REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO. 98 OF 2018

REPUBLIC.....APPELLANT

VERSUS

BRIAN NZIOKI MULI.....RESPONDENT

(Being an Appeal from the acquittal of Hon. Yusuf Shikanda (SRM)

on 9th October, 2018 in Machakos Chief Magistrate's

Criminal Case No. 445 of 2016)

BETWEEN

REPUBLIC.....COMPLAINANT

VERSUS

BRIAN NZIOKI MULI.....ACCUSED

JUDGEMENT

1. The Respondent herein, **Brian Nzioki Muli**, was charged with the offence of Malicious Damage to Property Contrary to Section 339(1) of the ***Penal Code*** the particulars being that between the dates of 27th day of October, 2013 at and 3rd November, 2013 at Kyanda Village, Mua Location in Machakos Sub-county within Machakos County, je jointly with another before court wilfully and unlawfully demolished a house under construction valued at Kshs 200,000.00 the property of **Justus Musyoka Mutiso**.

2. According to PW1, the complainant, on 22nd January, 2014 he received information from his neighbour, one Sarah, PW3, that his house under construction in Kyanda Location had been demolished by **Patricia Mueni**, the Respondent's mother together with the Respondent. When he proceeded there he found the Respondent's family cows grazing there while the building material had been piled on the fence. He reported the matter to the police at Machakos Police Station and the Respondent's mother was arrested, charged, convicted and placed on two years' probation. It was his evidence that he had a dispute with the Respondent over the plot and that the Respondent and his mother believed that he had no right over the said property.

3. In cross-examination he stated that he was not present when the house was being demolished ad that the communication was given to his brother and not to him.

4. PW2, **David Musyoka Munwoki**, testified that between 27th October, 2013 and 5th November, 2013 at about 6.30am on a date he could not recall, he was taking milk to the market when upon reaching the Respondent's gate he saw the Respondent, his nephew, demolishing the complainant's house. It was his evidence that the Respondent was alone and was using a metal rod. Upon his return he found when the house which was almost complete had already been demolished and the Respondent was not at the scene but the materials were at the scene. After a while the Respondent started carting away the materials outside and one week later took the same to his home.

5. In cross-examination he stated that the Respondent had accused him of robbery with violence but the case was concluded.

6. PW3, **Serah Nangu Musau**, testified that one morning in November, 2013 she was preparing the children for school when he saw the Respondent demolishing a house belonging to the complainant with a piece of metal with a pointed end. According to her, the Respondent was alone. She then called the complainant on phone and relayed the information to him and the complainant later went with the police. It was her evidence that the Respondent in the company of other people removed the blocks from the farm. In cross-examination, she denied that she indicated in her statement that she talked to the complainant's brother.

7. PW4, IP **Augustine Mwakio**, was the investigations officer in the case. Upon receiving the complainant from the complainant he proceeded to the scene where they saw the demolished building. After recording the statements from the witnesses, he preferred charges against the Respondent.

8. In cross-examination he stated that the complainant's received a call from his brother who informed him about the demolition.

9. PW5, **Regina Kanini Musyimi's** evidence was that she sold the land in question to the complainant in 2008 at Kshs 200,000/=. It was her evidence that she had no dispute with the Respondent over the land in question.

10. At the close of the prosecution's case, the Respondent was placed on his defence. It was his evidence that following the death of his father, PW2 wanted a share of his father's gratuity and upon realising that the same would not be shared with him, PW3 decided to cause trouble. Later the Respondent was attacked by 5 men including PW2. Pursuant to his report to the police, two of the suspects including PW2 were arrested and charged in court. However, the complainant lodged a complaint against the Respondent and his mother of malicious damage to property leading to the conviction of the Respondent's mother.

11. According to the Respondent he was nor at home on the date of the alleged offence since he was on duty at Mutuati Police Station and he produced the duty roster for the period from 19th October, 2013 to 2nd November, 2013 showing that he was on duty with his colleague. According to him, it was impossible for him to have travelled from Meru to go and demolish the structure and then return to Meru. It was his evidence that he was framed by the witnesses in the case since he disagreed with what they wanted to do.

