Jumaan v Republic (Criminal Appeal 119 of 2022)
[2023] KECA 1070 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KECA 1070 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL 119 OF 2022

SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA

SEPTEMBER 22, 2023

BETWEEN

MUHDHAR SAID JUMAAN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgement of the High Court of Kenya at Mombasa (Ong'injo J) dated 10th January 2022 in HCCRA No. 79 of 2019 Original Mombasa CMC CR.C NO. 2043 of 2015)

JUDGMENT

1. This appeal arises from the judgement delivered in Mombasa High Court Criminal Appeal No. 79 of 2019 which was an appeal from Mombasa Chief Magistrate's Court Criminal Case No. 2043 of 2015 in which the Appellant herein was charged with and convicted for the offence of robbery with violence in Counts I & II of the charges and sentenced to serve 21 years' imprisonment in each count to run concurrently.

2. The particulars of Count I were that the Appellant on 25th May, 2104 at Milimani Location in Lamu East District within Lamu County, jointly with others while armed with offensive weapons namely firearms robbed Corporal George Makhulo of a G3 rifle loaded with 20 rounds of ammunition valued at Kshs 220,000/= and immediately before the time of such robbery murdered the said Corporal George Makhulo.

3. The particulars of Count II for which the Appellant was convicted was that on the same day at the same place, the Appellant also in a similar way robbed Private Vincent Imbenzi of a G3 rifle loaded with 20 rounds of ammunition of the same value and similarly murdered the said Private Vincent Imbenzi.

4. According to the Prosecution's case, on 25th May, 2014, KDF officers based in Ras Kamboni in Somalia were on their way from Manda base in Lamu where they had gone to collect food supplies and on reaching Milimani Area in Lamu East district, due to heavy rains, their military truck got stuck in the

mud. Unable to get the truck out of the mud from 2.00pm to 7. 00 pm, they settled down to prepare food and thereafter divided themselves in three groups where some soldiers remained in the truck, and others took shelter in a nearby structure put up by KWS.

5. PW9 Seargent Andrew Wambua Nzomo, Corporal George Mahulo and Private Vincent Imbenzi were tasked sentry duties. At around 10. 00 to 11.00 pm, the vehicle that was being driven by the appellant herein arrived from Hindi direction and PW9 instructed Private Imbenzi and George Mahulo to stop the vehicle but it did not stop. However, the vehicle got stuck in the mud adjacent to their military truck. When the officers ordered the occupants of the vehicle to alight, the two people in the passenger's seat alighted and stood in front of the vehicle and produced their identity cards. The driver of the vehicle, who was in communication with other persons who were at the back of the vehicle, excused himself to go and get his identity card from the vehicle but suddenly removed a firearm and started shooting at the KDF officers in the course of which Corporal George Mahulo and Private Vincent Imbenzi were shot dead.

6. Sensing danger, PW9 took cover and the other people in the vehicle started shooting at the KDF officers. The shootout continued up to 2.00 am and in the course of it the fuel tank for the assailant's motor vehicle was shot and the vehicle engulfed in flames. The registration plate of the vehicle was produced in Court as KAV 599E Toyota Land Cruiser. The following morning, Mohammed Mohu who is in charge of military intelligence in the area proceeded to the scene and met KDF soldiers including PW 9 who informed him of what had happened. Apart from the two KDF soldiers who were felled in the shootout, there was also one body of an unidentified person who PW 20 said was one of the occupants of the motor vehicle driven by the appellant. From this body were recovered a pistol holster, a prismatic compass and a digital wrist watch whereas from the scene, the identity card of the appellant, and the identity card of one Ahmed Omar were recovered together with 9 spent cartridges and one live ammunition, pistol serial number AN5550, Safaricom wallet containing Nokia phone and sim cards of Safaricom and Yu were also recovered. The scene of the attack was photographed and Corporal Harrison Mugiri PW 10 processed the films and prepared a report which were produced as exhibits. The evidence of PW10 was corroborated by the evidence of PW11 who arrived at the scene after the incident.

