REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

HIGH COURT CRIMINAL APPEAL CASE NO. 8 OF 2015

GEOFFREY LUMEKA SAKWA …… APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

(Being an Appeal against the conviction and sentence in Criminal Case No. 168 of 2014 of the Senior Principal Magistrate's Court at Kajiado, delivered by M. O Okuche, on the 26th September 2014)

JUDGEMENT

Introduction

1. **GEOFFREY LUMEKA SAKWA** hereinafter referred to as the Appellant was charged alongside two others with six counts of Attempted Robbery with violence contrary to section 297(2) of the Penal Code Cap 63 and another Count of Attempted escape from lawful custody contrary to section 123 as read with section 389 of the Penal Code Cap 63 in the Chief Magistrates Criminal Case No. 168 of 2014. The contents of the charges are as particularised below.

2. On count one (1): 1. Geoffrey Lumeka 2. Julius Mwai Nthinga 3. Isaiah Kambi Anyembe on 12th day of February 2014 at Kosenja village of Isinya Location within Kajiado County jointly attempted to rob No. 55853 PC Augustine Sitienei a police officer attached to Kajiado Police Station who was escorting you to Kajiado Police Station, of an AK 47 riffle S/N023006533 and at the time of such attempted robbery used actual violence to the said Augustine Sitienei.

3. The particulars of count two (2) as per the charge sheet were that: 1. Geoffrey Lumeka 2. Julius Mwai Nthinga 3. Isaiah Kambi Anyembe on 12th day of February 2014 at Kosenja village of Isinya Location within Kajiado County jointly attempted to rob No. 55853 PC Augustine Sitienei a police officer attached to Kajiado Police Station who was escorting you to Kajiado Police Station, of his magazine of AK 47 riffle and at the time of such attempted robbery used actual violence to the said Augustine Sitienei.

4. Regarding count three (3) the charge sheet stated that: 1. Geoffrey Lumeka 2. Julius Mwai Nthinga 3. Isaiah Kambi Anyembe on 12th day of February 2014 at Kosenja village of Isinya Location within Kajiado County jointly attempted to rob No. 55853 PC Augustine Sitienei a police officer attached to Kajiado Police Station who was escorting you to Kajiado Police Station, of his 30 rounds of ammunitions calibre 7.62mm and at the time of such attempted robbery used actual violence to the said Augustine Sitienei.

5. The particulars of count four (4) as per the charge sheet were that: 1. Geoffrey Lumeka 2. Julius Mwai Nthinga 3. Isaiah Kambi Anyembe on 12th day of February 2014 at Kosenja village of Isinya Location within Kajiado County jointly attempted to rob No.

93936 PC Casmiel Otieno a police officer attached to Kajiado Police Station who was escorting you to Kajiado Police Station, of his AK 47 riffle S/N023006849 and at the time of such attempted robbery used actual violence to the said Casmiel Otieno.

6. The particulars of count five (5) per the charge sheet were that: 1. Geoffrey Lumeka 2. Julius Mwai Nthinga 3. Isaiah Kambi Anyembe on 12th day of February 2014 at Kosenja village of Isinya Location within Kajiado County jointly attempted to rob No. 93936 PC Casmiel Otieno a police officer attached to Kajiado Police Station who was escorting you to Kajiado Police Station, of his magazine of AK 47 riffle S/N023006849 and at the time of such attempted robbery used actual violence to the said Casmiel Otieno.

7. Count six (6) was outlined as: 1. Geoffrey Lumeka 2. Julius Mwai Nthinga 3. Isaiah Kambi Anyembe on 12th day of February 2014 at Kosenja village of Isinya Location within Kajiado County jointly attempted to rob No. 93936 PC Casmiel Otieno a police officer attached to Kajiado Police Station who was escorting you to Kajiado Police Station, of his 30 rounds of ammunitions calibre 7.62mm and at the time of such attempted robbery used actual violence to the said Casmiel Otieno.

8. The particulars of count seven (7) as per the charge sheet were that; 1. Geoffrey Lumeka 2. Julius Mwai Nthinga 3. Isaiah Kambi Anyembe on 12th day of February 2014 at village of Isinya Location within Kajiado County jointly being in a lawful custody of No. 55853 PC Augustine Sitienei and No. 93936 PC Casmiel Otieno police officers attached to Kajiado Police station who were escorting prisoners from Athi River prisons to Kajiado Police Station you as remandees from the said prison for the offence of robbery with violence attempted to escape from such lawful custody.

