Republic v Ali (Criminal Appeal 203 of 2017)
[2022] KEHC 10452 (KLR) (23 May 2022) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL APPEAL 203 OF 2017

JM MATIVO, J

MAY 23, 2022

BETWEEN

REPUBLIC ..... APPELLANT

AND

KASSIM STADI ALI ..... RESPONDENT

(Appeal against the Judgement and acquittal of the Respondent in Senior Principal Magistrates Court at Mombasa in Criminal Case Number 3453 of 2012, R v Kassim Stadi Ali delivered by Hon. Kyambia, SPM on 22.11. 17)

JUDGMENT

1. This is an appeal by the State against the judgment in Mombasa in Criminal Case Number 3453 of 2012, R v Kassim Stadi Ali delivered on 22.11.17. In the said case, the respondent, Mr Kassim Stadi Ali was acquitted on all the four counts he faced. The first court was preparation to commit a felony contrary to section 308(1) of the Penal Code[1]. It was alleged that on December 7, 2012, at around 11.00am at Bilima area, Mtopanga in Kisauni District within Mombasa County, he was found in possession of dangerous weapon namely a pistol serial number E10454/85 and 8 rounds of ammunition in circumstances that indicated he was so armed with intent to commit a felony, namely murder.

2. Count was being in possession of a firearm without a Firearm Certificate contrary to section 4 (2)(a) as reads with section 4(3) of the *Firearms Act* [2].It was alleged that on the said date and place, he was found in possession of one pistol serial number E10454/85 without a firearm certificate. The third count was being in possession of ammunitions without a firearm certificate contrary to section 4 (2) (a) as read with section 4(3) of the *Firearms act* It was alleged that on the said date and place, he was found in

1 Cap 63, Laws of Kenya.

2 Cap 114, Laws of Kenya.

possession of 8 rounds of ammunition of 9mm calibre without a firearm certificate. He faced a fourth count of being a member of a terrorist group contrary to section 24 of the Prevention of Terrorism Bill (sic). It was alleged that on said date and place, he knowingly engaged in criminal activity by being a member of a terrorist group, namely, Al-shabaab.

3. As a first appellate court, this court's duty[3] is to subject "the evidence adduced in the lower court as a whole to a fresh and exhaustive examination[4] and to the render this court's own decision on the evidence." Simply put, this court is required to weigh conflicting evidence and draw its own conclusions[5], only then can it decide whether the Magistrate's findings should be supported. In doing so, this court should make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses[6].

4. The prosecution case stood on the testimony of 8 witnesses. The essence of the prosecution case was that the Respondent was found in possession of a pistol and ammunition without a certificate and that he was preparing to commit a felony, namely murder. The defence case stood on his sworn testimony, that all the charges were a frame-up.

5. PW1, Rachel Aswan Eliaba, a resident of Bakarani testified that on December 7, 2012 the police searched the respondent's house and she heard them asking the respondent "where it is" and he replied "it is beneath the bed" and shortly thereafter she saw police officers bring a pistol with 8 rounds of ammunition and put them in open veranda. She said she heard the respondent telling the police that the pistol was his and that he had gone to train with Al-shabaab in 2010 and came back in 2012, so, his wife should not be troubled.

6. PW2, Mwanahalima Sudi was the landlord. He testified that on December 7, 2012armed people entered her house and Khadija's house and she heard the people asking the respondent "where is it" and he said it was under the bed and shortly one man emerged from under the bed with a pistol and he removed some ammunition from the pistol. She said she heard the accused tell the men that he had been to Somalia where he joined Al shabaab. PW3, a one Ato Worn identified the respondent as the person who used to visit a one Halima Hamisi. He said he was present when the respondent told the police he was Al-shabab.

7. PW4 Sgt Raphael Minis attached to the ATPU headquarters testified that on December 7, 2012he recorded items recovered and that PC Marioni recovered a pistol under the bed loaded with 8 rounds of ammunition. He identified the pistol, the magazine and 8 rounds of ammunition. He prepared a search certificate which was signed by Halima, Rachael Aswal, CIP Kilonzo, PC Abdalla and himself and produced it in court.

