



REPUBLIC OF KENYA



**Kololo v Republic (Criminal Appeal 76 of 2013)
[2023] KEHC 17451 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 17451 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL 76 OF 2013
SM GITHINJI, J
APRIL 27, 2023**

BETWEEN

ALI BABITU KOLOLO APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from Original Conviction and Sentence in Criminal Case No. 411 of 2011 of the Principal Magistrate's Court at Lamu-Hon. J.M Munguti, dated 29th July 2013)

JUDGMENT

CORAM: Hon. Justice S. M. Githinji

Mr Oraba for the Appellant

Mr Jami for the State

1. The appellant was convicted of and sentenced to death for the offence of robbery with violence contrary to section 296(2) of the Penal Code. He was also convicted and sentenced to serve seven (7) years imprisonment for the offence of kidnapping in order to murder, contrary to section 258 of the [Penal Code](#).
2. The particulars of the first offence are that on the night of 10th and September 11, 2011 at Kiwayu Safari Village Kiunga in Lamu County, the Appellant jointly with others not before court being armed with offensive weapon namely AK47 rifle robbed Judith Tebbut of her hand bag containing assorted clothing of unknown value, two British national passport Nos. xxxx and xxxx of unknown value and unknown amount of money and during the time of such robbery shot dead David Tebbut.
3. The particulars of the second count are that on the night of 10th and September 11, 2011 at Kiwayu Safari Village Kiunga in Lamu County jointly with others not before court kidnapped



Judith Tebbut a British National in order that the said Judith Tebbut may be deposed of as to be put in danger of being murdered.

4. Aggrieved by the conviction and the sentence of the trial court, the Appellant lodged the amended petition of appeal and supplementary grounds of appeal dated September 30, 2014 and May 20, 2015 respectively citing the following grounds: -
 1. That the judgment of the learned magistrate does not comply with section 169 (1) of the *Criminal Procedure Code*, cap 75 Laws of Kenya.
 2. That the Learned Magistrate misdirected himself on the evidence and erred in finding that ‘the tanga shoes Exh. No. 2 were being worn by the appellant at the time of the arrest and the impression found at the scene were made by them.’ On the contrary there was direct evidence on record that upon his arrest the appellant was not wearing any shoes at all, let alone the tanga shoes. The evidence was totally ignored by the Learned Magistrate.
 3. That in convicting the appellant the Learned Magistrate did not consider the appellant’s defence in his considered judgment and he totally misdirected himself on the appellant’s Defence.
 4. That the Learned Magistrate completely misdirected himself on the evidence and on the law on circumstantial evidence applicable in this case and in particular he admitted evidence of the alleged footprints made by the Tanga shoes from witness who were not expert witnesses in that field.
 5. That the Learned Magistrate erred in law in not affording the appellant an opportunity to state whether or not he objected to the production in evidence of statements allegedly made by the appellant and thereby conduct a trial within a trial to rule on the admissibility of those statements.
 6. That the Learned Magistrate erred in law in admitting the aforesaid statements without satisfying himself whether the same were recorded in compliance with the law of evidence and in particular with the ‘Wako Amendments’.
 7. That the Learned Magistrate erred in law in allowing the Prosecutor to read to the court the complainant’s statement as evidence instead of allowing the complainant to give oral evidence as provided for by the law once she had been sworn. The appellant was prejudiced by this.
 8. That the Learned Magistrate erred in not holding in favour of the appellant that despite the deployment by the investigators of sniffer dogs to the scene of crime no scent was picked up by the dogs to link the appellant to the scene of crime.
 9. That the appellant was not accorded sufficient opportunity to prepare for his defence and in particular he was denied the statements of witnesses and other exhibits which were produced in his case.
 10. That had the Learned Magistrate considered in detail the evidence of PW6 Omar Lali he would have given the Appellant the benefit of doubt in this case.
 11. That the appellant was not afforded an opportunity to cross-examine prosecution witnesses when the trial court visited the scene on December 14, 2012.



12. That the offence of robbery with violence contrary to section 296 (2) of the [Penal Code](#) was not proved against the Appellant.
5. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh bearing in mind that unlike the trial court it did not have the benefit of seeing the demeanor of the witnesses and the Appellant during the trial and can therefore only make an allowance for that. See *Okeno v. R* [1972] EA. 32.