9. At the Trial, the Respondent/ Prosecution availed seven (7) witnesses to prove the state's case against the Appellant and his co-accused's. At the close of the trial, the Learned Magistrate found the Appellant and his co-accused culpable of the offences and convicted them on Counts One, Four and Seven. The Appellant was sentenced to serve seven (7) years imprisonment in each Count 1 and 4 and to serve six (6) months imprisonment in Count 7 which custodial sentences were to run concurrently while his co-accused were sentenced to 4 years of imprisonment in Count 1 and 4 and to serve six (6) months of imprisonment in Count 7.

Grounds of Appeal

10. Feeling aggrieved by both the Conviction and Sentence of the Learned Trial Magistrate, the Appellant sought to appeal. By an Amended Grounds for Appeal dated 10th October 2016, the Appellant cited 9 grounds for appeal to wit:

a. THAT, the Learned trial Magistrate erred in failing to sufficiently appreciate that it was not open to him to rely upon exhibits marked for identification but not produced in Court.

b. THAT, there was variance between the particulars of the charge and the evidence in breach of the provisions of Section 214 of the C.P.C.

c. THAT the tenets of a fair trial were infringed in the premises that witness' statements were not supplied prior to the commencement of the trial in this case.

d. THAT, some witnesses were not sworn in before they testified in contravention to the requirements of Section 151 of the C.P.C.

e. THAT the Learned trial Magistrate failed to note that the witnesses seemed to have been coached and investigations were done when the appellant had already been arrested.

f. THAT the Learned trial Magistrate erred in law and fact by failing to inform the appellant of his right to cross examine his co-accused persons thereby contravening Section 208(3) of the C.P.C.

g. THAT, the Learned trial Magistrate erred in law and fact by basing his conviction on extraneous evidence which had not been adduced by either party.

h. THAT, the Learned trial Magistrate erred in law and fact in applying the wrong standard of proof in the case thereby arriving at a wrong decision.

i. THAT, the Learned trial Magistrate erred in law by rejecting the appellants defence without assigning any good reasons for so doing.

The Appellant's Submissions on Appeal

11. The Appellant represented himself for the conduct of this appeal. Having laid out his amended grounds of appeal, he proceeded to argue the nine grounds alluded to jointly.

12. It was submitted that the prosecution had failed to prove the offence under Section 297(2) of the Penal Code. According to the Appellant the Prosecution was unable to prove the fact that he was out to steal the alleged weapons therefore the charge as framed was not proven.

13. According to the Appellant, the prosecution did not call any witnesses to formally produce the arms movement register and the 3 guns exhibited in court therefore said exhibits had little if any evidential value. He cited with approval the case of **Keneth Nyaga Mwige vs Austin Kiguta & 2 others (2015) eKLR.**

14. The Appellant further submitted that the charge sheet was fatally defective under Section 214(1) of the Criminal Procedure Code as there were material contradictions in the two sets of serial numbers for the guns indicated in the charge sheet and Arms Movement Register. The case of **Jason Akumu Yongo vs Republic (1983) eKLR** was referred to.

15. It was submitted that there was a violation of the Appellant's right to a fair trial as guaranteed under Article 50 (2)(c) and (j) because while the Appellant requested to be provided with witness statements severally, the same was not done. The cases of **Paul Thiba Ndungu vs Republic (2014) eKLR and Republic vs Daniel Chege Magotho(2014) eKLR** were cited in this regard.

16. The Appellant went on to submit that contrary to Section 151 of the Criminal Procedure Code, several witnesses did not swear an oath before the commencement of their respective testimonies.

17. Relying on **Godhana vs Republic (1991) KLR 417,** the Appellant further submitted that he was not informed of his right to cross examine his co accused.

18. Additionally, it was argued that the prosecution failed to establish the exact vehicle the accused persons were transported in as the witness testimonies were contradictory in this regard.

19. Finally, the Appellant submitted that he was discriminated against in sentencing as his sentence was almost double that of his co accused. He riled on **Fatehali vs Republic (1972) EA 158.**

The Respondent's Submissions on Appeal

20. Submitting on behalf of the state, Principal Prosecution Counsel Mr. Meroka touched on three issues for determination by the court:

a. Did the Prosecution meet the requirements of Section 297 (2) of the Penal Code"

b. Whether the Appellant and his co-accused attempted to escape from lawful custody

c. Whether the Defence by the Appellants was a sham

21. On the first issue, it was submitted that the Prosecution had proven beyond reasonable doubt the three elements necessary to satisfy a conviction under Section 297 (2) which provides that for an attempted robbery to qualify as a violent one, the prosecution must prove that the offender must be:- a) Armed with a dangerous or offensive weapon and/or b) Be in company with one or more other persons and/or c) Immediately before or after the time of the attempted robbery, wound, beat, strike or use any other personal violence to the victim.