8. PW5 PC Hamisi Abdalla, attached to ATPU testified that on December 7, 2012acting on a report together with PC Wambua, PW4 and 4 uniformed officers, they found the suspect with his wife and they searched the house in the presence of the landlord, a one Abdalla Kumbo and recovered a gun loaded with a magazine and rounds of ammunition under the bed.

9. PW6 CIP Alex Chirchir CIP Alex Chirchir, a firearms examiner produced a report dated 29th February 2014 compiled on December 14, 2012 by CIP Charles Kolege with whom they had worked for 8 years

3 *Okeno v R (1972) E.A, 32 at page 36*

4 see *Pandya v Republic (1957) EA336*

5 see *Shantilal M. Ruwala vs Republic (1957) EA570*

6 see *Peter vs Sunday Post (1958) EA424*

and whose signature he was conversant with. He said the pistol was capable of being fired. He said the ammunition was 9x18mm was ammunition as defined under the act and capable of being used in the said pistol.

10. PW7 CI Abednego Kilonzo in charge of ATPU testified that the search recovered a pistol. He was recalled on June 15, 2017the firearm was recovered from the respondent. PW8 CPL Gedion Wambua attached to Anti-Terrorist Police Unit, Mombasa produced the exhibits

11. In his sworn defence, the respondent denied that he was found with a pistol. He said 5 ununiformed armed persons walked into the house and ordered them to face the wall and raise up their hands. They tied his hands and blindfolded him and ordered him to remove the AK 47 they alleged he had. He said they asked that the mattress and the TV be removed and he heard one of them saying they search the next room. He said they beat him telling him to remove the two AK 47's and poured hot liquid on his back and one of them told him to say it was under the bed, but he told them he did not have it, then he heard them say "ndio hii." He was pushed into a vehicle while blindfolded and they asked that he gives them his phone. He told them he had left it in his house. They led him to his house and took his mobile phone then they took him back to the vehicle and blindfolded him threatening him that was his last day and beat him with a blunt object on his elbows.

12. He said the vehicle stopped and some women entered and one of them showed him some photos on a phone and asked him whether he knew them and he said he did not know, then they threatened to beat him, blindfolded him and took him somewhere, uncovered his eyes and he found himself in an office. He was told he would be taken to court but they blindfolded and handcuffed him and taken to a police station where he was locked in. The following day he was interrogated and asked to tell them the persons he had saved in his phone. He was asked to admit the charges in court but he denied the charges. He denied that the pistol was found under his bed or seeing an inventory being prepared nor was his name or signature on the inventory. He denied that he was preparing to commit a crime.

13. In his judgment, the learned magistrate found that count one was premised on a confession procured against the law. The learned Magistrate found that the offence of possession was not proved and among other inconsistencies, he pointed out the discrepancy in the pistol's serial number in the charge sheet and in the exhibit memo. The learned Magistrate found merit in the respondent's version that the weapon was planted upon him. The court found that the Prosecution had failed to prove its case and acquitted the Respondent under section 215 of the *Criminal Procedure Code*[7].

14. In this appeal, the State seeks to upset the respondent's acquittal citing several grounds, namely; (a) that the trial Magistrate failed to appreciate that the prosecution does not have to bring a superfluity of witnesses to prove its case; (b) that the discrepancy in the exhibit memo which was later counter-signed was material; (c) that the trial court disregarded the ballistic expert report and its submissions; (d) the court erred in finding that Prosecution had not proved its case beyond reasonable doubt and acquitted the Respondent against the weight of the evidence.