The Prosecution Case

The prosecution called a total of 20 witnesses:

6. Aboud Salat Mboge [PW1] narrated that on the material date, while on duty as a watchman together with others at Kiwayu Safari Village Hotel [the hotel], he heard gunshots from one of the houses next to the beach, at around midnight. He ran to the office where one Abdi Kassim called some six police officers who were within the compound. As they approached the site where the gunshot sounds emanated from, they saw footmarks on the wet sand at the beach from one makuti house identified as Banda Zero. They decided to follow the footprints which led them to an area identified as Congo Wale Beach area, after which point the footprints faded into the ocean.
7. He was directed by their manager to record a statement at the police station. He later learnt that a white man who had been occupying the Banda Zero house had been killed and that the Appellant had gone to the house of one Bunu to report the incident. This prompted Bunu to inform the police who traced and arrested the Appellant. He added that he knew the Appellant as a former employee of the hotel, and that on the material date the lights had been put off at the hotel.
8. The witness confirmed on cross-examination that he was not present when the Appellant allegedly visited Bunu, and that he was not aware of who killed the white man.
9. Aboud Godhana Ulgo Abdalla [PW2], also a watchman at the hotel narrated that on the material date while on duty with one Mbela Dacho at house Juliet, they heard an announcement over an internal radio that there were gunshots. They immediately ran into hiding in a nearby bush until the following day when they handed over the Appellant to the police in a GSU lorry. The witness added on cross-examination by the Appellant, that he had a small black bag when they arrested him.
10. Aboud Kassim Tilo [PW3], another security guard at the hotel stated that he did not hear the gunshots but was only informed about it by PW1. He called a police officer who arrived to the scene immediately. He later learnt that a white man who was staying at Banda Zero had been murdered. According to him, there were only two guests at the hotel on that night. The witness confirmed on cross-examination that he did not know the assailant who murdered the white man.
11. Yussud Noe Abuu [PW4] also a security guard, testified that he established from the internal radio that the gunshots were around the houses within Little Head area and that there was a body of a white man in a room while a white lady who was also in the room was missing. According to this witness, they followed the footprints the following morning. The hotel later announced that the Appellant, a former employee, had masterminded the entire ordeal. On



cross-examination, PW4 told the court that he did not see the Appellant leading any group that masterminded the crime.

12. George Humpray Murray Moorhead [PW5], the hotel manager testified that the security guards use torch light in the night and each guest is given a torch to complement generator electricity. He added that on the material date, particularly 10/9/2011, the generators were on until 10.00pm in the night, and the Tebutts were the only guests at the hotel occupying Banda Zero. He was woken up at around 12.30a.m by one of the guards, when the head of security one Hussein Jirimo informed him that Mr. Tebutt had been shot dead while Mrs. Tebutt was missing.
13. During the same night he received information that there were some footprints on the beach, north of the hotel disappearing towards the ocean and another single set disappearing into the bush all from the Banda Zero. The witness added that it started raining when a group started pursuing the footprints leading towards the bush between the hours of 12.30am and 2.00a.m.
14. Later on at around 7.00a.m, he got information that there was a person in a certain shamba with information regarding the incident. He immediately made arrangements for police officers and two of his guards to be dispatched to the said shamba. At around 7.45 am, the area assistant chief informed him that Mrs. Tubett had been spotted at an area identified as Ras Kiamboni, Somalia by boat. He returned to the crime scene at 8.00am from the airstrip where he had gone to receive the DC, OCPD and OCS. It was at that time when the Lamu police officers took photographs of the crime scene. According to this witness, it was the Appellant who had all the information about the incident and he knew the Appellant as his former employee.
15. The witness narrated that on 12/9/2011, officers from Scotland Yard visited the scene. He showed them footprints next to Banda 7,6,4,3 and 2. They were able to establish from Banda 2A, that the footprints emerged from the bush and entered Banda 2. They proceeded to 3,4,5,6 and 7 then straight to Banda zero. Around Banda 3, the ground was moist meaning the footprints were visible. They established that a set of Tanga shoes had made the prints. He believed that the prints had to be for one of the attackers, since neither of the employees was wearing tanga shoes on that night. The Appellant was arrested on 11/9/2011 while wearing the same tanga shoes.
16. On cross-examination, the witness stated that he had not seen the Appellant since September 2010 when he left employment at the hotel, and especially not on the material date.
17. Bunu Omar Lali [PW6] testified that the Appellant woke him up in the night of 10/9/2011 at around midnight. He lived in a farm that was approximately 2 hours walk away from the hotel. The Appellant informed him that he had been abducted at Sanguri area by some unknown people but had managed to escape that night while they were walking. The witness offered him a place to sleep until the subsequent morning when the Appellant informed him that he was headed to file a report. The witness could not recall the type or color of shoes the Appellant had on. He later heard news about the incident at the hotel. Thereafter, police officers interrogated him at his home and asked him to record a statement. The witness confirmed on cross-examination that the Appellant did not tell him any information about the incident at the hotel.
18. Hussein Jirimo Fumo [PW7] told the court that he was informed about the gunshots by Aboud Kassim. He informed PW5 immediately and the police. They saw 8 footprints outside Banda Zero which led them to Congo Wale Beach area. He returned to the Banda where