   PW12 was the KWS Officer who arrested the Appellant when he was found hiding in the bush. PW13 was the one who received the body of the unknown body that was recovered at the scene while PW16 witnessed the post-mortem examination on the body of the said person. PW14 was one of the investigators and PW15 was one of the officers who was present during the incident and corroborated the evidence of the other eye-witnesses. PW17 matched the fingerprints to the Identity Cards that were recovered from the scene. PW18 extracted the information from the Sim Cards that were recovered from the scene while PW19 confirmed that the burned ashes that were recovered from the scene were the residues of foodstuffs.

7. The bodies of the two KDF officers were airlifted to Forces Memorial Hospital for post-mortem upon proper identification by the relatives. The body of the unidentified person was preserved at Mpeketoni Hospital Mortuary. On 26th May, 2014, the appellant was arrested by Corporal Losiro of KWS after his footprints were trailed to where he was hiding under the bush and he was collected by KDF officers.

8. There were more exhibits which were recovered from the scene and were forwarded to the Government chemist for analysis and forensic analysis respectively. Corporal Elisha Maru, PW20, the investigating officer, collected spent cartridges at the scene and forwarded them to chief inspector Alex Mwandwiru a ballistic expert and upon examination, he formed the opinion that the spent cartridges were fired from different AK 47 rifles.

9. Upon being placed on his defence, the Appellant gave sworn evidence in which he denied stealing or helping Al shabab. He testified that on 22nd May, 2014, one Said Maraba, who was known to him as his customer and who was running a tour firm went to his garage at Kongo boys in Mombasa, and told him that there was a radiator he wanted the Appellant to repair. They proceeded to Watamu area where the vehicle had been parked and he took the radiator to Mombasa where it was repaired and he went to fix it at 6.00pm. He thereafter slept at Musa's home in Watamu. Said Maraba then requested him to accompany him to Lamu in case the vehicle broke down before reaching Lamu. According to the Appellant, the vehicle was loaded with cooking oil and other food stuffs.

10. However, at a place called Bango, they got stuck in mud but managed to remove the vehicle and proceeded with the journey. By then it was the appellant who was driving while Musa was seated in the Co-driver's seat and they were in the company of Dongo. At Hindi, while they were removing the vehicle from the mud in which it had gotten stuck, five people came armed with guns, one of them of Somali origin, forcefully entered into the vehicle and they proceeded with the journey.

11. At Kiunga, they saw torches flashing a sign that they stop and the vehicle landed in a ditch. He together with Musa and a passenger that they had given a lift alighted and gave out their identity cards and when he was told to stand aside for the officers to search the vehicle, he heard gun shots. Fearing for his life, he ran into the bush. The following day he started looking for the road but he did not find it and in the evening he climbed a tree to sleep. On 27th May, 2014, he found the road and when he reached a place called Bothei and decided to rest, several persons came armed with guns and arrested him and took him to a nearby school. A call was made and KDF officers came and tied his face and took him to places that he did not know while assaulting him and asking him for guns. He was then taken to Makonge police station on 3rd June, 2014 and placed in the cell. On 4th June, 2014, police officers took him to Hindi and arraigned him in Court. He said that he did not have a gun and he never owned a gun and he didn't know whether the people they carried were Al Shabab. He told the police that he knew where Musa and Said were staying.

12. On cross-examination, he stated that he was taking food stuffs to Hassan Noor in Kiunga. He stated that among the three people he was carrying, one was of Somali origin and one was armed with a gun but he did not know the make of the gun. He averred that he suffered a gunshot injury on the right leg on the thigh but did not know where the gun shots came from.