15. The appellant's counsel submitted that the finding that the gun was planted on the Respondent was erroneous because credible witnesses witnessed the search. He argued that there was evidence that the gun was found under the bed. Counsel cited section 17 of the *Evidence Act*[8] in support of his argument that there was an admission by the respondent. He attributed the discrepancy in the pistol's serial number to a "probability of an honest typographical error" which he submitted was not material and relied on section 137 of the *Criminal Procedure Code*. He submitted that the state proved the presence

7 Cap 75, Laws of Kenya

8 Cap 80, Laws of Kenya

of a firearm and cited section 4 of the *Penal Code* in support of his argument that possession can either be physical or constructive. Lastly, he submitted that the respondent admitted being a member of Al-shabaab.

16. The respondent's counsel submitted that the charges of being a member of a terrorist group collapsed on grounds that it was premised on alleged admission. He argued that the prosecution is required to highlight the alleged activities so as to qualify to be a member of the said group. He submitted that the alleged involvement was premised on an alleged admission which was rejected by the court. *He relied on Mohamed Haro Karo v Republic*[9] which laid down the parameters of what constitutes membership of an illegal association. Also, he submitted that for the admission to be admissible under section 17 of the *Evidence Act*, it must meet the pre-conditions in section 18 of the *Evidence Act*.

17. As for the alleged possession, counsel submitted that the trial court correctly found that the firearm was planted on the respondent. He questioned why they did not present it for finger print lifting or DNA analysis. He submitted that considering the premises was also occupied by other people, it would have been prudent to adduce evidence to exclude the rest and zero in on the respondent. He submitted that the prosecution case was marred by inconsistencies and contradictions. Counsel also faulted the prosecution for failing to call Halima as a witness. He also argued that no explanation was offered for the respondent's failure to sign the inventory.

18. Also, the respondents counsel submitted that serial number of the pistol remained a contested issue and the author of the document was never called. He argued that the said failure was fatal and cited *Abdul Mohamed Abdulrahman v Republic*[10].He also faulted the failure to call the scenes of crime officer who photographed the scene and Halima the tenant in the house. Counsel highlighted what he termed as numerous omissions/failures/gaps in the prosecution evidence.

19. In determining this appeal, I find fitting to underscore that the primary objective of criminal law is to maintain law and order in the society, to protect the life and liberty of people and punish the offender. It is the basic principle that criminal liability may be imposed only if all the ingredients of an offence are fully proved beyond reasonable doubt.

20. Count one was the offence of preparation to commit a felony, namely, murder. Preparation to commit a felony falls under the category of offences described as "inchoate" meaning "not completely formed or developed yet, not yet completed or fully developed; rudimentary[11]."Inchoate comes from a Latin word for beginning. When something is inchoate, although you don't yet understand what it is fully, you have a strong sense that it is indeed coming. It's stronger than the wisp of an idea that never turns into anything. But it's hard to really find the language to describe an inchoate idea[12].

21. Inchoate crimes are incomplete crimes which must be connected to a substantive crime to obtain a conviction. Examples of inchoate crimes are criminal conspiracy, criminal solicitation, and attempt to commit a crime, when the crime has not been completed. It refers to the act of preparing for or seeking to commit another crime. However, an inchoate offense requires that the defendant have the specific intent to commit the underlying crime. An inchoate crime may be found when the substantive crime failed due to arrest, impossibility, or an accident preventing the crime from taking place.

9 (2016) eKLR

10 Criminal Appeal No. 9 of 2009

11 http:*www.dictionary.com/browse/inchoate*

12 https:*www.vocabulary.com/dictionary/inchoate*

22. Inchoate crimes are a unique class of criminal offences in the sense that they criminalize acts that precede harmful conduct but do not necessarily inflict harmful consequences in and of themselves. "Inchoate offense" has been defined as: "Conduct deemed criminal without actual harm being done, provided that the harm that would have occurred is one the law tries to prevent[13]."Every inchoate crime or offense must have the mens rea of intent or of recklessness, but most typically intent. Specific intent may be inferred from circumstances[14]. It may be proven by the doctrine of "dangerous proximity", and the presence of a "substantial step in a course of conduct"[15].