12. The accused called **PC Nicholus kipwalei** who was attached to Masinga Police Station as his witness. According to him, on 27th October, 2013 he was at Mutuati Police Station in Meru where he together with the Respondent had been assigned duty at the report desk and cell sentry from 6am to 6pm. According to him they worked for one week during the day and the following week they were on night shift from 10th November 2013 to 9th November, 2013. He confirmed that it was not possible for a person to travel from Igembe North in Meru to Machakos County during that time.

13. In his judgement, the learned trial magistrate found that the authenticity of the duty roster was not challenged and that there was evidence of blood between the Respondent and PW2. He found that PW2 seemed to have recorded his statement after he had been charged with the said offence of robbery with violence. PW3 on the other hand could not recall the exact date of the demolition. Her evidence contradicted that of the complainant who stated that he received the information on 22nd January, 2014 from his brother. The court found that the prosecution had not displaced the Respondent's defence of alibi. He therefore found that the prosecution had failed to prove its case against the Respondent.

14. In this appeal, the appellant submits that from the prosecution's evidence it was clear that the Respondent was within the scene on the date of the commission of the offence and was seen carrying debris from the scene after demolition. It was submitted that contrary to law the defence of alibi was not raised at the earliest opportunity and therefore should have been disregarded when weighed against all the other evidence by the prosecution. It was submitted that the prosecution did not have ample time and opportunity to test the alibi defence which defence was also not tested during cross-examination of the prosecution witnesses.

15. On the other hand, the Respondent submitted that it was the duty of the prosecution to disprove the alibi defence raised by the Respondent since the Respondent's obligation was simply to raise a doubt as regards the prosecution case.

Determination

16. I have considered the grounds of appeal, the evidence, the submissions and authorities relied upon.

17. This is a first appellate court. As expected, I have analysed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."**

18. Similarly in the duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in **Pandya -vs- Republic [1957] EA 336** is as follows:-

"On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

19. It was therefore appreciated by the Court of Appeal in **Kiilu & Another vs. Republic [2005]1 KLR 174,** that:

1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.

20. In this case the only evidence connecting the Respondent to the offence in question was that of PW2 and PW3. As regards PW2, it was not in doubt that there was bad blood between him and the Respondent and that at one time the Respondent caused him to be charged with the offence of robbery with violence. The trial court found that he only recorded his statement with the police after he was charged with the said offence. As was stated in **Ndung'u Kimanyi vs. Republic [1979] KLR 282**:

"A witness in Criminal Case upon whose evidence it is proposed to rely should not create an impression in the mind of the Court that he is not a straightforward person, or raise a suspicion about his trustworthiness or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence."

See also **Alicandioci Mwangi Wainaina vs. Republic Criminal Appeal No. 628 of 2004** and **David Kariuki Wachira vs. Republic [2006] eKLR.**

21. That animosity is a factor which can properly be taken into account in determining the weight if any to be attached to the evidence of a witness was appreciated by **Trevelyan and Sachdeva, JJ** in **Ayub Muchele vs. The Republic [1980] KLR 44**, where it was held that:

"Just as animosity is a factor which is properly to be taken into account where required, so is lack of animosity. We see nothing wrong in an appropriate case for the court to ask "What reason had the witness to lie?" …The fact that people have no grudge against someone does not mean that they cannot, at the same time, be mistaken or, for that matter, deliberately untruthful…There are spiteful people about."

22. In those circumstances, it was proper for the learned trial magistrate to have attached no weight to the evidence of PW2.

23. As regards the evidence of PW3, it was clear that there was inconsistency between her evidence and that of the complainant regarding the report made by herself to the complainant. It was therefore held in **Onubugu vs. State 119741 9 S.C.1 Kem vs. State (1985)1 NWLR** that**:-**

"Where prosecution witnesses have given conflicting version of material facts in issue, the trial judge by whom such evidence is led must make specific findings on the point and in so doing must give reasons for rejecting one version and accepting the other. Unless this is done, it will be unsafe for the court to rely on any of the evidence before it."