13. In dismissing the appeal, the Learned Judge identified only one issue which in her view was whether there was sufficient evidence whether direct or circumstantial to warrant the conviction of the appellant for the offence of robbery with violence. According to the Learned Judge, the Appellant knew that he was carrying dangerous people in his vehicle and while giving out his identity card to the KDF officers who had stopped them he had the opportunity to alert them of the danger that they were exposing themselves to. He however, failed to signal the KDF officers and as a result, the five gunmen in his vehicle opened fire on the KDF officers and shot two of them fatally. Having aided the five gunmen by transporting them at night on an obviously dangerous route and having failed to alert PW 9 and the deceased officers of the imminent danger, the Learned Judge found that he was an accomplice to the violence against the officers and the robbery of their firearms and uniform. In the Learned Judge's finding, the allegations of forceful entry by bandits/ gunmen into the appellant's vehicle lacked corroboration. The Learned Judge found that the only inference that can be made from those circumstances i.e. that the persons carried by the appellant were armed and were travelling on a dangerous road at night, is that the appellant was properly found guilty of the offence of robbery with violence the prosecution having established all the necessary ingredients forming the said offence. The Learned Judge accordingly, dismissed the appeal on both the conviction and the sentence.

14. We heard the appeal on the Court's virtual platform on 16th May, 2023 and the Appellant was virtually present from Kamiti Maximum Prison, while Learned Counsel Mr Chacha Mwita appeared for the Appellant, and Ms Nyawinda Learned Principal Prosecution Counsel held brief for Ms Valerie Ongeti for the Respondent. Both Learned Counsel confirmed that they had filed their respective submissions, and while Mr Mwita briefly highlighted his submissions, Ms Nyawinda wholly relied on her written submissions.

15. On behalf of the Appellant, issues were taken with the manner in which the Appellant was treated before he was taken to Court. It was contended that the Appellant was kept in custody in excess of the period prescribed, 11 days according to the Appellant. It was further contended that the transfer of the case from Lamu to Mombasa prejudiced the Appellant who was unable to avail his witnesses. In the Appellant's submissions, the acquittal of the Appellant on count III while being convicted on counts I and II was a contradiction. According to the Appellant, had he been found culpable for the offence of knowingly supporting the commission of a terrorist act by soliciting and supplying the Al Shabaab with assorted foodstuff, it could have confirmed that their existed a common intention between the Appellant and the people who hired/contracted him as a standby mechanic and driver, thus he was an accomplice but that was not the case.

16. It was submitted that the High Court failed to live up to its expectations and responsibilities as the first appellate court; that the learned judge failed to consider the ingredients of the offence of robbery with violence and that nowhere in the analysis and determination by the High Court were the ingredients of the offence of robbery with violence ever highlighted, measured or weighed against the evidence on record, hence lacking a basis to uphold the conviction and sentencing; and that finding that their existed a common intention between the Appellant and the passengers in Toyota Land Cruiser Registration No. KAV 599E to rob Cpl. George Makhulo & Private Vincent Imbenzi of their firearms & uniform was unfounded and devoid of any supporting direct, factual nor circumstantial evidence from the prosecution. It was submitted that based on the evidence of the investigating officer (PW20) who described the unfortunate incident as a coincidence, the Appellant was exonerated from any Mens Rea, Actus Reus and could not have been an accomplice to the offence of Robbery with Violence. It therefore cannot to alleged that the Appellant intended, singularly or jointly with others, who remain unknown to commit any offence (let along the offence of Robbery with violence) and neither was he an accomplice.

17. According to the Appellant the recovery of three ID Cards from the scene showed that the three, the Appellant, Musa and Dogo produced their ID Cards upon demand and moments before the shooting. The Appellant then dwelt on the contradictions between the evidence of PW1, PW3, PW5, PW9 and PW15 as to whether the Appellant was the one who shot at the officers and whether or not the Appellant actually alighted from the vehicle. According to the Appellant, in light of the evidence by PW20, the investigations officer, that PW9 having gone back to the vehicle could not have observed what he alleged to have observed coupled with the finding by the trial magistrate that the prosecution witnesses could not have been able to identify the Appellant as the shooter, the evidence of PW9 lacked credibility for lack of consistency and corroboration from the evidence of the other witnesses.