23. The dividing line between legal and illegal conduct is whether there is a "substantial step" towards committing a specific crime; similarly, the dividing line between attempt and conspiracy is whether or not there is another person involved or an agreement, plus a substantial step. When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is said to attempt or to prepare to commit the offence.

24. In a commentary on the Indian *Penal Code*[16] the learned authors defined the essential ingredients of an attempt to commit an offence in the following words: -

> " In every crime, there is first intention to commit it, secondly, preparation to commit it, thirdly to commit it. If the third, that is, attempt is successful, then the crime is complete. If the attempt fails, the crime is not complete but the law punishes the act. An 'attempt' is made punishable because every attempt, although it fails of success, must create an alarm, which, of itself, is an injury, and the moral guilt of the offender is the same as if he had succeeded"

25. Thus, for there to be an attempt to commit an offence by a person, that person must:-

    a. *Intend to commit the offence;*

    b. *Begin to put his intention to commit the offence into execution by means which are adapted to its fulfilment. This means that the accused begins to carry out his intention to commit the offence in a way suitable to bring about what he intends to achieve;*

    c. *Do some overt act which manifests his intention; that is, the accused performs an act which is capable of being observed by another (although it may not have been) and which in itself makes clear his intention to commit the offence,*

But in fact, he does not commit the whole offence. For the offence of preparing or attempting to commit an offence to be proved, the prosecutor mus[17]t prove each of those three elements beyond reasonable doubt.

26. The act relied upon as constituting the attempt or preparation to commit an offence must be an act immediately, not merely remotely, connected with the contemplated offence. As was held in *Williams,*

13 Larry K. Gaines, Roger LeRoy Miller (2006). *Criminal Justice in Action: The Core*. Thomson-Wadsworth Publishing

14 See *People v. Murphy, 235 A.D. 933, 654 N.Y.S. 2d 187 (N.Y. 3d Dep't 1997)*

15 James W.H. McCord and Sandra L. McCord, Criminal Law and Procedure for the paralegal: a systems approach, pp. 189-190, (3d ed. Thomson Delmar Learning 2006)

16 The Indian Penal Code (Act XLV OF 1860), by RatanlalRanchhoddas & DhirajlalKeshvalal Thakore (26th Edition (Reprint 1991), at bpage 517

17 *See Barbeler {1977} QD 80*

Ex parte The Minister for Justice and A-G[18].what is done must go beyond mere preparation to commit the crime and must amount really to the beginning of the commission of the crime. But it is necessary that the accused should have done his best or taken the last steps towards the intended offence. There can be an attempt to commit an offence where the failure to complete the commission of it is due to ineptitude, inefficiency or insufficient means on the part of the accused person. In fact, the fact that a person, having done something which amounts to an attempt, then voluntarily desists from continuing the attempt, does not relief him from criminal responsibility for the attempt which he made before desisting.

27. The word 'Preparation' is not a term of art. In its ordinary meaning it means "the act or an instance of preparing" or "the process of being prepared". This is the meaning ascribed to the word 'Preparation" in the *Concise Oxford Dictionary*[19]. To prove the offence in question some overt act, to show that a felony was about to be committed. They must establish that the Respondent had the intention to commit the offence[20]. It must be shown that the Respondent had put in motion his intention by making preparations to commit the offence. The prosecution must establish that the respondent made the attempt to put into effect their intention. In the words of Spry J in *Mussa s/o Saidi v Republic*[21]: -

> " The principles of law involved are very simple but it is their application that is difficult.... The intention will, in the majority of cases, only be capable of proof by inference and it follows in such cases that an act must be of such a character as to be incompatible with another reasonable explanation. Secondly, if the intention is established, the act itself must not be too remote from the alleged intended offence."

