REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 70 OF 2015

ELIJAH MULUNGUSU…….....APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

RULING

INTRODUCTION

1. The Appellant herein and his Co-Accused Kiplangat Rono Kiporo, were both tried by Hon E.G. Nderitu Senior Principal Magistrate on 14th October 2015. She sentenced the Appellant herein to serve seven (7) years imprisonment for the offence of robbery with violence contrary to Section 295 (1) of the Penal Code Cap 63 (Laws of Kenya). She acquitted his Co-Accused under Section 215 of the Criminal Procedure Code after finding that the Prosecution never proved the offence of handling stolen property contrary to Section 322(2) of the Penal Code.

2. Being dissatisfied with the said Learned Trial Magistrate's Judgment, the Appellant herein lodged a Petition of Appeal on 25th November 2015. On 23rd November 2016, this court directed the Appellant to file his Written Submissions. Instead of doing so, on 9th December 2016, he filed a Notice of Motion application seeking the following orders:-

> **1. THAT this Hon. Court be pleased to allow** (sic) **Application for further evidence of the Original First Report of OB No 85 of 9th February 2015 at 21.50 hours for Cr Case No 70 of 2016 in accordance with Section 385 of the CPC.**
>
> **2. Any other orders that the Hon. Court may deem fit to grant.**

3. His Further Affidavit, which he erroneously titled Appellant's Replying Affidavit and Written Submissions were filed on 15th March 2017. Guided by the provisions of Article 159 (2) (d) of the Constitution of Kenya, 2010 that mandates courts to administer justice without undue regard to the procedural technicalities, this deemed the said Affidavit to have been a response to the State's Replying Affidavit filed on 22nd February 2017. Its Written Submissions were dated 11th April 2017 and filed on 12th April 2017. Notably, the State's Replying Affidavit was not dated. This omission will be dealt with later on this Ruling.

4. When the matter came up on 12th April 2017, both the Appellant and the counsel for the State asked this court to deliver its Ruling based on the Written Submissions they had both filed without highlighting the same. The Ruling herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

5. As a preliminary point, this court felt that it was necessary to consider the competence and validity of the State's Replying Affidavit as the same was undated. This was clearly in breach of the provisions of Section 5 of Oaths and Statutory Declarations Act Cap 15 (Laws of Kenya) that provides as follows:-

> **"Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the Jurat or attestation at what place and on what date**(emphasis court) **the oath or affidavit is taken or made."**

6. Although the Appellant did not raise this issue and his copy may very well have been dated, the copy in the court file is the one that is considered in determining any matter before it. As the said Replying Affidavit was not dated, the court found and held that the said Replying Affidavit was null and void *ab initio.*The facts in the Appellant's Affidavit that was filed on 9th December 2016 were thus unrebutted. However, this court considered the State's Written Submissions as the same had raised points of law. Indeed, a party opposing another's application can opt to oppose the same on points of law.

7. It was the Appellant's case that the Prosecution misled the Trial Court by producing a different OB Number 28 of 21/3/2015 at 1.00pm which was copied on the face of the preferred Charge Sheet. He pointed out that No 60035 PC Paul Ouma (hereinafter referred to as "PW 4") testified that the Complainant Joseph Matano Ndara (hereinafter referred to as "PW 1") was the origin **(sic)** of the case herein and referred to OB No 85 of 9th February 2015 at 2150 hours.

8. He contended that PW 4 told the Trial Court that PW 1 was robbed by one Elijah Makosi which was at variance with OB No 85 of 9th February 2015. He added that if the alleged offence was committed on 9th February 2015, then it would not have been possible to have been reported in OB Number 28 of 21st March 2015.

9. It was his submission that if this court did not order that the said OB Number 85 of 9th February 2015 be produced in court, his chances of challenging the evidence of his identification which was through recognition, would be infringed upon. He urged this court to rely on the case of **Cr Case No 272 of 2011- Mombasa Boniface Kamau Ndungu vs Republic**in support of his case.

10. He also relied on the provisions of Article 35(1)(a) (b) of the Constitution of Kenya which guarantees his right to access to information and urged this court to allow his application.

11. On its part, the State submitted that the Appellant's right of access to information was not infringed upon as he was given an opportunity to scrutinise the particulars of OB Number 9/2/2015. It also referred this court to the case of **Wanjau vs Waikwa (1984) KLR 275** where the Court of Appeal stated as follows:-

> **"This rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to catch up weak point in his case and fill up omissions in the court of appeal. The rule does not authorize the admission of additional evidence for the purposes of removing lacunae and filling in gaps in evidence. The appellate court must find the evidence needful. Additional evidence should not be admitted to enable a plaintiff to make out a fresh case. There would be no end to litigation if the rule were used for purposes of allowing parties to make out a fresh case or to improve their case by calling further evidence. It follows the power given by rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence."**

12. It pointed out PW 4 clarified that ON Number 28 of 21st March 2015 related to the Appellant being booked as a "prisoner" while OB No 85 of 9th February 2015 related to the date PW 1 made the initial report to Voi Police Station. It was emphatic that the failure by the Appellant to have led questions regarding the First Report during trial should not result in him being allowed to clear the discrepancies at

the appellate stage because the Prosecution did not hide evidence that could justify him to contend that his right to a fair hearing under Article 50 of the Constitution of Kenya had been challenged.

13. A perusal of the Charge Sheets in the Trial Court file made reference to O.B. 28/21/3/2015. As was rightly pointed out by the State, PW 4 told the Trial Court that this OB Number related to the booking of the Appellant as a "prisoner." Although the Appellant contended that the PW 4 adduced the wrong First Report, in her order of 22nd July 2015, the Learned Trial Magistrate merely directed that the Investigation diary be provided. She did not specify which OB Number was to be produced in court.

14. When PW 4 testified on 2nd September 2015, he marked the First Report as DMFI 2. The Appellant did not also seek clarification of the OB Number that was to be adduced in court. He did not allude to the same when he testified in his defence. As the said First Report was not adduced in evidence, it did not form part of the court record that give the Appellant an opportunity to refer to the same during the appellate stage. Indeed, the marking for identification of the First Report was only for identification purposes and did amount to proof of the contents therein as was affirmed by the Court of Appeal in the case of **Kenneth Nyaga Mwige vs Austin Kiguta & 2 Others [2015] eKLR**.

15. In this regard, this court agreed with the State that the Appellant was not denied access to information relating to the OB Number 85 of 9th February 2015 as the same was presented to him for perusal and he was given an opportunity to Cross-examine PW 4 on the same. If the Appellant had wanted a copy of the same, nothing would have been easier than for him to have applied for the same during the Trial and the Learned Trial Magistrate to have been supplied with the same.

16. However, if as the Appellant was contending that the said OB Number 85 of 9th February 2015 should be availed before this appellate court as the same showed that PW 1 was robbed by Elijah Makosi which he was emphatic was not his name, it was not necessary for this court to physically see a copy of the same as PW 4 had indeed testified that the person who robbed PW 1 was Elijah Makosi and his evidence recorded accordingly.

17. Notably, as was held in the case of **Wanjie vs Saikwa** (Supra), the rule for calling for fresh evidence ought to be used sparingly and exercised with a lot of caution. Where an opportunity presents itself, nothing should stop a court from calling additional evidence. This additional evidence is not intended to give either of the parties a second bite of the cherry but rather it is to enable a court resolve an appeal with certainty.

18. Section 358 of the Criminal Procedure Code Cap 75 (Laws of Kenya) provides as follows:-

> **"In dealing with an appeal from a subordinate court, the High Court, if it thinks additional evidence is necessary, shall record its reasons, and may either take such evidence itself or direct it to be taken by a subordinate court."**

19. The fundamental principle therein which is also applicable herein is that the evidence sought to be adduced at the appellate stage must fall in the category of evidence that was not available before and at the time of trial even after due diligence and that once adduced, it will enable the High Court make a just, fair and conclusive determination of the appeal before it.

20. In this particular case, the Appellant was seeking orders that the High Court should ordinarily order *suo moto* having deemed it necessary to make such an order. It is not an application that should ordinarily be made by a party to a proceeding because if this was to be allowed, there would be no end to litigation as any party could continuously seek additional evidence and lead to endless proceedings.

21. Accordingly, having considered the affidavit evidence and the Written Submissions in support of the parties herein, this court came to the firm conclusion that the Appellant's present application was misplaced. It was the considered view of this court that if the Appellant was concerned about the manner in which he was identified, nothing stopped him from arguing his appeal on that issue based on the

evidence that had already been recorded by the Learned Trial magistrate.

22. Any inconsistencies or contradictions are a matter of evidence as this court is able to resolve the appeal herein without having to call for additional evidence. This court was thus not satisfied that any value would be added if the same First Report was to be presented before this court.

DISPOSITION

23. In the circumstances foregoing, this court's decision was that the Appellant's Notice of Motion application filed on 9th December 2016 was not merited and the same is hereby dismissed.

24. It is hereby directed that this matter shall be mentioned on 20th June 2017 for further orders and directions.

25. It is so ordered.

DATED and **DELIVERED** at **VOI** this **15th** day of **June 2017**

J. KAMAU

JUDGE

In the presence of:-

Elijah Mulungusu - Appellant

Miss Karani - for State

Josephat Mavu