24. It was therefore held in in the case of **Felix LuwambeGonzi -vs- Republic in Criminal Appeal No. 83 of 2006** that it was difficult to know the true position of a matter when witnesses give contradictory evidence.

25. Most important issue, however, was the Respondent's defence. The Respondent testified that he was away from the scene during the period the offence was alleged to have been committed. He produced the duty roster showing that he was miles away on duty during the said period and it was not possible for him to travel, demolish the building in question and return to duty. He called a colleague with whom he was on duty who corroborated his evidence.

*26. In the case of **Patrick Muriuki Kinyua & Another vs. Republic Nyeri Criminal Appeal No. 11 of 2013 (UR)** the Court held that:*

"an alibi is a plea by an accused person that he was not there (was not present) at the place where the crime was committed at the time of the alleged commission of the offence for which he is charged."

27. In **Wang'ombe vs. The Republic [1980] KLR 149**, **Madan, Miller and Potter, JJA** held that:

> **"…in *Ssentale vs. Uganda [1968] EA 365, 368* [Sir Udo Udoma CJ]…said that a prisoner who puts forwards an alibi as an answer to a charge does not thereby assume any burden of proving that answer; it is a misdirection to refer to any burden as resting on the prisoner in such a case; for the burden of proving his guilt remains throughout on the prosecution. We agree, we have ourselves said so on more than one occasion…The defence of alibi was put forward for the first time some four months after the robbery when the appellant made his unsworn statement in court. Even in such circumstances the prosecution or the police ought to check and test the alibi wherever possible."**

28. In **Elizabeth Waithiegeni Gatimu vs. Republc [2015] eKLR** where the Nigerian case of **Ozaki & Another –vs- The State** was relied, where it was held that:

> **"Thus it is settled law that the defence of ALIBI must be proved on balance of probabilities and that for it to be rejected it must be incredible…"**

29. In **Uganda vs. Sebyala & Others, [1969] EA 204** the learned Judge citing relevant precedents 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."**

30. The South African case of **Ricky Ganda vs. The State, {2012} ZAFSHC 59**, Free State High Court, Bloemfontein provides useful guidance. In the said case it was held that: -

> **"The acceptance of the evidence on behalf of the state cannot by itself be sufficient basis for rejecting the alibi evidence. Something more is required. The evidence must be considered in its totality. In order to convict there must be no reasonable doubt that the evidence implicating him is true…the correct approach is to consider the alibi in light of the totality of the evidence in the case and the courts impression of the witnesses…it is acceptable in totality in evaluating the evidence to consider the inherent probabilities…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, taking 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."**

31. In this case, however, the Respondent not only testified to his whereabouts during the time of the incident, but called his colleague as his witness who corroborated his evidence. He also produced the duty roster whose contents were not challenged by the Appellant.

32. In my view, this was a clear case in which the Appellant ought to have taken advantage of the provisions of section 309 of the ***Criminal Procedure Code*** which provide as follows:

> ***If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.***

33. In the case of ***Adedeji vs. The State*** **{1971} 1 All N.L.R 75** it was held that: -

> ***"failure by the police to investigate and check the reliability of alibi would raise reasonable doubt in the mind of the tribunal and lead to the quashing of a conviction imposed."***

34. In my view the evidence presented against the Respondent fell short of the required standards. The learned trial magistrate was therefore justified in finding that the prosecution had failed to satisfy the onus which the law placed on it: the duty to prove the Respondent's guilt beyond reasonable doubt.

35. Consequently, I find no merit in this appeal which I hereby dismiss.

36. Orders accordingly.

Read, signed and delivered in open Court at Machakos this 3rd day of June, 2020.

G V ODUNGA

JUDGE

In the presence of:

Mr Ngetich for the Appellant

Respondent present in person

CA Geoffrey