28. Before I deploy the principles of law discussed above in determining count one, I will first address the grounds cited in this appeal because the offence of preparation is closely related to the other counts and the findings thereon will impact on count one. The first ground argued by the appellant is that trial Magistrate erred in failing to find that the prosecution is not required to a call a superfluity of witnesses. This argument brings into memory section 143 of the *Evidence Act*[22] which provides: -

> " No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact."

29. In the words of the Court of Appeal decision in *Julius Kalewa Mutunga v Republic*[23]:-

> " ...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."

18 {1965} Q B R 86

19 Eighth Edition

20 See *Simon Kandege Ondego v Republic, Nakuru High Court Criminal Appeal No. 142 of 2005.*

21 {1962} E.A. 454.

22 Cap 80, Laws of Kenya

23 Criminal Appeal No. 31 of 2005

(Also see the Court of Apeal in *Alex Lichodo v Republic*[24].)

30. Perhaps the leading authority on the issue at hand is *Bukenya & Others v Uganda*[25] in which the East African Court of Appeal held: -

    i. *the prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent.*

    ii. *The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case.*

    iii. *Where the evidence called barely is adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution.*

31. In the above case, the court was categorical that the prosecution is not expected to call a superfluity of witnesses. However, the adverse inference will only be made by the court if the evidence by the prosecution is not or is barely adequate. Accordingly, it will not be inferred where evidence tendered is sufficient to prove the particular matter in issue or the entire case. Conceivably, I must underscore that the rule in *Jones v Dunkel* [26]which outlines the circumstances under which an adverse inference may be drawn where a witness is not called is grounded on common sense. The prosecution has discretion to assess the importance that the testimony of a witness would play, or would likely have played in relation to the issue concerned.

32. Nevertheless, the unexplained failure by a party to give evidence or call a witness may, in appropriate circumstances lead to an inference that the uncalled evidence would not have assisted the party's case. The failure to call a witness can allow evidence that might have been contradicted by such witness to be more readily accepted. Further, where an inference is open from the facts proved, the absence of the witness may be taken into account as a circumstance in favour of the drawing of the inference. But the absence of a witness or document cannot be used to make up any deficiency in the evidence. Thus, it cannot be used to support an inference that is not otherwise sustained by the evidence. The rule cannot fill gaps in the evidence or convert conjecture and suspicion to inference[27].

33. Whether the failure to call a witness gives rise to an inference depends upon a number of circumstances. In *Fabre v Arenales* [28]Mahoney J. said that the significance to be attributed to the fact that a witness did not give evidence depends in the end upon whether, in the circumstances, it is to be inferred that the reason why the witness was not called was because the party expected to call him feared to do so. There are circumstances in which it has been recognized that such an inference is not available or, if available, is of little significance, a proposition of the law cited with approval by Miler JA in *Hewett v Medical Board of Western Australia* [29]and also underscored in *Cross on Evidence*[30].

[24] Criminal Appeal No. 11 of 2015-Visram A, Karanja W, and Mwilu P. JJJA

[25] {1972} E. A. 549

[26] {1859} HCA 8; {1859}101 CLR 298, 308, 312.

[27] See *Schellenberg v Hesse Tunnel Holdings Pty Ltd {P2000} HCA 18*

[28] {1992} 27 NSWLR 437, 449-450, Priestly and Sheller JJA agreeing)

[29] {2004} WASCA 170

[30] 7th Edition, Page 1215, by Heydon J D

34. The rule only applies where a party is required to explain or contradict something. What a party is required to explain or contradict depends on the issues in the case as thrown in the pleadings or by the course of the evidence in the case. No inference can be drawn unless evidence is given of facts requiring an answer. (See *Schellenberg v Tunnel Holdings*[31], *Ronchi v Portland Smelter Services Ltd*[32] and *Hesse Blind Roller Company Pty Ltd vs Hamitovski* [33]and its also reiterated in Cross on Evidence[34].