18. It was submitted that from the evidence on record the element of the attackers being armed did not come out clearly; that there was no evidence as to who took the rifles; that there was no evidence linking the recovered pistol to the Appellant; that there was nothing to link the Appellant to what happened between the officers and the attackers; that the violence that lead to the three dead bodies cannot be attributed to the Appellant in any way; and that the Defence tendered by the Appellant stood solid, it was never shaken during cross examination and it remained consistent from the time he narrated the same to those who tortured him and the investigating officer.

19. In response, the Respondent submitted that the Appellant was positively identified by PW 1, 5 and 9, PW1 having seen him in the area for about 2 years; that on the day of the incident there was moonlight and there were lights emanating from motor vehicle registration number KAV 599E that enabled PW5 to see the appellant; that on 26th May 2014, a few hours after the incident, while on foot patrol, PW12 and 6 other officers' tracked footprints from the scene to a place about 3 kilometres away where they found the appellant injured and hiding in the bush and arrested him; and that the appellant's ID Card Number 22498157 was recovered at the scene of the incident; that there was evidence that the attackers were more than one and that they were armed; and that from the evidence, the two suspects robbed the two officers of their rifles and fatally wounded them.

20. According to the Respondent, the *Penal Code* prescribes a death sentence for the offence of robbery with violence and in this particular case, the court took into account the mitigation offered by the appellant and sentenced him to serve 21 years imprisonment in each count to run concurrently. Based on *David Mutai v Republic* [2021] eKLR it was submitted that an appellate Court cannot interfere with the sentencing Court's discretion unless it is established that there was real error on application of the sentencing principles.

Analysis And Determination

21. We have considered the issues raised before us in this appeal. Being a second appeal our mandate is restricted by Section 361(1)(a) of the *Criminal Procedure Code* to consider issues of law only but not matters of fact that have been tried by the first court and re-evaluated on first appeal and concurrent findings arrived at, unless it is demonstrated that the two courts below considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision. In that event, such omission or commission would be treated as matters of law entitling this Court to interfere. In such appeals, this Court therefore has a duty to pay homage to concurrent findings of fact made by two courts below, unless such findings are based on no evidence at all, or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings, in which event, the decision is bad in law, thus entitling this court to interfere. See *Adan Muraguri Mungara v R* CA Cr App No 347 of 2007; *Njoroge v Republic* [1982] KLR 388; and *Karani v R* [2010] 1 KLR

22. However, there is a duty imposed on the first appellate court of re-evaluating and re-analysing the evidence placed before the trial court and arrive at its decision cautious of the fact that it was not the trial court and therefore, unlike the trial court had no benefit of seeing the witness testify hence incapacitated in terms of gauging the demeanour of the witnesses and allowance must be given for this. See *Okeno v Republic* [1972] EA 32.

23. The failure, therefore, by the first appellate court to undertake that duty, a duty imposed by the law, elevates the otherwise factual matters to a matter of law. This Court therefore held in *Jonas Akuno O'kubasu v Republic* [2000] eKLR that:

> "It is correct that on first appeal the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the material before the judge or magistrate with such other material as it may decide to admit. The appellate court must make up its own mind not disregarding the judgement appealed from but carefully weighing and considering

it...On second appeal, it becomes a question of law as to whether the first appellate court on approaching its task, applied or failed to apply such principles." [Emphasis ours].

24. At times, where the question involved is that of mixed fact and law, it is not easy to distinguish the two. The Supreme Court therefore clarified what constitutes "matters of law" in relation to this Court's jurisdiction as the second appellate court, in *Gatirau Peter Munya v Dickson Mwenda Kithinji and 3 others* [2014] eKLR where the three elements of the phrase "matters of law" were identified thus:

> "(a) the technical element: involving the interpretation of a constitutional or statutory provision;
>
> b. the practical element: involving the application of the *Constitution* and the law to a set of facts or evidence on record; and
>
> c. the evidentiary element: involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record."

25. Our determination of this appeal must therefore be based on the above principles and we shall briefly revisit the facts of the case purely to satisfy ourselves whether the two Courts below carried out their legal mandate as is required of them.