he discovered the body of a white man. He received information about the whereabouts of the Appellant the following day. He then ordered PW2 to trace the Appellant to give more information about his alleged kidnappers. He was not present when the Appellant was arrested but he was wearing tanga shoes when he saw him in custody. On cross-examination, the witness testified that the said shoes did not have any mark or name indicating that they belonged to the Appellant.

19. Mohammed Issa Jirimo [PW8] a guard at the hotel told the court that on the material date he was called by About Kassim about the gunshots. They followed the footprints towards the bush but they faded because of rains. The witness added on cross-examination that he did not see the Appellant passing around his post.
20. Alex Madindi Mwandawiro [PW9] a firearm examiner at the CID Headquarters, of Force No. 231165, received a spent cartridge from Senior Sergeant Mwachupi Mwalonya on 14/9/2011 for examination. He observed that the same had a diameter of 7.62mm and length of 39mm. He also observed some scratches on the base which he concluded resulted from either firing from an AK47 rifle or simonor cabine. He produced a report dated 14/9/2011 as PEXH 4 and an exhibit memo as PEXH 5. The witness stated on cross-examination that he was not aware of the connection between the cartridge and the Appellant.
21. C.I Lacton Mbengi [PW10], officer in charge of crime scene received a call on 11/9/2011 at around 1.00pm from the deputy PCIO-Coast region instructing him to receive a deceased body at Lee Funeral Home. He observed a bullet wound on the left side of the deceased's chest, and bruises on the face and right hand. He immediately took 16 photographs of the deceased body which he produced as PEXH 7. On 20/9/2011, he instructed one Snr Mwalonya to witness the postmortem which he did and the witness certified the photographs taken at that point. He also produced a report dated 11/10/2011 as PEXH 8.
22. PC James Kibett Mitei [PW11] testified that he was on duty on the material date offering security to the hotel. They were called to the hotel office at around 11.00pm about the attack. They found one dead body and 2 pairs of shoes marks which disappeared in the nearby bushes. That there was a search the following day by an airplane backed by dogs from Lewa Conservancy which yielded no results. He first saw the Appellant when he had been arrested.
23. CI Simon Mutiso Muema [PW12] from the Anti-terrorism Police Unit, Nairobi testified that they instructed the hotel employees to arrest anybody seen around the premises and file a report. He was later informed that the Appellant had been arrested, while he proceeded to the ocean to rescue Judith Tebutt. Later on during interrogations, the Appellant informed him that he had been taken to Somalia by one Issa Sheikh Saadad and Ali Hussein to cut timber. On reaching an area called Ras Kiamboni, he was taken by other unknown people in a speed boat to show them the hotel. That the Appellant did as asked. The witness doubted the Appellant's version of events since the specific banda occupied by the Tebutts was previously occupied by the hotel owner in the former year.
24. The witness believed that the Appellant was involved since there was a tanga shoe mark on the shore. Further when they found the Appellant, his clothes were wet and he was found wearing a marvin cap and black tanga shoes. He later discovered that the Appellant lived over 100km from the hotel and there was nothing at his home to support his cutting timber story. The witness also contacted the said Issa Sheikh who denied knowing the Appellant and that he was a herdsman in Mvinden area south of Kiwayu. All these circumstances built his belief that the Appellant was involved in the attack.