35. In order for the principle to apply, the evidence of the missing witness must be such as would have elucidated a matter[35].The appropriate inference to draw is a question of fact to be answered by reference to all the circumstances of the case. In the instant case, a one Halima, the owner of the house where the Respondent was arrested was not called. There is no explanation why she was not called or even charged. The scenes of crime officer was not called. The evidence of these two persons would have elucidated the circumstances under which the pistol was recovered (if at all it was recovered). To me th evidence of these two persons was a crucial. Their testimony could have assisted the court to appreciate the scene and relate it to the evidence before the court. The foregoing being the position, I find no reason to fault the trial Magistrate in his finds nor do I see any misdirection.

36. The appellant faults the trial court for failing to appreciate that the discrepancies in the exhibit memo which was later counter signed was not material. The discrepancy here as I understand it is the serial number of the pistol as shown in the charge sheet and the exhibit memo.

37. The court's duty is to determine whether there were contradictions and inconsistencies in the prosecution evidence to the extent that a reasonable person would be left in doubt as to whether the charges were proved, or whether the contradictions (if any), are so material that the trial Magistrate ought to have rejected the evidence. Granted, as was subtly stated in *Twehangane Alfred v Uganda*[36], it is not every contradiction that warrants rejection of evidence. It stated: -

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

38. Inconsistencies unless satisfactorily explained would usually but not necessarily result in the evidence of a witness being rejected[37].The question to be addressed is whether the cited contradictions are grave

31 Cubillo (No. 2) 35

32 {2005} VSCA 83

33 {2006} VSCA 121 28

34 Supra at page 1215

35 See *Payne vs Parker*, 202 Cubillo)No. 2) 360

36 Crim. App. No 139 of 2001, [2003] UGCA, 6

37 See Uganda vs Rutaro {1976} HCB; Uganda vs George W. Yiga {1979} HCB 217

and point to deliberate untruthfulness or whether they affect the substance of the charge. As was held in by the Court of Appeal of Nigeria in *David Ojeabuo v Federal Republic of Nigeria*[38]: -

> "Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains."

39. Contradictions in evidence of a witness that would be fatal must relate to material facts and must be substantial. It must deal with the real substance of the case. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial[39]. It is not every trifling inconsistency in the evidence of the prosecution witness that is fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court and therefore necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. The correct approach is to read the evidence tendered holistically. It is only when inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court that they can necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from[40].

40. At the heart of the prosecution case is the pistol allegedly recovered from a house belonging to a one Halima who is said to have been a girl friend to the Respondent. The Respondent refuted the offence and his defence was that the pistol was planted on him. As pointed out above, the pistols serial number in the charge sheet and the exhibit memo vary. This variation is material to this case. It is not trivial. It leaves many questions unanswered. Was the firearm recovered in the first place? If it was recovered as alleged, is it the same one which was before the court? Was it planted on the accused? Why was the Respondent and the said Halima not asked to sign the search document, if it was written in their presence? Is it the same firearm which was taken for examination? Why was the person who prepared the exhibit memo not called? It is basic law that in criminal cases, doubts are resolved in favour of the accused.

41. The description of the pistol is fundamental to the success of the charges. Its misdescription cannot be cured by the alleged counter-signing, more so, when the person alleged to have prepared the exhibit memo was not called to explain the discrepancy. Such an issue upon which the success of the charge stands or falls is sufficient to create a reasonable doubt in the prosecution case. Reasonable doubt is not mere possible doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it can say it feels an abiding conviction to a moral certainty of the truth of the charge[41]. Further, the evidence in question is to be considered together with the rest of the evidence, which point to the occurrence of the incident and the culpability of the accused. Corroboration of the evidence is also a relevant factor. It is my finding that

38 {2014} LPELR-22555(CA), Adamu JA; Ngolika JA; Orji-Abadua JA; & Abiru JA.