22. According to Counsel, the testimony of PW2 and PW5 as corroborated by the testimonies of PW1, PW3 and PW6, was consistent and clearly confirmed that the Appellant and his co-accused tried to rob them of their AK 47 rifles. Both testified that the Appellant grabbed PW2 by the neck as he was picking a call and pleaded with other remandees to join hands to disarm them. The 2nd Accused joined and grabbed PW5 and tried to snatch his rifle while the 3rd Accused started pushing PW2 out of the speeding vehicle. Fearing for their lives, PW5 threw out his rifle and also removed PW2's magazine and threw it out to disarm the rifle. The two rifles were produced in court as Pexh 2 (a) and (b). Other remandees did not participate.

23. Counsel submitted that the exhibits Pexh 3 and Pexh 4, which were p3 forms, confirmed that indeed the Appellant and his co-accused visited actual violence on PW2 and PW5 at the time of the said attempted robbery. PW4 confirmed that PW2 and PW5 had injuries when they came for treatment. Further, PW1, PW3, PW6 and PW7 confirmed that PW2 and PW5 were bleeding when they were rescued. PW1 stated that he saw the Appellant and the 3rd accused pushing the PW2 out of the speeding vehicle. PW7 confirmed there were blood stains on the Appellant's and co-accused clothes. The appellant's coat was torn. It is clear from the testimony of four witnesses that the Appellant and his co-accused inflicted injuries on PW2 and PW5 during the attempted robbery.

24. On whether the Appellant and his co-accused attempted to escape from lawful custody, Mr. Meroka submitted that both the Appellant and his co accused were remandees facing charges of robbery with violence in Criminal Case Number 1118/2013. It is therefore a fact that the Appellant and his co-accused were in lawful custody during their movement from Athi Prisons to Kajiado Prison. Counsel stated that it was also undisputable that the Appellant and his co-accused were in the lawful custody of PW1, PW2, PW3 and PW5 at the time of the incident. PW1, PW2, PW3 and PW5 were lawfully executing their official duties as police officers by escorting remandees. The Appellant and his co-accused tried to grab AK 47 rifles from PW2 and PW5. They also tried to push PW2 and PW5 out of a speeding vehicle. Their aim was to disarm PW2 and PW5 and push them out of the vehicles so as to gain liberty. Since they were in lawful custody, such liberty would have been unlawful.

25. Turning to the argument that the Defence put up by Appellants was a mere sham it was submitted that the Appellant in his defense alleged that PW2 was persistently dozing off while leaning on the Appellant prompting the appellant to push him to the ground. PW2 rose from sleep and attacked the Appellant. PW5 threw his gun out of the vehicle and joined PW2 in assaulting the remandees. This defense is not tenable and the same is an afterthought as it did not explain the circumstances under which PW5 who is a police officer would throw his weapon away so that he can assault a handcuffed remandee. It was further submitted that neither did the Appellant explain why PW2 would hang on a speeding vehicle using only one while assaulting the appellant with the other hand.

26. According to Counsel, the allegations by the Appellant and his co-accused that they had been assaulted by PW2 and PW5 places them at the scene and proves that indeed that they tried to strangle PW2 and PW5 and forcefully tried to steal the officers' AK 47 rifles. It was submitted that the Appellant’s Defence was simply unbelievable and the same ought not to be considered.

27. In closing, Mr. Meroka submitted that the seven (7) witnesses availed by the prosecution made a solid case against the Appellant and his co-accused to the required standard. On this basis, the Appeal lacked merit and ought to be dismissed and the judgement by the Learned Magistrate delivered on 26th September 2014 be affirmed.

Analysis and Determination

28. As the first appellate court, it behoves this court to re-evaluate the evidence presented at trial and draw its own independent conclusions. The court however remains cognizant of the fact that it does not have the benefit of hearing and seeing the witnesses as the trial court did. See **Okeno v Republic [1972] EA 32; Peters v Sunday Post [1958] EA** and **Pandya vs Republic [1957] ES 336** where the court held:

“It is an established principle of the law that a first appellate court has powers to consider the questions of law and facts. It also has the duty to subject the evidence on record as a whole to a fresh and exhaustive scrutiny and to make its own findings of facts, giving allowance to the fact that it had no opportunity to see and observe the witnesses as they testify.”