25. Upon cross-examination, the witness testified that he did not recover anything belonging to the hotel or the deceased from the Appellant.
26. Judith Tebutt [PW13] narrated the events of the material date, 11/9/2011 as recorded in her statement read in court by the prosecutor. She told the court that she was kidnapped on the material date from the hotel and her husband murdered. She remained in captive for a period of 6 months. She gave a detailed encounter of what transpired on the material night, from the moment the assailants attacked them, how she was dragged into a boat to the moment they arrived in Somalia. She was able to name three out of the five abductors and gave a clear description of their physical appearances. The witness told the court that one of the assailants told her that they had left one of their partners behind since he was in a bad condition. She told the court that none of her assailants was wearing shoes. She added that she had neither seen the Appellant nor was he one of her assailants.
27. Neil Hubberd [PW14], a senior investigative officer from New Scotland Yard produced google maps and photographs showing the Appellant's movements prior to the attack. PEXH 11 and 12 showed the Appellant with one Hassan Ali at Boni National Reserve at around 1.00am on 10/9/2011. The Appellant was then asked by some men to accompany them to the bush. They got into a boat and proceeded to Mkokoni area and later to Kongowale area where they anchored the boat. The Appellant managed to escape while they were at Mkokoni and the assailants proceeded to the hotel.
28. The witness added that the assailants had no shoes except one who had tanga shoes. He testified that Appellant must have been around the banda when the gunshot was fired according to his maps. This he explained, was because contrary to what the Appellant had told them during the investigations, that he heard gunshots from Kongowale, the distance between the banda and Kongowale was quite long and being the monsoon season, the sound of the ocean waves would make it difficult for sound to travel that far.
29. He explained that around 6.30am, one watchman identified as Ali Godana saw a man walking towards him and Kato. The two hid and confronted him. It was the Appellant, and he looked disturbed. The Appellant was then arrested and taken to GSU. He was wearing tanga shoes at that time. According to him, if the Appellant had indeed been kidnapped as he had told them, he would have first gone to the police.
30. C.I Joseph Esegon [PW15] the then OCS Kiunga Police Station, testified that PW5 called him on 11/9/2012 informing him of the incident. The hotel employees later informed him together with his other colleagues that they had found the Appellant within the surrounding, about 300 meters from the hotel. The Appellant had wet clothes on. On interrogation, the witness recorded the Appellant's statement under inquiry in which the Appellant explained that on 9/9/2011 at around 1.00am he had been hired by one Hassan to split timber in Ras Kiamboni, Somalia but on arrival, he was introduced to other people with a boat. They left Ras Kiamboni at around 5.00pm heading to the hotel. They stopped in the high seas at around 7.00pm for prayers and proceeded to Kiwayu village arriving at 11.30pm where they anchored at Kongowale. That the Appellant told him that the assailants then forced him to take them to the hotel since he had been an employee there. Before he could comply, he managed to escape and later heard gunshots from a distance. That he managed to get to Mvundeni area where he spent the night. On the following day, on his way to the hotel to report the incident, he was arrested and locked up as a suspect.