39 See *Osetola vs State* {2012} 17 NWLR (Pt1329) 251.

40 See *Theophilus vs State* {1996} 1 nwlr (Pt.423) 139.

41 Duhaime, Lloyd, *Legal Definition of Balance of Probabilities, Duhaime's Criminal Law Dictionary*.

the inconsistency in the serial pistols serial number cannot by any stretch of imagination be described as trial or immaterial.

42. Closely tied to the above issue is the appellant's assault on the Magistrate's decision premised on the submission that the learned Magistrate disregarded the ballistic evidence and the submissions by the state. Having found that the testimony on the serial number is marred by inconsistencies, it follows that the Ballistics' report was rendered otiose and or of no utilitarian value.

43. Regarding the submission that the trial court failed to consider the appellant's submissions, it is important to note that a trial court has a duty to weigh the evidence adduced in court by all the parties in totality and make a finding on the culpability or otherwise of the accused. Choosing to analyze one party's submissions and leave out that of the other party's submissions is a fatal mistake. It's a duty bestowed in every court to weigh one set of submissions (prosecution) against another (defence) before arriving at a conclusion. This is the basic calling of every Court without exception[42]. In determining whether the appellant's evidence/submissions were considered, this court has a legal duty to re-analyse, re-evaluate and assess the evidence and the submissions in the lower court so as to come up with its own conclusions bearing in mind that it did not have the benefit of seeing the witnesses testify[43]. The best indication that a court has applied its mind in the proper manner is to be found in its reasons for judgment.

44. I must, however, make it clear that by requiring the trial court to consider and weigh all evidence or submissions is not meant that the judgment of the trial court must also include a complete embodiment of all evidence led or submissions made, as if it comprises a transcript of the proceedings. All it means is that the summary of the evidence led or submissions must indeed entail a complete embodiment of all the material evidence or submissions tendered.

45. This court must determine, what the evidence of the state witnesses and the submissions was, as understood within the totality of the evidence, including evidence led on the part of the accused or defence, and compare it to the factual findings made by the trial court in relation to those evidence/submissions, and then determine whether the trial court applied the law or applicable legal principles correctly to the facts in coming to its decisions.

46. In other words, this court must consider whether the Magistrate considered all the evidence and the submissions, and whether it weighed it correctly and correctly applied the law or legal principles in arriving at his judgment. This exercise necessarily entails a scrutiny of the evidence/submissions within the context of the totality of evidence/submissions, and, what the trial court's findings were in relation to such evidence/submissions[44].

47. Stated differently, in order to determine whether there is any merit in any of the submissions made by the respective parties in this appeal, including whether the appellant's case was considered, this court must consider the evidence led in the trial court, juxtapose it against the judgment by the trial court, and finally determine whether there is any basis for interfering with the said judgment[45].If this court is of the view that a particular fact/submission is so material that it should have been dealt with in the judgment, but such fact is completely absent from the judgment or merely referred to without

42 *John Matiko & Another vs Republic*, Criminal Appeal No. 218 of 2012

43 See Okeno vs Republic {1972) E.A, 32at page 36, Pandya vs Republic {1957} EA 336, Shantilal M. Ruwala vs Republic {1957} EA 570 & Peter vs Sunday Post {1958}EA 424.

44 Ibid

45 Ibid

being dealt with when it should have, this will amount to a misdirection on the part of the trial court. This court must then consider whether the said misdirection, viewed either on its own or cumulatively together with any other misdirections, is so material as to affect the judgment, in the sense that it justifies interference by the court of appeal[46]. I have carefully followed the learned Magistrates analysis of the facts, the submissions, the law and reasons for the decision and the decision. To me, the Magistrate properly accounted for all the material before.