29. In establishing its case, the prosecution in the Trial Court relied on the evidence of seven witnesses which I shall undertake to condense in what follows.

30. **PW1 No. 35371 Erick Kahindi** testified that on 12th February 2014 as a court orderly he left for Athi River Prisons together with PW2, PW3 and PW5 to pick remandees. He, PW2 and PW5 were armed. He was armed with Ceska Pistol S/NO. 98279 loaded with 15 rounds of ammunition. PW5 was armed with AK47 rifle S/NO. 06533 while PW2 was issued AK 47 rifle S/NO. 06849. They signed for the said weapons in the Arms Movement Register. They were given a total of 11 capital remandees amongst them the Appellant and his co-accused. As they passed Isinya Town on their way to Kajiado he noticed the vehicle was swerving on the road. He told the driver to stop the vehicle. When the vehicle stopped, there was a lot of noise from the rear and PW2 was raising alarm. The vehicle's tent was torn hence he and PW3 could not hear the noise from the driver's cabin when the vehicle was in motion. PW2 was hanging on the vehicle grills with one hand while the other hand was on the Appellant. The Appellant was holding PW2 while Accused 3 was pushing him (PW2) out of the speeding motor vehicle. PW5 was on the floor of the vehicle holding a riffle to the floor of the vehicle. He calmed the situation using his Ceska Pistol by ordering the remandees to lie down. He checked and found that PW5 didn't have his AK 47 riffle while PW2's AK 47 riffle didn't have the magazine. He called for reinforcement from Kajiado. Isinya Police officers came to their aid. They recovered PW5's riffle as well as PW2's magazine. He produced the Arms movement Sheet which was marked as MF1-P1, AK 47 rifle S/ No. 06533 marked as MF1-P2 (a), AK 47 rifle S/NO. 06849 marked as MF1-P2 (b) and Ceska Pistol S/NO. 98279 marked as MF1-P2 (c).

31. **PW2 No. 93936 PC Casmiel Otieno** testified that on the material day, he together with PW1, PW3 and PW5 went to pick remandees from Athi River Prisons using a GK Land Cruiser. He, PW1 and PW5 were armed. He was armed with AK 47 riffle. They received 11 capital remandees including the Appellant and his co-accused. He and PW5 were guarding the remandees at the rear of the vehicle while PW1 and PW3 were seated at the driver's cabin. When they passed past Isinya, he received a call but before he could speak on the phone, the Appellant grabbed him by the neck while Accused 2 grabbed PW5. The Appellant told other remandees "Tuchukueni". Accused 3 joined in trying to grab PW5's rifle using his left hand. PW5 threw his rifle out of the vehicle. They (Appellant, 2nd and 3rd Accused) then started to grab his (PW2's) magazine but he threw it out and remained with the rifle. The Appellant told the other remandees "tuungane toweke hawa watu juu kumeharibika na hata kama hamtajoin hakuna vile mtajiondoa." The three (Appellant, 2nd and 3rd Accused) then tried to push him (PW2) out of the moving vehicle but he held the grills to avoid falling. Later PW3 and PW 1 heard their alarm and came to their rescue. They also received reinforcement from Isinya and Kajiado. He was injured on the leg, neck and ribs. He was treated and issued with a p3 form. He produced the p3 form marked as MF1-P3 and AK 47 S/ No. 06849 marked as MF1-2b.

32. **PW3 No. 54013 PC Danmeck Nyagara** testified that on the material day he was instructed by the In Charge Kajiado Police Station to pick remandees from Athi River prisons using motor vehicle Registration number GK A849G. He was accompanied by PW1, PW2 and PW5. They were given 11 remandees. The remandees were seated in the rear cabin with PW2 and PW5. As they passed past Isinya he heard something fall. He asked PW1 if he had seen anything but PWI replied in the negative. Later he saw a rifle thrown away and heard wailings. He stopped the vehicle. He saw PW2 holding the vehicle's iron bar and his legs hanging out. He alerted PW1 that the prisoners were trying to escape. PW2 and PW5 informed them that the prisoners were trying to rob them of their rifles and that they threw a rifle and the magazine away as they feared shot by the prisoners.