31. PW15 told the court that the Appellant voluntarily gave his statement under inquiry on 13/9/2011, which he affixed his left thumbprint. PW15 then prepared the relevant certificate to the statement. He produced the Appellant's statement and certificate as PEXH 17.
32. C.I Joseph Tuksho [PW16], officer in charge flying squad, also produced a statement under inquiry taken from the Appellant. According to this statement, the Appellant left Barigoni on 28/8/2011 to a place identified as Basuba for a funeral. That he stayed there for about a week when he left for Kiunga to find one Abu Mujahidi. The Appellant left Kiunga the following day for Mararani village through Sankuli where he met some nine armed men in jungle uniform. This was around 7.00pm on 10/9/2011. The said men ordered him at gunpoint to accompany them to Mkokoni area. They got to some forest area where he was left with 5 of the men while the 4 left. They proceeded to an area identified as Rubo where he managed to escape at around 11.00pm. That he walked for the entire night until he arrived at Bunu's home in Mvundeni village. That Bunu accommodated him until the next morning when the Appellant was arrested by the employees of the hotel, while on his way to the police station.
33. On cross-examination, the witness added that the Appellant was not tortured neither did they recover any items connected to the robbery from the Appellant.
34. CPL Geoffrey Loldoss [PW17] arrested the Appellant who was at that point being held by the hotel guards. The Appellant was wearing a black track suit with white stripes produced as PEXH 9, a marvin PEXH 10. He added that the Appellant had no shoes at that point. On cross-examination, the witness told the court that it did not rain on that particular day 11/9/2011, and that it was the Appellant who informed the police about the assailants.
35. CPL Hudson Magiri [PW18], a former officer at the Mombasa PCIO office, produced a total of 14 photographs taken at the crime scene as PEXH 19.
36. CPL Wycliff Otando [PW19], the former Lamu CID and investigating officer in this case, arrived at the crime scene in the early hours of 11/9/2011. He drew the scene sketch plan. They recovered 7.62 calibre bullet remnants and a special 7.62mm bullet. He also recovered a bullet head from a nearby bush. According to this witness, the Appellant was arrested on 11/9/2011 at 6.30am while wearing a khaki blue tracksuit, a grey khaki marvin and open *tanga* shoes. He explained that another suspect, one Issa Sheikh Saad was also arrested during the investigations but later released for lack of sufficient evidence.
37. The witness told the court that one of the reasons he charged the Appellant was because he appeared nervous, and was found within the hotel surroundings with wet clothes with no reasonable explanation. In addition, that the Appellant knew the hotel well and was found wearing *tanga* shoes and that he himself admitted being with the assailants on the material night. The witness added that during his investigations, he saw *tanga* shoes at the scene which convinced him that the marks must have been made by those shoes. That the Appellant was found wearing the exact shoes during his arrest.
38. Dr. Peter Muriuki Ndegwa [PW20], a pathologist at Nairobi City Mortuary, performed a postmortem examination of the deceased on 20/9/2011. He observed a gunshot wound on the right side 140cm from the head. The wound appeared to be blackening, tattooing with some soot indicating that the deceased had been shot at a close range. He observed an exit gunshot wound on the left shoulder blade and the trajectory was downward. There was abrasion on the left upper arm, the right frontal skull had an injury caused by a hot object. The left lung



had been penetrated and one of the left ribs had been ruptured. His opinion on the cause of death was hemorrhage due to chest injury caused by a single gunshot wound at a close range. He produced the post mortem report as PEXH 20.

39. Upon the prosecution's request, the trial court visited the crime scene on 14/12/2012, thereafter, the prosecution case was closed. On the even date, the trial court ruled that the prosecution had established a prima facie case and placed the Appellant on his defence. At this point, Mr. Olaba came on record for the Appellant and the defence case kicked off on 3/4/2013.