26. However, it must also be appreciated that this Court is not entitled to interfere with the findings of the High Court unless the issue raised was taken up before the first appellate court. This Court in *Alfayo Gombe Okello v. Republic* [2010] eKLR had this to say about the issue:

> "....the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest although it could and should have."

27. The predecessor to this Court in *Alwi Abdulrehman Saggaf v Abed Ali Algeredi* [1961] EA 767 held that the course of taking a point of law, which has not been argued in the court below, on appeal ought not to be followed unless the court is satisfied that the evidence upon which they are asked to decide established beyond doubt that the facts, if fully investigated, would have supported the new plea. The justification for that holding was that:

> "The appellate jurisdiction is conducted in relation to certain well-known principles and by familiar methods. The issues of fact and law are orally presented by counsel. In the course of the argument it is the invariable practice of the appellate tribunals to require that the judgements of the judges in the courts below shall be read. The efficiency and authority of a Court of Appeal, and especially a final Court of Appeal, are increased and strengthened by the opinions of the learned Judges who have considered these matters below. To acquiesce in such attempt as the appellants have made in this case is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the judges in the courts below."

28. This Court in *Stallion Insurance Company Limited v Ignazzio Messina & C S.P.A* [2007] eKLR expressed itself on the issue as hereunder:

> The Privy Council also, in an appeal emanating from the supreme court of Kenya, The United Marketing Company Case (*Supra*), held: -

"(ii) their Lordships would not depart from their practice of refusing to allow a point not taken in the courts below to be argued unless they were satisfied that the evidence upon which they were asked to decide established beyond doubt that the facts, if fully investigated, would support the new plea; even if the facts were beyond dispute and no further investigation of facts were required, their Lordships would not readily allow a fresh point of law to be argued without the benefit of the judgments of the judges in the courts below, accordingly;

(iii) their Lordships would not, even if the question were a bare question of law, entertain the submission that the respondent's claim was to be defeated by reason of his breach of a condition in his contract of insurance. *North Staffordshire Railway Company v. Edge*, [1920] AC 254, applied."

We are of the further view that the appellant's case as put and argued before the superior court was specific. The intention to alter it at this appellate stage would be grossly prejudicial to the respondent and it ought not to be allowed. The persuasive speech of Sir Raymond Evershed M.R. in *United Dominion Trust Case* (*Supra*) may illustrate the point:

> "I rest my conclusion perhaps most strongly on this consideration, that the judgment, extracts from which I have read, seems to me to be in no way whatever related to it. Indeed, it seems to me to have proceeded on a basis which was absolutely inconsistent with the way in which counsel for the plaintiff now puts his case. As a matter of principle the Court of Appeal has always been strict in applying the rule that an appellant from a county court, unless the other party consents, cannot be allowed in this court to raise a new point of law not raised below. After all, the county court is intended to serve litigants of relatively small means. It is not in accordance with the public interest that a party who has fought a case in a county court and been defeated should then raise in this court a new point and put his case in an entirely different way as a matter of law and so make the other party, hitherto successful,litigate the matter again at the risk of having to pay the costs not only below, but in this court."

The same approach appears to obtain in India where, in a case where the new issue of law was raised for the first time on appeal eighteen months after the lower court's decision, the court stated: -

> "Unless upon very strong grounds, and under very special circumstances, we should hesitate to permit a party at such a stage of his suit, as the present suit now is, to set up a case which was not set up for him in the Court of first instance or of primary appeal, where his professional representative must have been perfectly well aware whether such a case as this alleged special custom could be legitimately set up, and abstained from any attempt to set it up. To yield to such an application as the present, would be to make an evil precedent, and to hold out a premium to perjury and interminable litigation."

We have said enough, we think, to underscore our reluctance to accede to the arguments sought to be put forth by the appellant in this matter and we reject that attempt."