33. **PW4 Chebolet Jonah**, a clinical officer at Kajiado Hospital, testified that on 12th February 2014 he attended to a patient by the name Cosmas Otieno who had been injured while escorting prisoners. The patient had bruises on the thumb with mild swelling, right elbow was tender on touch and the knuckles were tender with swelling. The injuries were soft and the degree was harm. He produced a p3 form for Cosmas Otieno marked as Pexh.3. On 13th February 2014 he attended to yet another patient by the name Augustine Sitienei. His lower back to the right had mild tenderness. The wrist joint was swollen with tenderness. The leg had bruises on the sheen. The degree of injuries was harm. He produced a p3 form for Augustine Sitienei marked as Pexh 4.

34. **PW5 Augustine Sitienei** testified that on the material day he and PW1, PW2 and PW3 went to Athi River Prisons to pick prisoners using a police vehicle. They picked 11 prisoners. He and PW2 were seated at the rear cabin of the vehicle. When they reached past Isinya next to the road block, the Appellant tried to strangle PW2 while the 3rd Accused tried to throw him (PW2) out of the vehicle. The 2nd Accused tried to push him (PW5) outside. He threw out his rifle so as to help PW2. He got Otieno's Magazine and threw it out because it had bullets. The vehicle stopped and PW1 came their rescue. PW1 sought reinforcement from Kajiado. Police officers at the road block also came to their rescue. He was injured on his both hands during the struggle.

35. **PW6 No. 51160 CPL James Waiganjo** testified that on 12th February 2014 he was on duty at Kenchic area at Kosenja together with other three colleagues. They saw a GK Land Rover speeding towards Kajiado from Kitengela. As it passed them, they noticed a police officer hanging on the door of the vehicle and noise inside the vehicle. When the said officer saw them, he threw out a gun at the middle of the road. He (PW6) picked the gun. They got lift from a private motor vehicle and pursued the vehicle and stopped it. He handed over the gun he collected to PW1. They were informed that some prisoners had tried to escape.

36. **PW7 No. 53732 IP Achiel Kamau**, the investigating officer, testified that on 12th February 2014 he was informed by the In Charge that there was an attempt to escape by some suspects and that the officers needed reinforcement. He and the OCS left for Isinya and in the midway they found motor vehicle GK A486G belonging to Namanga Police station which had gone to pick remandees. It was surrounded by police officers. Upon inquiry he was informed that three suspects had tried to escape. Both PW2 and PW5 had injuries. PW2 was bleeding on his hands. Remandees who had tried to escape were easily identified as their clothes had blood stains. The Appellant's coat was torn. The other remandees refused to record statements out of fear since they were remanded at the same facility with the remandees that tried to escape. He produced the Arms Movement Register marked as Pexh 1 and the two guns issued to PW2 and PW5 which were marked as Pexh 2 (a) & (b) respectively.

37. The Appellant in his evidence at trial stated that on 12/2/14 at midday their names were called out at Athi River GK Prison. He together with 11 other prisoners took their property and changed for their journey to Kajiado. Four of the other prisoners including himself were handcuffed then they boarded the motor vehicle. On the way PW2 started dozing off and leaning on the Appellants shoulders. He pushed him away, PW2 fell down and grabbed him by the coat. He asked him what he was doing and started beating him and even tore his coat. The Appellant begged for forgiveness. The vehicle stopped and PW1 came to the rear cabin to inquire what was going on. PW2 informed him that the accused persons had tried to escape. The police officers then started assaulting them. PW1 ordered them to get out and ran away, but they could not as they were injured. The OCS came and ordered them back to the motor vehicle. They were brought to Kajiado and they were taken to the police station. They were later charged with the offences cited. They were assaulted, and the court ordered that they be taken to hospital but they were never taken. However later they were taken to hospital and they recorded their statements.