The Defence Case

40. The Appellant gave a sworn statement. He testified that on 8/9/2011 he attended a funeral in Basuba town, Kiunga Division, after which he entered Boni forest to harvest timber at around 9.00am. At around 11.00am, 9 men speaking in Somali language captured him and confiscated all his cutting tools and tied him with ropes. They walked with him deep into the forest until sometime around 3.00pm. He was wearing a vest, jeans short, a cap and open caterpillar shoes which the said men also confiscated. They stopped at some area with a deep hole with lots of ivory which he was instructed to transfer to a different site within the forest. He did that until on 10/9/2011 when he managed to escape since the said men were also fleeing from a certain aeroplane that was flying low above the forest. He explained that as he fled, he had black jeans on, a green vest, a black cap but no shoes. At around 10.00pm on 10/9/2011 he saw a road which he followed to Mvundeni village and specifically to Bunu's home. He told Bunu about his encounter, who in turn advised him to sleep and file a report the following day.
41. On 11/9/2011 while on his way to Mkokoni Police Post he met one Albela Kalu and Abdi Osama from whom he learnt about the attack at the hotel. The two accompanied him but before getting to the police post, they met police officers in a GSU lorry. He explained his ordeal to them and they ordered him to get into the lorry. The officers took him to Kiunga Police Station where he narrated his ordeal to some other officers who turned against him and tortured him so that he could confess to have been involved in the attack at the hotel. He explained that the officers pulled his private parts, which left a permanent injury to his urine flow process. That the officers also threatened to kill him if he failed to confess to save their jobs.
42. The Appellant testified that the shoes before the trial court did not belong to him as they were a size 9 yet his size was either 10 or 11. That the clothes and marvin did not also belong to him as he first saw them in court. He denied recording any statement with the police.
43. On cross-examination, the Appellant told the court that when he left his home on 22/8/2011, he had 3 pairs of clothes, 2 kikois, 1 jean short trouser, 1 plain trouser and 2 shirts. He stated that he did not know the hotel well and that PW6 and 7 lied in their testimonies. He also disputed having ever worked at the hotel. According to him, he had previously disagreed with PW7 over a woman identified as Fatuma. He denied knowing PW5 and denied ever being arrested by PW2.
44. The Appellant was given the tanga shoes on record to try on, they appeared to be a small fit to him. He added that he was on treatment due to the torture and that the clothes he was wearing in court had been given to him by his relatives while in prison.
45. This was all the evidence adduced before the trial court. Upon leave of this court being granted, the Appellant called additional witnesses at the appeal stage; Zoe Bedford –DW2 and Prof. Jason Payne James-DW3. They both adopted their statements and reports dated 21/9/2022



and 15/3/2019 respectively as evidence in chief. According to DW3, the footwear marks were neutral and not conclusive that they had been made by the Appellant. He could not establish any traces of the Appellant's DNA to support the conviction. He added that there was no gunshot residue on the Appellant's clothes.

46. On 25th January 2023, the prosecution filed a Notice of Concession on grounds 1 to 4 of the amended petition. I have considered the grounds of petition, evidence, the concession notice and submissions on record, both oral and written. I find that the following issues arise for determination; -

1. Whether the prosecution proved the offence of robbery with violence against the Appellant beyond reasonable doubt.
2. Whether the prosecution proved the offence of kidnapping in order to murder.

47. The offence of robbery with violence is contained in Sections 295 and 296(2) of the Penal Code as follows:

“295. 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.

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- (2). If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

48. In *Jeremiah Oloo Odira –v- Republic* [2018] eKLR the Learned Judge encapsulated the aforementioned sections and elaborated on the offence of robbery with violence as follows:

“Robbery is committed when a person steals anything capable of being stolen and immediately before or after the theft the person uses actual violence or threatens to use actual violence on the holder of the thing or the property so as to either obtain or retain the stolen thing or so as to prevent or overcome any resistance thereto. Two things must therefore be proved for the offence of robbery to be established: Theft and the use of or threat to use actual violence.

On the other hand, the offence of robbery with violence is committed when robbery is proved and further if any one of the following three ingredients are established: -

- i. The offender is armed with any dangerous or offensive weapon or instrument, or
- ii. The offender is in the company of one or more other person or persons, or



iii. The offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person”

49. Based on the evidence of PW13 who distinctly gave a recollection of what unfolded on the material night, it is clear that PW13 and the deceased were attacked leading to death of the deceased, her husband. In the process, PW13 was robbed of a handbag with assorted clothes of unknown value, passports and unknown amount of money. PW13 confirmed that although she was given back her passports and money, there was no mention whether the handbag was retrieved. She added that the deceased’s wedding ring and necklace were also not retrieved. The witness also confirmed that the assailants were in a group of five men armed with a rifle which caused the deceased’s death. PW20 confirmed the deceased’s cause of death as hemorrhage due to chest injury caused by a single gunshot wound.

50. It is undoubtedly clear that there was an offence committed and that offence certainly fits the description of robbery with violence enunciated under section 296(2) above.

51. The Appellant was also charged and convicted of the offence of kidnapping in order to murder contrary to section 258 of the Penal Code which reads:-

“ Any person who kidnaps or abducts any person in order that the person may be murdered, or may be so disposed of as to be put in danger of being murdered, is guilty of a felony and is liable to imprisonment for ten years.”