48. The other argument propounded by the prosecution is that the trial Magistrate erred in finding that the prosecution had not proved its case and in acquitting the Respondent. The legal burden of proof in criminal cases never leaves the prosecution's backyard. Viscount Sankey L.C. in *Woolmington v DPP*[47] in a subtle and masterly fashion stated the law on legal burden of proof in criminal matters, that: -

> " Through the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception...No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

49. Whatever is thought to be the purpose of criminal punishment, one fundamental principle seems to have evolved in the jurisprudence of the common law legal tradition; that, before an accused person can be convicted of a crime, his/her guilt must be proved beyond reasonable doubt. The Supreme Court of *Nigeria in Ozaki and another v The State*[48] stated that for a defence to be rejected it must be incredible and that the defence must be weighed against the evidence offered by the prosecution. In *Uganda v Sebyala & others*[49] had this to say: -

> " The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts."

50. The accused has only what is referred to as the evidential burden which means the duty of adducing evidence or raising the defence of alibi[50]. Once an accused person discharges the evidential burden of adducing evidence of alibi, it is the duty of the prosecution to disprove it. The duty of the court is to test the evidence of alibi against the evidence adduced by the prosecution and if there is doubt in the mind of the court, the same is resolved in favour of the accused.

51. The proper approach is to weigh up all the elements, which point towards the guilt of the accused against all those, which are indicative of his innocence. The court is required to take proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt.

46 Ibid

47 {1935} A.C 462 at page 481

48 Case No. 130 of 1988.

49 {1969} EA 204.

50 See *OrteseYanor& Others v The State* {1965} N.M.L.R. 337

52. Reasonable doubt is not mere possible doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge[51]. Our system of justice is deeply concerned that no person who is innocent of a crime ought to be convicted of it. In order to avoid that, a court must consider all the evidence with great care, especially when it is the only evidence because the law is not so much concerned with the number of witnesses called as with the quality of the testimony given. A guilty verdict is permitted, however, only if the evidence is of sufficient quality to convince the court beyond a reasonable doubt that all the elements of the charged crime have been proven, that the evidence irresistibly points to the accused, and that the evidence is both truthful and accurate.

53. This is a case where the prosecution evidence is manifestly wanting. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right.

54. There is no denying that in a criminal case, unless the guilt of the accused is established by proof beyond reasonable doubt, he is entitled to an acquittal. When a prima facie case is established by the prosecution in a criminal case, the burden of proof does not shift to the defense. It remains throughout the trial with the party upon whom it is imposed—the prosecution. It is the burden of evidence which shifts from party to party depending upon the exigencies of the case in the course of the trial[52]. A prima facie case need not be countered by a preponderance of evidence nor by evidence of greater weight. Defendant's evidence which equalizes the weight of accuser's evidence or puts the case in equipoise is sufficient. [9]

55. It has from time immemorial been part of our system of laws that the innocent not be punished. This principle has long been recognized as an essential element of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and on the rule of law. It is so old that its first enunciation was in Latin Action *non facit reum nisi mens sit rea*[53].The presumption of innocence includes both the right of an accused to be presumed innocent until proved guilty, and the right to have the state bear the burden of proving guilty beyond a reasonable doubt.

56. Lastly, before concluding, find my self-compelled to comment on the appellant's reliance on section 17 of *Evidence Act* in support of the argument that the respondent admitted being in possession of the pistol. First, the trial court up held the respondents objection to the production of the said evidence. Second, in the learned magistrate correctly construed section 25A of the *Evidence Act* which provides: -

> (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.

57. Flowing from my analysis and determination on the issues discussed above, the conclusion becomes irresistible that the prosecution did not prove any misdirection on the part of the trial court to

51 Duhaime, Lloyd, Legal Definition of Balance of Probabilities, Duhaime's Criminal Law Dictionary

52 Florenz D. Regalado, *Remedial Law Compendium*, 1970 ED; p. 795

53 See *Re B.C. Motor Vehicle Act* [1985] 2 SCR 486 at513, Lamer J, writing for the majority

warrant this courts interference. The upshot is that this appeal against the respondent's acquittal fails. I therefore dismiss it.

Right of appeal 14 days

SIGNED, DATED AND DELIVERED AT MOMBASA THIS 23RD DAY OF MAY 2022

JOHN M. MATIVO

JUDGE