38. The second accused person testified that on 12/2/14 while at Athi River Prison he was called together with those prisoners who were going to courts though he was not to attend court on the material day. He prepared and they boarded the vehicle. Four of them were handcuffed; two each. He sat next to PW5. He saw PW2 dozing on several occasions and leaning on accused 1. Accused 1 pushed him away, and that is when he woke up and picked a fight with them, claiming that they tried to rob him. PW5 took a riffle and threw it away. The vehicle stopped. PW1 came to the rear cabin and he was informed that the accused persons were intending to escape. It is when they started assaulting them. Several people came to the scene and eventually they were ordered back to the vehicle and taken to Kajiado Police Station. The following day they were taken to court and charged. They were taken to hospital and recorded their statement with the C.I.D. They were not given treatment notes at the hospital

39. PW3's testimony was that on 12/2/14 while at Athi River GK Prison they were asked to take all their properties as they were leaving for Kajiado and will not go back there. They were eleven prisoners in number. Four of them were handcuffed and they set for Kajiado. On the way PW2 dozed off and was leaning on the Appellants shoulder. The Appellant told PW2 to stop leaning on him severally and eventually pushed him and he fell down. PW5 took his riffle and threw it away. The vehicle stopped. PW1 went to where they were armed with a wheel spanner, which he used to assault him. The OCS came to the scene and they were ordered back to the vehicle. They were taken to Kajiado police station and charged in court the following day. They were taken to hospital, treated and discharged.

40. Having sufficiently rehashed respective parties' cases at trial, I now turn to an analysis of the grounds of appeal with a view to making my final determinations on the same. The grounds raised by the Appellant can be broadly abridged into two substantive issues:

a. Whether the prosecution proved the case beyond reasonable doubt to warrant this court to confirm the lower court judgement on conviction and sentence of the Appellant.

b. Whether the learned trial magistrate misdirected himself on fact and law on his evaluation of evidence and did not consider the Appellants defence resulting in a miscarriage of justice.

41. The Appellant was convicted on 2 counts of Attempted robbery with violence contrary to **Section 297(2) of the Penal Code** as well as attempted escape from lawful custody contrary to **Section 123 as read with Section 389 of the Penal Code.** He has challenged both the conviction and the sentence. At the root of this appeal therefore is the pertinent question of whether the prosecution advanced an argument that met the requirements for upholding a conviction under **Section 297(2) of the Penal Code.**

42. The controversy surrounding offences brought under **Section 297** of the Penal Code is not lost on this court. It has been held that **Section 297(2)** is in conflict with **Section 389** of the Penal Code as well as the Constitution of Kenya by providing for the death penalty where the maximum sentence ought to have been 7 years. The court in **Joseph Kaberia Kahinga & 11 others v Attorney**

General Petition No. 618 of 2010 [2016] eKLR declared:

"*We hereby declare that Sections 295, 296(1), 296(2), 297(1) and 297(2) of the Penal Code do not meet the constitutional threshold of setting out in sufficient precision, distinctively clarifying and differentiating the degrees of aggravation of the offence of robbery and attempted robbery with such particularity as to enable those accused to adequately answer to the charges and prepare their defences."*

43. In the current case however, though the Learned Magistrate found the Appellant and his co-accused guilty of an offence under **Section 297(2),** no death penalty was invoked. Instead, the Appellant was sentenced to seven years imprisonment and his co-accused to four years imprisonment. It is therefore necessary for this court to establish whether in its view, the Trial Court's conviction was meritorious.

44. For the prosecution to secure a conviction for the offence of attempted robbery with violence contrary to Section 297(1) of the Penal Code the following ingredients must be established -

a. That the accused assaulted the victim with the intent to steal.

b. That immediately before or immediately after the time of the assault, uses or threatens to use actual violence to any person or property;

c. In order to obtain the thing intended to be stolen;

d. Or to prevent or overcome resistance of its being stolen.

45. The offence is aggravated under Section 297(2) if, in addition to the above ingredients: The offender is armed with dangerous or offensive weapon or instrument; Is in company with one or more person(s), or If at or immediately before or immediately after the time of the assault, he wounds, beats, strikes, or uses any other personal violence to any person. An offence under this section succeeds when any one of the three ingredients is proven.

46. It is the Appellants case that the prosecution was unable to prove that he was out to steal the alleged weapons. He alleges that PW2 overreacted when he(the Appellant) shoved him to the ground for constantly dozing off on his shoulder. The prosecution on the other hand submitted that this defence is a mere sham that that does not explain why PW5 would throw away his riffle. Additionally, it is the prosecution's case that the accused persons were placed at the scene of the crime and that the P3 forms produced by PW4 were evidence of the violence visited upon PW2 and PW5 by the accused persons.

47. On analysis of the evidence on record, I find no reason to fault the Learned trial magistrate on this ground of appeal. I am satisfied that the requirements set out in Section 297(2) were met by the prosecution. This appeal can therefore not succeed on this limb.

48. In assessing whether the learned trial magistrate misdirected himself in law and fact in reaching the decision upon which the conviction was based, I will analyse the various grounds of appeal raised by the Appellant.