29. It is clear from the submissions made before us that some of the grounds articulated in this appeal were not the subject of the appeal before the High Court. These include such issues as to the period within which the Appellant was kept in custody and whether his right to call witnesses was curtailed by the

transfer of the case from Lamu to Mombasa. We therefore find that the said issues are not properly for consideration before us.

30. The appeal before the High Court was based on the following grounds:

    1. That the learned Honourable Magistrate erred in both law and fact by convicting the appellant for the offence of robbery with violence despite the prosecution having failed to demonstrate motive/*mens rea* and *actus reus vis-à-vis* the charges.

    2. That the learned Honourable Magistrate erred in both law and fact by convicting the appellant by finding that two firearms were robbed violently while the existence of the firearms and the case was never demonstrated beyond reasonable doubt.

    3. That the learned Honourable Magistrate erred in both law and fact by convicting the appellant despite having ruled that the circumstances prevailing were not favorable/conducive for a positive identification and the prosecution having failed to draw a nexus between the appellant and the ingredients of the offence of robbery with violence.

    4. That the learned Honourable Magistrate erred in both law and fact by convicting the appellant despite the prosecution's failure to link the appellant o the alleged murder weapons (firearms) and active or passive participation in the robbery with violence.

    5. That the learned Honourable Magistrate erred in both law and fact by convicting the appellant despite having ruled that there was no earlier plan involving the appellant to commit robbery with violence and for that reason the prosecution's failure to demonstrate that the appellant shared common intention/plan and purpose with the assailants.

    6. That the learned Honourable Magistrate erred in both law and fact by convicting the appellant despite his finding that the appellant was not privy to the intentions, mechanizations and plans of those that had hired him to repair and drive the vehicle that they had for a fee and those others that forced themselves in the vehicle later.

    7. That the learned Honourable Magistrate erred in both law and fact by shifting the burden of proof to the appellant and dismissing his well- articulated, corroborated and un-rebutted defence evidence in defending his innocence; as seconded by the pre-sentencing report.

    8. That the learned Honourable Magistrate erred in both law and fact despite the prosecution's failure to prove their case to the required standard and reason we find the sentencing to have been unwarranted.

31. As we stated above, the Learned Judge of the High Court determined the appeal on the basis that:

> " the issue that arises for determination by this Court is whether there was sufficient evidence whether direct or circumstantial to warrant the conviction of the appellant for the offence of robbery with violence."

32. With due respect to the Learned Judge, while substantially the appeal was challenging the proof of the commission or the involvement of the Appellant in commission of the offence, the issues raised in the High Court encompassed other issues that ought to have been expressly dealt with. The Appellant pointed out alleged contradictions and inconsistencies both in the judgement of the trial court and in the evidence of the witnesses. These allegations ought to have been expressly dealt with by the Learned Judge. While it may well be that they were considered in arriving at her decision, we hold that where such allegations are made, the first appellate court ought to expressly deal with them either by finding

whether or not there are in fact contradictions and inconsistencies and if found to exist, a reconciliation of the same be undertaken. Where this is not done, this Court may well find that the first appellate court failed in its duty to subject the evidence to a re-evaluation. This Court in *John Mutua Munyoki v Republic* [2017] eKLR, had this to say on that issue:

> " We also note the contradiction between PW2's claim that the appellant habitually had sex with J.M.K and J.M.K's own evidence on oath that it was the first incident and that the appellant "had never joked with her before". There is also the contradiction that contrary to what PW2 herself said, the investigating officer PC Nixon Tallam (PW4) provided a different picture that the report he received was that PW2 went to the appellant's home during the incident and "found the complainant on accused's bed without pants". That variance is not minor one. The first appellate court seems not to have dealt with those contradiction and inconsistencies in the prosecution evidence with the effect that we find merit with the appellant's complaint that his appeal did not benefit from the thorough, exhaustive and independent re- evaluation that he was entitled to. They should have been interrogated and resolved in the appellant's favour".

