REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 38 OF 2016

PAUL TIPANDE MOKARE……………………...........APPELLANT/APPLICANT

VERSUS

REPUBLIC……………..…………………………RESPONDENT/RESPONDENT

RULING

INTRODUCTION

1. The Appellant herein was tried and convicted by Hon C.N. Ndegwa Senior Resident Magistrate on 15thFebruary 2011. He was sentenced to suffer death in the manner prescribed by the law for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code Cap 63 (Laws of Kenya).

2. Being dissatisfied with the said Learned Trial Magistrate's Judgment, the Appellant herein lodged a Petition of Appeal on 30th November 2016. The Petition of Appeal he had filed on 5th August 2016 was irregular as he filed the same without leave of the court.

3. On 22nd February 2017, this court directed the Appellant to file his Written Submissions. Instead of doing so, on 20thDecember 2016, he filed Amended Grounds of Appeal. On 7th February 2017, 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 in OB No 29/22/2/2010-Taveta Police Station.**
>
> **2. Any other orders that the Hon. Court may deem fit to grant.**

4. On 1st March 2017, the Appellant filed his Supplementary Affidavit in response to the State's Replying Affidavit that was filed on 22nd February 2017. His Written Submissions were filed on 15th March 2017. Notably, the State's Replying Affidavit was not dated. This omission will be dealt with later on this Ruling. The State's Written Submissions were dated 11th April 2017 and filed on 12th April 2017.

5. 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

6. 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 <u>on what date</u>**(emphasis court) **the oath or affidavit is taken or made."**

7. 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 7th February 2017 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.

8. It was the Appellant's case that the description of the attacker was not given in OB Number 29/22/2/2010- Taveta Police Station that would have enabled such attacker to have been identified on 12th February 2010, which was six (6) days from the date of the alleged incident.

9. He pointed out that the details and particulars of the Original First Report in OB No 29/22/2/2010- Taveta Police Station conflicted and contradicted the identification and recognition that was made by the Complainant, Joseph Ndoti Musango (hereinafter referred to as "PW 1") on 12th February 2010 at Oloitokitok where he searched, identified and aided his arrest.

10. He referred this court to the cases of**<u>Ngui vs Republic (1984) KLR</u>** , **<u>Kabogo s/o Wangunyu 23 (1) KLR 50</u>** (sic) to buttress his argument that the lighting conditions were not conducive for his identification.

11. On its part, the State submitted that at no time did the Appellant rely on the First Report and neither did he seek to be furnished with the same or lead any questions relating to the same. It was emphatic that the Appellant was positively identified by PW 1 and Isaac Kyamaru (hereinafter referred to as "PW 2") and that in any event, an identification parade was conducted where the Appellant was identified as the assailant.

12. It also referred this court to the case of **<u>Wanjau vs Waikwa (1984) KLR 275</u>** 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."**

13. It also relied on the case of **<u>Karmali Tarmohamed & Another vs I.H. Lakhani (1958) EA 567</u>** where the Court of Appeal held as follows:-

> **"Except on grounds of fraud or surprise the general rule is that an appellate court will not admit fresh evidence unless it was not available to the party seeking to sue it at the trial or that reasonable diligence would not have made it so available."**

14. A perusal of the proceedings showed that at no time did the Prosecution tender in evidence the First Report O.B. Number 29/22/2/2010 or the Appellant allude to the same when he Cross-examined the Prosecution witnesses or adduced his sworn evidence.

15. In this regard, this court agreed with the State that the Appellant was not denied access to information relating to the OB Number 29/22/2/2010 as he never sought to be furnished with 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 29/22/2/2010 should be availed before this appellate court as the same did not provide the description of PW 1's attacker, it was not necessary for this court to physically see a copy of the same as none of the Prosecution witnesses mentioned anything about the description of PW 1's attacker.

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 as this court is able to resolve the appeal herein without having to call for additional evidence.

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 30th November 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:-

Paul Tipande Mokare - Appellant

Miss Karani - for State

Josephat Mavu