49. The appellant argued that, by failing to provide him with the witness statements, the prosecution had infringed upon his fundamental rights under Article 50 (2) (c) and (j) which provide as follows:

"Every accused person has a right to a fair trial which includes the right to:

(c) to have adequate time and facilities to prepare a defence.

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence."

50. The question I am faced with is whether the trial court infringed the provisions of Article 50 (2) (c) and (j) of our Constitution. In the case of **George Ngodhe Juma & Others v Attorney General [2003] eKLR** the High Court has this to say in reference to Article 50 (2) (c):

"In general terms, it means that an accused person shall be free from difficulty or impediment, and free more or less completely from obstruction or hindrance in fighting a criminal charge made against him. He should not be denied something the result of which denial will hamper, encumber, hinder, impeach, inhibit, block, obstruct, frustrate, shackle clog, handicap, chain, filter, trammet, thwart or stale, his case and defence or lessen and bottle neck his fair attack on the prosecution case."

51. With respect to Article 50 (2) (j), **in Chomondely v Republic [2008] eKLR** the Court of Appeal citing **Republic v Strichmite [1992] (Canadian case)** held thus:

"Our understanding of this Canadian decision is that there is a duty on the part of the prosecuting authorities to disclose to an accused person the evidence which they intend to bring before the court in support of their charge. That duty also includes disclosing to an accused person evidence which the prosecution has in their possession but which they do not intend to use during the trial. Such evidence may, if adduced, weaken the prosecution case and strengthen that of the defence, whatever may be its nature, the prosecution is still obliged to disclose it to the defence. That duty includes during the pretrial period and during the trial itself, so that if any new information is obtained during the trial it must be disclosed."

52. To ascertain whether the trial court complied with Article 50 (c) and (j), I have perused the record of proceedings at the trial court. The plea was taken on 17th February 2014. On 4th March 2014, the Appellant requested for witness statements and the court directed that they be supplied with the same at their own cost. On 12th March 2014, the Appellant again requested for witness statements. It is also on record that on 18th June 2014, the accused persons requested for the statements they had recorded with the CID. While there is nothing on record to show that the directions to supply the accused persons with statements was complied with, it is however clear that at the trial, the appellant was given adequate and proper opportunity to challenge and question witnesses who testified. In the absence of evidence to the contrary by the prosecution, I agree with the Appellant that the failure to supply witness statements violated his right under Article 50(2)(j). On this ground the Appeal succeeds.

53. The Appellant questioned the procedure at the trial court and asserted that the Arms Movement Register and the 2 AK47 riffles were never formally produced in court. On this limb, I am persuaded by the case of **Peter Kihia Mwaniki Vs Republic [2010] eKLR** where the Court of Appeal held that it would have been proper to avail the exhibits but that failure to produce them was not fatal to the prosecution's case. The court observed that no injustice arose to tender those exhibits. Similarly, in **Chris Kasamba Karani v Republic [2010] eKLR** the court pronounced itself thus:

"In law and following the correct procedure, Chege should have identified that exhibit and it should have been marked for identification, before PC Wambua could produce it as exhibit. However, in our view, nothing turns on that irregularity because the production of that exhibit did not affect any ingredient of the offence. The offence as charged could have been proved even if the dangerous weapon was not produced as exhibit as indeed happens in several cases where the weapon is not recovered. So long as the court believes, on evidence before it, that such a weapon existed at the time of the offence, the court may still enter and has been entering conviction without the weapon being produced as exhibit."

54. Keeping in mind the above, it is clear to me that the Appellant's case cannot turn on this ground of appeal.

55. It is the Appellant's case that there were material contradictions in the serial numbers indicated in the charge sheet and those shown in the Arms Movement Register, specifically, the prefix '230' was missing in the serial numbers indicated in the Arms Movement Register. Moreover, it is the Appellant's case that the registration numbers, exact make and model of the vehicle used to transport them was not established. These contradictions as alleged by the Appellant are minor at best. They did not affect the substance of the prosecution's case and neither did they prejudice the Appellant's defence in any way. As such it is my finding that the Appeal does not turn on these grounds.