33. This position was appreciated by the Supreme Court of India in *K. Anbazhagan v State of Karnataka and others* Criminal Appeal No. 637 of 2015 in the following terms:-

> " The appellate court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely,.....The appellate court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively and dispassionately. The reasoning in appeal are to be well deliberated. They are to be resolutely expressed. An objective judgment of the evidence reflects the greatness of mind – sans passion and sans prejudice. The reflective attitude of the Judge must be demonstrable from the judgment itself. A judge must avoid all kind of weakness and vacillation. That is the sole test. That is the litmus test."

34. However, it must be stated that there is no set format to a re-evaluation of evidence by the first appellate court should conform. We adopt what was stated by the Supreme Court of Uganda in the case of *Uganda Breweries Ltd v Uganda Railways Corporation* [2002] 2 EA 634, thus:

> " The extent and manner in which evaluation may be done depends on the circumstances of each case and the style used by the first Appellate Court. In this regard, I shall refer to what this court said in two cases. In *Sembuya v Alports Services Uganda Limited* [1999] LLR109 (SCU), Tsekooko JSC said at 11:
>
> > 'I would accept Mr. Byenkya's submission if he meant to say that the Court of Appeal did not go into details of the evidence, but that is really a question of style. There is really no set format to which the re-evaluation should conform. A first Appellate court is expected to scrutinise and make an assessment of the evidence but this does not mean that the Court of Appeal should write a judgment similar to that of the (trial).'"

35. In the case of *David Njuguna Wairimu v Republic* [2010] eKLR the Court of Appeal reiterated this duty as follows:-

> " The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."

36. The Court in *Isaac Njogu Gichiri v Republic* [2010] eKLR, similarly held that:

> " With regard to failure by the superior court to give due consideration to the appellant's defence we wish to state that his defence was a mere denial of the charge and the sequence of events of his arrest. The trial court stated after narrating it thus: "I find that the defence of the 5th accused is not true." We would not have expected the trial Magistrate to say more because the appellant said nothing about the events of 8th October, 1998. On this, the superior court stated: "The trial Magistrate was also right in rejecting the defence of the appellant in the circumstances." We agree with this confirmation."

37. In *Odongo and another v Bonge* Supreme Court Uganda Civil Appeal 10 of 1987 (UR), Odoki, JSC (as he then was) appreciated that:

> " While the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance."

38. In this case what weighed heavily in the mind of the Learned Judge was that:

> " The appellant admitted that while on their way to Kiunga, they arrived at Bango and as it was raining and the state of the road was bad, they got stuck in the mud. That while removing the vehicle from the mud, five persons came armed with guns and one of them was of Somali origin.
>
> That the five people entered their vehicle and they proceeded with their journey to Kiunga. Allegations of forceful entry by bandits/ gunmen into the appellant's vehicle lacks corroboration. He confirms that they were stopped by police officers wearing KDF uniform but from the evidence of PW 9, they refused to stop and it is only that they were stuck in the same mud that the vehicle came to a stop. In the words of the appellant the vehicle landed in a hole and he has not explained why it landed in a hole if it is not true that he had refused to stop. When the vehicle got stuck in the mud, the appellant, Musa and one of the passengers they had picked alighted and identified themselves. The appellant knew he was carrying dangerous people in his vehicle and while giving out his identity card to the KDF officers who had stopped them he had the opportunity to alert them of the danger that they were exposing themselves to. The appellant failed to signal the KDF officers and as a result, the five gunmen in his vehicle opened fire on the KDF officers and shot two of them fatally. Having aided the five gunmen by transporting them at night on an obviously dangerous route and having failed to alert PW 9 and the deceased officers of the imminent danger, this

Court finds that he was an accomplice to the violence against the officers and the robbery of their firearms and uniform."

39. The Learned Judge concluded that:

> " The only inference that can be made from those circumstances i.e. that the persons carried by the appellant were armed and were travelling on a dangerous road at night, is that the appellant was properly found guilty of the offence of robbery with violence the prosecution having established all the necessary ingredients forming the said offence."

