



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL APPEAL NO. 99 OF 2013**

**JABA ABUDHO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

The Appellant herein is Jaba Abudho, who was charged with three counts of attempted murder contrary to section 220(a) of the Penal Code. It was alleged that on 2.12.2012 at Hulahula Area in Marsabit, with others not before the court, while armed with AK 47 rifle, unlawfully attempted to cause the death of Leiboku Ikume Galbaran, Achukul Letaraya and Iltisiyon Elsim Galhi by firing at them. After a full trial, the appellant was convicted on all the three counts and sentenced to serve life imprisonment on each count and the sentences were ordered to run concurrently. Being dissatisfied with the said convictions and sentences, the appellant filed this appeal citing six grounds which his counsel, Mr. Omari summarized in two issues i.e. that the evidence against the appellant was circumstantial evidence which was not free from error and that identification was not water tight. Mr. Mungai learned counsel for the state conceded the appeal. He submitted that it is the evidence of PW8 and 11 who linked the appellant to the offence having been directed to the appellant by a boy who was not called as a witness. Further, he urged that the confession made to the investigation officer did not meet the requirements of a confession under section 25(A) of the Evidence Act.

Before I consider the said submissions, it is necessary to set out the case before the trial court. The prosecution called a total of five witnesses. PW1 Iltisiyon Elsim Galhai (complainant in 3<sup>rd</sup> count) a resident of Hulahula Location is a police reservist and had been issued with a firearm by Marsabit Police Station. He recalled that on 7.12.2012 about 8 am, he was on Marsabit-Laisamis-Isiolo Road with other reservists, namely Leiboku and Achukul and women who sell milk, when they were suddenly attacked from the forest by people firing at them. The reservists fired back. He said he saw a person running away, saw a trail of blood which they followed but did not arrest anybody. He was not able to identify the appellant as the person he saw escaping from the scene of the shoot-out.

PW2 Achukul (complainant in count 2) is also a police reservist who was with PW1 and Leiboku. He reiterated what PW1 told the court. He said that in the shoot-out, he saw three people running away one in a green shirt and two in black. They pursued the attackers and only recovered sandals and a jericin. He was not able to identify the appellant as the attacker.

PW3 Sgt. Benson Kiptui of Marsabit Central District recalled that on 2.12.2012; about 10.30am he heard communication through the radio that some KPR had reported a shoot-out at Hulahula Bridge. He mobilized other officers to go to the scene. He heard screams in a village near the Cereals Board. They

got out and met a woman who informed them that she saw a person who was bleeding and she led them where the person was. Upon interrogating the person, he said that he had been shot by bandits who took his animals and that the others with him had illegal firearms. They took the person to Marsabit District Hospital went back to the scene of the shooting, recovered spent cartridges, five sandals a jerrican and clothes. Next day, they recovered a shirt with a hole and blood stains which they suspected the apparent was wearing because he did not have a shirt. PW3 denied that any report had been made was about stolen cows.

PW4 PC George Kamanda of CID Marsabit recalled that on 2.12.2012, the OCS Marsabit asked him to interrogate the suspect who had been shot and arrested at Hulahula. He interrogated the appellant who informed him that he had been with others Boru Yattani and Ruba Adano and that they planned to raid Hulahula one and that they shot at Rendile home guards who shot back at them and he was injured in the exchange. The other 2 escaped and he was left behind and was arrested by police officers. PW4 also received items recovered by the police including a green shirt which the appellant admitted to be his and that it was tattered at the spot where the appellant was injured. He produced the firearms which were taken to the Government Analyst as exhibits together with all the items that were recovered.

PW5 Leiboku Ikume (complainant in count II) was walking on the road with PW1 and 2 when they were attacked. He said that he only saw one person wearing a green shirt running away but he was not able to identify the person.

The appellant opted to make an unsworn statement in his defence. He told the court that he was taking cattle to graze and to water them near Manyatta Gild but he did not get water there. He met other herdsmen from Chabi. They went to town while he was left behind they met Rendile who shot at them near camp Henry. He denied having been involved in the crime.

Mr. Omari, the appellant's counsel submitted that PW1, 2 and 5 who were attacked were not able to identify any of the assailants; I have considered all the evidence on record and submissions by counsel. PW1 said he saw one person running away; PW2 saw three, PW5 said he saw one; it is likely that there were more than one person attacking PW2 and 5. However, PW2 and 5 did not see any of the assailants. They only saw the backs of the fleeing assailants. They were not able to positively identify the appellant as the assailant or one of them.

The court relied on circumstantial evidence to convict the accused. None of the exhibits produced in court could connect the appellant to the offence PW2 and 5 told the court that they fired shots at the attackers and so did the assailants. It could not be ascertained who fired the cartridge, the witnesses or the attackers. The courts have over the years clearly stated when the court can found a conviction on circumstantial evidence. In **SAWE VRS REPUBLIC (2003) KLR 364** the court of Appeal held.

- 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.**
- 3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.**

In this case, PW3 told the court that a woman led the police to the appellant. The woman was not called as a witness to explain how she knew the appellant to be one of the suspects or exactly where the appellant was found in relation to the scene of the shooting.

The appellant suffered a bullet wound but the investigation officer never took blood samples from the appellant to compare with the blood on the shirt that was recovered which was said to have blood stains

and torn. The witnesses also followed a trail of blood from the scene, but samples were not taken from the scene to compare with the appellants blood. The trial magistrate did not give reasons for believing that the appellant was one of the assailants. In my view, the police were very shoddy in their investigations because they should have taken considered the appellants blood sample to be compared with that on the shirt and the trail of blood at the scene. The court was also not told whether any bullet was found lodged in the appellant's body, which could also have been examined by the ballistic expert to determine whether or not it was fired by PW1, 2 and 5.

It seems the appellant was arrested in the same general area where there had been a shooting and he is a prime suspect but suspicion, however strong cannot be a basis for inferring guilt because guilt has to be proved beyond any reasonable doubt. The duty still rested on the prosecution to prove their case beyond any reasonable doubt. It seems the trial court was shifting the burden on the appellant to prove his case where the court said "there is no evidence that there was an attack on the accused while herding cattle. No such report was made to the police station. The accused did not call his colleagues with whom he was allegedly herding cattle with to confirm that they were attacked by bandits." The above statements clearly demonstrate that the trial court fell into serious error by requiring the applicant to prove his innocence and hence shifting the burden of proof.

As regards the evidence of PW4 the Investigation Officer, the trial court correctly rejected the evidence as it did not amount to a confession since the investigation officer was not qualified to obtain a confession from the appellant PW4's evidence on the alleged confession made by the appellant was totally inadmissible.

In the end, I find that the circumstantial evidence on record did not irresistibly point to the appellant as one of the attackers to the exclusion of all the others. The appellant was only a suspect. In the end result, I find the conviction by the trial court to have been unsafe and hereby quash it. I also set aside the sentence. The appellant is set at liberty forthwith unless otherwise lawfully held.

**DATED SIGNED AND DELIVERED THIS 6<sup>TH</sup> DAY OF FEBRUARY, 2014**

**R. P .V. WENDOH**

**JUDGE**

.....**For accused**

.....**For State**

.....**Court Assistant**

.....**Accused**