56. My finding above rests on **Section 382 of the Criminal Procedure Code** which provides;

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

57. I associate myself with the finding in **Obedi Kilonzo Kevevo v Republic Criminal Appeal 77 of 2015 [2015]**

"We have perused the record and have seen that the charge sheet indicates that the date of the offence was on 10/2/2013 while the facts of the case as read out by the prosecutor refer to 9/2/2013 as the date of the offense. The test applicable by an appellate court when determining firstly the existence of a defective charge, and secondly its effect on an appellants' conviction is whether the conviction based on the alleged defective charge occasioned a miscarriage of justice resulting in great prejudice to the appellant. In the case of JMA v. Republic (2009) KLR 671, it was held inter alia that:

"It was not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the CPC was meant to cure such an irregularity where prejudice to the appellant is not discernible."

Applying this principle to the rival arguments of the parties, we are satisfied in the instant case that this was an omission and discrepancy which did not prejudice the appellant and that no miscarriage of justice has been occasioned as a result of the difference in dates. The errors on the dates cannot make the charge sheet defective or the conviction a nullity. This defect is therefore curable under Section 382 of the Criminal Procedure Code which provides;

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

The above statutory curative position is also replicated in Section 214(2) of CPC which provides that:

"…variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof."

We are therefore of the considered view that the discrepancy on the dates as contained in the charge sheet and as contained in the facts read out to the appellant did not occasion a miscarriage of justice."

58. From the record, there is no indication whatsoever that some witnesses were not sworn in as alleged by the Appellant. In addition, contrary to his allegations, the Appellant was accorded every opportunity for cross examination of witnesses. As far as this court is concerned therefore, the Appeal does not succeed on this front.

59. The Appellant submitted that the decision by Trial Court to mete out lesser sentences to his co accused based on a similar set of circumstances amounted to discrimination. In sentencing, the learned Magistrate at the trial court remarked as follows:

"I have considered mitigation of accused 2 and accused 3. They are each sentenced to serve four years imprisonment in each count 1 and 4 and to serve six months imprisonment in count 7. However, the court finds the accused 1 is not remorseful at all for the offence. He is sentenced to serve seven years imprisonment in each count 1 and 4 and to serve six months imprisonment in count 7. Custodial sentence to run concurrently."

60. The Appellant cited the case of **Fatehali vs Republic (1972) EA 158** where it was held that:

"We agree that care should be taken not to discriminate between 2 accused persons where all the circumstances and the facts are the same."

61. Regarding disparities in sentencing between co-accused, the Court of Appeal in **Walter Marando vs Republic Criminal Appeal No. 16 of 1980[1980] eKLR** opined that*: 'when two or more people are convicted of the same offence, it was wrong in principle to impose different sentences except for good reason.'*

62. I wholly associate with the verdict reached by Majanja J in **Joel Ongeta Ondieki vs Republic Criminal Appeal No. 18 of 2017[2018] eKLR** where he opined thus:

"10. In this case, the appellant's co-accused was sentenced to serve a one year suspended sentence after being convicted of the offence of handling stolen goods contrary to section 322(2) of the Penal Code. I note the offence of handling stolen goods is a serious offence that attracts a maximum sentence of 14 years' imprisonment as compared to the offence the appellant was convicted of, which attracts a maximum sentence of 7 years' imprisonment. Even though the accused were convicted of different offences relating to the same transaction and facts, the court ought to avoid disparity in sentencing as is evident in this case. The Court of Appeal, in Marando v Republic [1980] KLR 114, dealt with the issue of disparity in sentencing between co-accused persons and adopted the dictum in R v Ball [1951] 35 Cr App Rep 164, 167 that;

The differentiation in treatment is justified if the court, in considering the public interest, had regard to the difference in the characters and antecedents of the two convicted men and discriminates between them because of those differences.

11. The trial magistrate did not set out in the sentencing notes why the 7 years' term of imprisonment was imposed, and it is also not apparent why the sentence varies substantially from that imposed on the co-accused. I note that the appellant did not offer any mitigation but he ought to have been considered a first offender and considering the sentence imposed on the co-accused, I would reduce the sentence imposed on the appellant."

63. As a result of the foregoing, I find that the learned magistrate erred in imposing a different sentence on the accused as compared to his co accused. I would reduce the sentence of the Appellant, more so considering the fact that the Appellant was sentenced on 26th September 2014. On this ground therefore, the appeal succeeds.

64. In the upshot, I allow the appeal on sentence to the period already served. Accordingly, the Appellant is released unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAJIADO THIS 17TH DAY OF DECEMBER 2018.

R. NYAKUNDI

JUDGE

Representation:

Mr. Meroka for the DPP

The appellant