40. From the foregoing, it would seem that the Learned Judge's findings were based on circumstantial evidence rather than on direct evidence of the Appellant's involvement in the commission of the offence. Proof in criminal cases can either be by direct evidence or circumstantial evidence. When a witness, such as an eyewitness, asserts actual knowledge of a fact, that witness' testimony is direct evidence. On the other hand, evidence of facts and circumstances from which reasonable inferences may be drawn is circumstantial evidence. Therefore, where circumstantial evidence meets the legal threshold, it may well be a basis for finding the accused person culpable of the offence charged. In fact, in *Neema Mwandoro Ndurya v R* [2008] eKLR, this Court cited with approval the case of *R v Taylor Weaver and Donovan* [1928] 21 Cr. App. R 20 where the court stated that:

> " Circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial."

41. Whereas it is appreciated that a charge may be sustained based on circumstantial evidence the courts have established certain threshold to be met if a conviction is to be based thereon. In *Sawe –vs- Rep* [2003] KLR 364 this Court held that:

> " 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 hypotheses than that of his guilt; Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on; 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; Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."

42. The predecessor of this Court in *R. v Kipkering Arap Koske & another* [1949] 16 EACA 135, had this to say:

> " The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused."

43. In *Abanga Alias Onyango v Rep* CR. A No. 32 of 1990 (UR) this Court set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case are sufficient to sustain a conviction as follows:

> " It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:
>
> (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,
>
> (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
>
> (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

44. As reiterated by this Court in *Mwangi v Republic* [1983] KLR 327:

> " In order to draw the inference of the accused's guilt from circumstantial evidence, there must be no other co-existing circumstances which would weaken or destroy the inference."

See also *Simon Musoke v Republic* [1958] EA 715 and *Teper v R* [1952] AC489.

45. In this case, from the Appellant's evidence, he was in the company of the attackers who opened fire on the KDF officers. He knew that the people he was carrying were not very good people since, in his own evidence, they had forcefully compelled him to carry them. They were armed and dangerous. According to PW1, the Appellant was not a stranger to the area having been seen there before. He therefore ought to have known that the area was prone to terrorists' attack. However, when they came across KDF Officers, although he was waved down by the officers, he failed to stop and the vehicle only came to a standstill when it was stuck in the mud. He did not take any step to alert the officers, if only for his own safety, that he had in the vehicle people who seemed not to be up to some good, having been forcefully compelled to carry them. After the shooting incident, he ran into the bush and the following day one would have expected him to try and retrace his way back to where the attack had taken place to see if he could offer or get some help. Instead he decided to spend the night on top of a tree and was arrested 3 kilometres inside the bush.

46. This Court in *Abanga Alias Onyango v Republic* (*supra*) held that:

> " In *Rafaeri Munya Alias Rafaeri Kibuka V Reginam* (1953) 20 EACA 226, the appellant there was convicted of murder and the case against him was mainly based on circumstantial Evidence. In his sworn evidence at the trial, he made some denials which were obviously false. It was held that: The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect". This case in our view does not in any way go against the basic legal principle that the burden of proving a criminal charge beyond doubt is solely and squarely upon the prosecution. But it`s a basic holding, namely that when an accused person tells an obvious and deliberate lie which is disproved or disbelieved, then such a lie is capable of providing corroboration to other independent evidence available."

47. In this case, we have considered the conduct of the Appellant prior to, during and after the incident and we find that the same was incompatible with his innocence and was incapable of explanation upon any other reasonable hypotheses than that of his guilt. We therefore have no reason to fault the conclusion that the Learned Judge ultimately came to.

48. We find no reason to fault the Learned Judge as regards the proof of the ingredients of robbery with violence which we find were satisfactorily proved. In any case, we, at this stage cannot interfere with the concurrent findings of fact by the two courts below where there is evidence to support such findings.

49. Accordingly, since we have no power, as a second appellate court to interfere with the sentence in these circumstances, we find no merit in this appeal which we hereby dismiss in its entirety.

50. Judgement accordingly.

DATED AND DELIVERED AT MOMBASA THIS 22ND DAY OF SEPTEMBER 2023.

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR