Appeal No. 10 of 2002**, a decision of this Court. There, the accused person had indicated that he could call "a Moyale person" as his witness. Instead of allowing him to call that witness, the trial magistrate ordered the case to proceed. The accused gave evidence in which he raised *an alibi* to the effect that he was in Moyale at the time of the robbery which occurred in Nairobi and that while there he had been assisted by the one 'Pastor' Mutuma. In allowing his second appeal against conviction, the Court said, and we would respectfully concur;

> ***"The point is that the appellant wanted to call a witness in support of his alibi and the magistrate did not accord him a reasonable opportunity to call the witness. That clearly amounted to a violation of his rights guaranteed by Section 77 (1) (e) of the Constitution."***

We also find germane and more applicable to the case before us the following observation by the Court in the **HENRI KIMATHI** case; (supra)

> ***"We note that the appellant had not asked the magistrate's aid in calling his witness; the applicant could himself have called the witness without the assistance of the court. There is no legal requirement that a witness can only be called with the assistance of the Court."***

On the same issue of fair trial, **Mr. Oyalo** took issue with the failure of the trial magistrate to compel the attendance of the OCS for production of the Occurrence Book (OB) from Moyale Police Station for the day when the robbery was reported and of the Executive Officer of the Magistrate's Court in Moyale to appear and produce the court file in respect of the terminated trial of the appellant.

As we have already stated, the learned trial magistrate did in fact issue summons for the attendance of the Executive Officer to produce the court file and that the 2nd Accused did subsequently dispense with the production of the same. Mr. Oyalo urges us that the said accused had neither capacity nor authority to so dispense with the production of the file. This submission is for rejection as the record shows quite clearly that it is that accused person who requested production and he that dispensed with it.

Whereas we note that the High Court did make several orders that the court file and the O.B. be availed for the hearing of the first appeal to no avail, we do not for our part think that much turns on it. We are not aware that any application had been made for the adduction of additional evidence before the 1st appellate court. At any rate what did emerge is that both the file and the O.B. could not be traced. Given the very cogent and compelling nature of the evidence tendered before the trial court that placed the appellants at the scene of the crime, we are quite clear that whatever evidence there may have been in the O.B. and the Court file for the first trial could only have been so good as to show, at best, inconsistencies, if at all, that would have been of minimal if any utility in the entire scheme of things. It is notable, moreover that this issue was not raised in the first appellate court, and as such seems to us to be an afterthought.

We agree with the submission by Mr. O'mirera the learned Senior Principal Prosecution Counsel for the respondent which we consider worthy of verbatim rendition;

> ***"While appreciating that there are circumstances in this case that might be construed***

> ***negatively against the State, especially the O.B. and court file sought for a long time and not availed, there was no prejudice to the appellants. The O.B was for purposes of ascertaining consistency not displacing the State's case. You don't need an O.B. to prove you were attacked by your next door neighbor. PW4 and PW6 heard a dying declaration in which the deceased (FATUMA) called the name of Wako and also saw him coming out of the house. You do not need the O.B. to prove that."***

The ground of alleged violation of the appellants rights respectfully fails.

Mr. Oyalo next assailed the decision of the High Court for affirming conviction founded on a defective charge. According to Mr. Oyalo, the charge was bad as it cited **Section 296 (2**) of the Penal Code which is a punishment section without citing **Section 295** which, in his submission, is the one that creates the offence. And for this proposition, Mr. Oyalo referred once more, to the **HENRY KIMATHI** case.

With respect, Mr. Oyalo's position cannot be right. While counsel submits that **Section 295** of the Penal Code 'creates' the offence of robbery, what it does is define it. In that case, a submission had been made that the threat to use violence cannot prove a robbery charge and this is what the Court had to say;

> **"The offence of robbery is generally defined in Section 295 of the Penal Code and there it is simply stated;**
>
> **"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."**
>
> **That is the general definition of "robbery" Section 296(1) then sets out the penalty for that offence. Section 296(2) brings in other circumstances which may surround a robbery, such as that the offender may be armed with a dangerous or offensive weapon, or may be in the company of one or more other person(s) and so on. In the latter case, the penalty is death, but then it does not change the definition of the term robbery, which remains theft accompanied by use or threat to use violence."**

We do not see how the case stands as authority for the use and proposition that a charge of robbery with violence must also include mention of **Section 295** of the Penal Code to be good and effective. Indeed, when we pressed him on the point, Mr. Oyalo was candid enough to concede that this Court did not in that case hold that a charge under **Section 296 (2)** that did not also cite **Section 295** of the Penal Code was defective. The law of drafting of charges as we understand it is that it is the punishment or penal section that creates the offence and as such it is the one that is cited in a charge sheet. In the book ***Essentials of Criminal Procedure in Kenya***, (Law Africa, 2010) P.O. Kiage (now J.A, on this bench) did point out and we agree as follows;

> ***"If the offence charged is one created by a statutory enactment, it must contain a reference to the Section of the enactment creating the offence. The correct procedure is to specify in the statement of offence, not the section that defines the offence, but the one that prescribes the punishment thereof."***

(At p 76. See also Douglas B (1964) ***Criminal Procedure in Uganda and Kenya*** (Law Africa) (No 13) pp37 and the Case of **Cosma Vs. Republic [1955] 22 EA. 450**.

Mr. Oyalo also sought to persuade us that the charge was defective for not containing in the particulars the words "being armed with dangerous or offensive weapon or instrument" which, he contended, were an essential constituent of the offence. He cited the decision of the predecessor of this Court in **YOZEFU & ANOR Vs. UGANDA [1969] EA 236** for the general proposition that a charge that does not allege an essential ingredient of an offence is defective.

Next, counsel cited this Court's decision of **JUMA Vs. R [2003] 2 EA 471** where it was held that in a robbery with violence charge under **Section 296 (2)** of the Penal Code, the failure to describe the knives with which the appellant was armed as 'a dangerous weapon vitiated the charge'. The Court there was emphatic that;

> ***"Under Section 296(2) of the Penal Code the charge must state that the accused was armed with a dangerous or offensive weapon or instrument, or was in the company of one or more other person or persons or at, or immediately before or immediately after the time of the robbery the accused wounds, beats, strikes or uses any other personal violence to any person. In this appeal the charge as laid was defective as it did not clearly specify the essential ingredients of the offence under Section 296 (2) of the Penal Code."***

That decision was followed and taken a step further by this Court in **ODHIAMBO & ANOTHER Vs. R [2005] 2KLR 176** (in which two of the judges who decided **JUMA** also sat) which started by explaining that;

> ***"The charge must state that the weapon or instrument with which the appellant was armed was a dangerous or offensive one. The reason for that a knife, for example, or a Stone, is not an inherently dangerous or offensive item. A knife can and often is used under very many circumstances for entirely peaceful purposes … it is the use to which the weapon or instrument is put that makes it dangerous or offensive. Even a gun is not necessarily a dangerous or offensive weapon; a gun can be used in target practice, for example, and put to that use it is not an inherently dangerous weapon."***

On the strength of those authorities Mr. OyalO sought to persuade us that the charges in which the appellants were tried and convicted were defective and therefore entitled them to an acquittal.

We have had very serious difficulty following the reasoning of the Court in the passages we have just quoted, not least because they appear to be intrinsically contradictory. Having correctly found that it is the use to which a weapon or instrument is put to that determines whether it is dangerous or offensive, it would seem to us inevitable for such a conclusion to be drawn where such weapon has actually been used to maim, wound or kill. It would seem unreal for us to ignore such stark reality on the basis that the words "dangerous or offending weapon "or instrument" did not precede the guns and rungus with which the appellants were armed on the material night. We are quite satisfied that the firearms were not being used for target practice nor the pangas for tending flowers. They were weapons that were meant to be and were in fact employed in a dangerous and offensive manner. We decline the invitation, to embark on a defeatist task of sophistic semantics. We cannot think of a more dangerous or offensive weapon than a firearm in the hands of a robber.

The appellants herein were not in any way prejudiced by the absence of the words dangerous or offensive weapons in the charge sheet and were fully conversant with the charges that confronted them. They were not misled in any manner.

The **JUMA** and **ODHIAMBO** line of cases (supra) are, in our view, perfectly right where a charge of robbery with violence is premised only on the ingredient of being armed with a dangerous or offensive weapon and no other. The court's circumspective approach would be entirely understandable given the seriousness of the charge. The elements of the offence under **Section 296 (2)** are, however, three in number and they are to be read not conjunctively, but disjunctively. One element is enough to found a conviction. This was considered at length by this Court in **JOHANA NDUNGU Vs. REPUBLIC Criminal Appeal No. 116 of 1995 (**unreported;)

> ***"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 properly at or immediately after to further in any manner***

the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed 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.*

Analyzing the first set of circumstances the essential ingredient apart from the ingredients including the use or threat to use actual violence constituting the offence of robbery, is the fact of the offender at the time of robbery being armed with a dangerous or offensive weapon. No other fact is needed to be proved. Thus if the facts show that at the time of commission of the offence of robbery as defined in Section 295 of the Penal Code, the offender was armed in the manner afore-described then he is guilty of the offence under sub-section (2) and it is mandatory for the court to so convict him.

In the same manner in the second set of circumstances if it is shown and accepted by court that at the time of robbery the offender is in company with one or more person or persons then the offence under sub-section (2) is proved and a conviction thereunder must follow. The court is not required to look for the presence of either of the other two set of circumstances.

With regard to the third set of circumstances there is no mention of the offender being armed or being in company with others. The court is not required to look for the presence of either of these two ingredients. If the court finds that or immediately before or immediately after the time of robbery the offender wounds, beats, strikes or uses any other violence to any person (may be a watchman and not necessarily the complainant or victim of theft) then it must find the offence under sub-section (2) proved and convict accordingly."

We respectfully agree with the foregoing analysis and, applying the same to the appeal before us harbour no doubt that not one (which would have sufficed) but <u>all three</u> elements were present and proved and the two courts below were correct in their conclusions.

That now brings us to the last of Mr. Oyalo's complaints which was to the effect that the learned judges gravely misdirected themselves and shifted the burden of proof to the appellants to disprove the prosecution case. The passage that has attracted the appellant's ire is where the learned Judge's stated as follows;

"We find that apart from explaining the circumstances of their arrest the said four appellants did not discharge the burden placed on them to disprove the evidence adduced against them by the prosecution witness."

The choice of words by the learned judges may have created the impression of which the appellants complain but, put in proper context, there was no shifting of the burden at all. The learned judges were simply addressing the appellants' complaint that the trial magistrate did not consider their defences. They observed, correctly, that the said defences only dealt with how and when the appellants were arrested and failed to deal with, confront, dislodge or displace the case the prosecution had put forth. It really was no more than a common sense statement to the effect that the defences proferred did not dilute the prosecution case that remained watertight and iron clad. Nothing turns on this complaint and the ground accordingly fails.

As we observed before, the 4th appellant's grounds of appeal were identical to those of his co-appellants and in fact his learned advocate, Ms. Mwango adopted and associated herself with the submissions made by her learned senior save to explain that her client dispensed with the production of the court file from Moyale "out of frustration". We do not think the motive behind the dispensation makes any difference to the result which is that he did dispense with it.

The upshot is that we find no merit in this appeal and we accordingly dismiss it in entirety.

Dated and delivered at Nairobi this 12th day of July 2013.

R. N. NAMBUYE

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

A .MURGOR

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR

/mwn