52. There is uncontroverted and overwhelming evidence by the prosecution that PW13 was kidnapped. PW13 gave a vivid narration of how her assailants dragged her out of the banda, into the ocean and to a place which she later learnt was Somalia. Her assailants were dangerously armed with rifles. She testified that one of her assailants informed her that she will only be released once a ransom is paid. In my view, PW13 was put in danger of being murdered had her ransom not been paid.

53. It follows therefore that the two offences were sufficiently established. The final duty the prosecution had was to prove that the Appellant was indeed involved in executing the offences.

54. It is apparent that the Appellant was convicted on the strength of circumstantial evidence. Circumstantial evidence can be relied upon to support a conviction if it points irresistibly to the appellant as having taken part in the attack. In *Abanga alias Onyango -v- Republic*, Cr. App No. 32 of 1990 the Court of Appeal had this to say:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
- (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
- (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all



human probability the crime was committed by the accused and none else.”

Further, in *Sawe –v- Republic* [2003] KLR 364, the Court held that:

- “ 1. In order to justify on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.
2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.”

55. In the present case, the circumstantial evidence is that the Appellant’s arrival at Bunu’s compound coincided with the attack at the hotel. There is evidence that there were footwear marks which the prosecution alleged were made by tanga shoes that belonged to the Appellant. Again, since the accused had previously worked at the hotel he knew his way around the hotel and it was suspected that he played an active role guiding the other assailants. It is trite that suspicion alone, however strong, cannot form basis for conviction.
56. In any event, the clear inconsistencies in the prosecution case are sufficient to destroy the inference of guilt on the part of the Appellant. One of such flaws was on the issue of the tanga shoes and the circumstances leading to the Appellant’s arrest. It should be noted that this was the main evidence allegedly linking the Appellant to the crime scene. According to PW1, the police traced and arrested the Appellant. This was not said by the arresting officer, PW17. PW17 testified that he arrested the Appellant from the hotel where he was being detained by the employees since he was seen roaming within the surrounding of the hotel. PW15 testified as much.
57. It was also the prosecution evidence that PW2 together with one Mbela arrested the Appellant first before handing him over to the Police. PW2 did not say whether the Appellant had any shoes on at the time of the arrest. PW17 on the other hand was firm that the Appellant was not wearing any shoes when he arrested him. The testimonies by the other prosecution witnesses that the Appellant was wearing tanga shoes at the time of arrest is doubtful. I say so because the arresting officer himself and the first person to detain the Appellant confirmed otherwise. Moreover, the Complainant, PW13, testified that she did not see the Appellant during the attack, and that none of her assailants was wearing shoes.
58. I have equally perused the report by DW2, it is evident that the footwear marks could have been made by any other shoes with a similar tread pattern.
59. As already established, the law regarding the use of circumstantial evidence as a basis for a conviction is that it must be such evidence which irresistibly points at the accused as the exclusive perpetrator of the offence and with no other co-existing circumstances which would weaken such conclusion. Given the circumstances, I am not satisfied that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.
60. Moreover, the alleged confession by the Appellant was retracted. In his Defence, the Appellant denied making any such statements. He stated that the police tortured him while in custody



trying to force him admit to the offences. The law on confessions and admissions is settled. Section 25A of the Evidence Act, Cap 80 provides;-

“Confessions generally inadmissible.

- (1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Inspector of Police, and a third party of the person’s choice.
- (2) The Attorney-General shall in consultation with the Law Society of Kenya, Kenya National Commission on Human Rights and other suitable bodies make rules governing the making of a confession in all instances where the confession is not made in court.”

61. Although the trial magistrate did not rely on the alleged confession in his verdict, I am of the view that he ought to have conducted a trial within a trial to interrogate the circumstances under which the statement was recorded and the veracity thereof. He failed to do so, perhaps the reason why he did not specifically rely on the alleged confession in his judgment. In any case, I have perused the alleged statement under inquiry or confession allegedly made by the Appellant, it is evident that the same do not meet the requirement of section 25A of the Evidence Act, above.
62. All in all, the conviction of the Appellant is unsafe. He is entitled to the benefit of doubt. Consequently, I quash the conviction, set aside the sentence and order that the Appellant be set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 27th DAY OF APRIL, 2023

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S.M.GITHINJI

JUDGE

In the Presence of; -

1. Mr Olaba for the Appellant
2. Miss Mutua holding brief for Mr Jami for the Respondent

