IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KOOME. JJ.A)

CRIMINAL APPEAL NO. 18 OF 2018

BETWEEN

BODOLE ABALA KONE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the Judgment of the High Court of Kenya at Malindi (Chitembwe & Muya, JJ) dated on 31st August, 2016

in

H.C.CR.App. No. 101 of 2011)

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JUDGMENT OF THE COURT

1. This being a second appeal by **Bodole Abala Kone** (*appellant*), only points of law fall for our consideration by dint of Section **361(1)** of the **Criminal Procedure Code**. We also appreciate that this Court cannot interfere in the findings of fact by the two courts below unless it is apparent that on the evidence presented and accepted by the trial court, no reasonable tribunal could have reached that conclusion. Additionally, the Court has loyalty to accept the concurrent findings of fact of the two courts below provided they are based on clear evidence which was adduced at the trial. See **Bernard Mutua Matheka vs. Republic (Criminal Appeal No. 155 of 2009** unreported). In **Boniface Kamande & 2 Others vs. R [2010] eKLR**, this Court pronounced itself as follows:-

> ***"On a second appeal to the Court, ... we are under legal duty to pay proper homage to the concurrent findings of facts by the two courts below and we would only be entitled to interfere if and only if, we were satisfied that there was no evidence at all upon which such findings were based or if there was evidence, that it was of such a nature that no reasonable tribunal could be expected to base any decision upon it."***

2. We now rehash albeit in brief, the evidence adduced before the trial court to enable us put this appeal in perspective. Mariam Hassan (PW2), a resident of Garsen, Malakoteni was on 18th October, 2009 was at around 8.30 p.m. tending to her convenience store in the company of her two children aged 10 and 7 years. They had just finished dinner and PW2 decided to lie down on a bed when suddenly two robbers charged at her and startled her to her feet. One of the robbers, whom PW2 said she positively identified as the appellant pointed a rifle to her chest. She screamed for help frightening her 10 year old daughter who stumbled on a bundle of flour. The younger child also screamed and while running towards his mother the boy tripped on the lamp which immediately went out.

3. According to PW2, she had seen the two robbers earlier that day chewing miraa at a neighboring store and so she managed to recognize them before the lamp went off. She later noticed that her purse containing cash worth Kshs.5,000-was missing. Meanwhile her husband, (Abubakar Thuma - PW3) was at their home nearby taking dinner when he heard his wife screaming from the kiosk. As he ran towards the house to find out what was happening, he met the robbers outside the kiosk running off. He threw his spear at one of them who was holding a rifle and as luck would have it, the spear caught the robber injuring him. This appears to have caused the robber to slip on the wet ground (it was raining) and he fell down. The commotion attracted a mob which came to PW3's aid and they were able to subdue the suspect. The matter was reported at the police station and the scene was visited. The police officers had to shoot in the air in a bid to scatter the angry mob which was baying for the suspect's blood. Unfortunately, the suspect is said to have disappeared amidst the confusion. Inspector Obonyi (PW6), went to the scene and recovered an AK 47 rifle with 6 rounds of ammunition.

4. The following day, following a tip off, a group of police officers went to a house at Tula village from where they found the appellant

bleeding from fresh wounds on his back and leg and his clothes were soaked in blood. He was arrested and taken to the police station where he was charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code and with two counts of being in possession of firearm, and ammunition without a firearm certificate contrary to section 4(1) as read with section 2 (a) of the Firearms Act Cap. 114 Laws of Kenya.

5. The appellant denied all the charges and the matter proceeded to full trial. During the trial Lawrence Ndiwa, a firearm examiner (PW1) confirmed that the rifle was a Chinese AK 47 SN3504719 in mechanically sound condition and capable of firing. Paul Waweru Kangethe (PW7), an analyst from the government chemist department in Nairobi further testified that he received from one Police Constable Peter Muli a spear head and the clothes bearing the appellant's blood samples. After analysing the samples, he confirmed that the appellant's blood group B matched the blood type on the items which were recovered from the appellant and which were produced before the trial court as exhibits.

6. In his defence, the appellant denied the charges and stated that on the material day he was looking for his missing cow when unknown men attacked him and accused him of being a thief. As a result of the mistaken identity he was arrested and charged for committing an offence unknown to him.

7. After considering the evidence adduced before the court in entirety, the learned magistrate was satisfied that the charges had been proved beyond reasonable doubt and consequently convicted and sentenced the appellant to suffer death on the first count. Sentencing in respect of counts two and three was held in abeyance.

8. The appellant's first appeal to the High court against conviction and sentence was unsuccessful. Unrelenting, he moved to this Court on appeal relying on grounds inter alia that the learned Judges erred:-

> ***i. In finding that the appellant was not positively identified;***
>
> ***ii. In failing to address itself to the test applied in respect of circumstantial evidence before making it a basis of conviction;***
>
> ***iii. In failing to consider that the prosecution did not call crucial witnesses to testify and hence the first appellate court erred in failing to find that had the said witnesses testified, their evidence would have been unfavorable to the prosecution's case;***

9. At the plenary hearing of this appeal **Mr. Okoth Duncan Odera** learned counsel for the appellant, relied on the supplementary memorandum in which he faulted the two courts below for giving weight to the evidence on identification saying that the appellant's identification was purely dock identification, and hence of very low probative value. **Mr. Odera** however admitted that the High court had faulted the evidence on identification and found it insufficient to convict. Counsel further faulted the trial court for relying on the injuries and the blood group, saying that the appellant had explained he sustained the said injuries after being beaten up by a mob who mistook him for a thief.

10. On the blood sample, learned counsel posited that, there was no evidence as to how it was preserved and who took it to the analyst. He was therefore casting aspersions as to the quality of the sample intimating that there was a possibility of adulteration. Ultimately, Mr. Odera faulted the two courts below for not believing the appellant's defence saying that both courts had shifted the onus of proof to the appellant. He therefore urged this Court to allow the appeal.

11. Opposing the appeal, **Mr. Isaboke** Senior Prosecution Counsel submitted that the appellant had been properly identified as PW2 had seen him clearly earlier that day as he chewed miraa outside her store. Her husband (PW3) confirmed that he was the one who had inflicted the wounds on the appellant as the appellant was fleeing from the scene. He urged us to dismiss the appeal.

12. As stated earlier, on second appeal, only issues of law fall for our determination. Having considered the entire record and the rival submissions of counsel, we crystalise the issues for determination as two, namely, identification and circumstantial evidence. On identification, although the trial court found the identification of the appellant sufficient, the High court found that identification by PW2, who was the only identifying witness was no more than dock identification and could not therefore be relied on to convict. We are reluctant to fault the learned Judges on that finding.

13. This leaves us with the ground on circumstantial evidence. Was the circumstantial evidence on record sufficient to found a conviction? This Court has cautioned that before a court can draw from circumstantial evidence the inference that the accused is guilty, it must also satisfy itself that there are no other co-existing circumstances, which would weaken or destroy the inference of guilt. In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilt, this Court must also consider a further principle set out in the case of **Mwangi vs. Republic** and **(1983) KLR 522 Musoke vs. R [1958] EA 715** citing with approval **Teper vs. R [1952] AL 480**, thus:

> ***"It is also necessary before drawing the inference of accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."*** *(*See Musoke vs. R [1958] EA 715). In Dhalay Singh vs. Republic, Cr. App. No. 10 of 1997.

This Court has also emphasized that the chain of events must be so complete that it establishes the culpability of the appellant and no one else without any reasonable doubt. (See **Musili Tulo vs. Republic CR. APP. No. 30 of 2013)**.

14. The circumstantial evidence relied on by the High court to uphold the conviction was that PW3 while pursuing the robbers flung a spear at one of the robbers and stabbed him twice with the spear. The appellant was arrested the following day 1½ km from the scene nursing wounds. Addressing this issue the learned Judges stated:-

> ***"The appellant was arrested the following day about 1½ km away from the crime scene nursing the stab wounds. Blood samples examined proved that the blood on the spear used to stab the appellant is similar to the appellant's blood... the circumstantial evidence points to nothing else other than the appellant's guilt."***

15. The issue we must address is whether the circumstances as encapsulated in the above finding left no room whatsoever for any other conclusion. Did these circumstances prove the appellant's guilt beyond reasonable doubt? Does the circumstantial evidence meet the threshold necessary to prove a case purely on the basis of circumstantial evidence? We appreciate the settled tenet that this Court will not interfere with concurrent findings of fact by the two courts below. There are however a few exceptions as stated in the cases of **Chemagong vs. Republic [1984]**

KLR 61, **Kiarie vs. Republic [1964] KLR 739)** and in **M'Riungu vs. Republic [1983] KLR 455** to mention but a few. The common thread weaving through these cases is that where a right of appeal is confined to questions of law, the appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law and it should not interfere with the decisions of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law. (See **Martin vs. Glyneed Distributors Limited (T/A) MBS Fastenings – The Times of March 30, 1983)**.

16. There are only two links in the chain of the circumstantial evidence used to convict the appellant. The first one is that he was found with fresh wounds when he was arrested and PW3 had stabbed one of the robbers the previous day. The nature of the wounds does not appear to have been considered and there was no P3 form or other medical evidence to establish if the wounds in question were spear wounds or not. The two courts below acknowledged this fact but both concluded that the P3 form was not necessary as it was not disputed that the appellant was wounded as at the time he was arrested. We will defer to those findings of fact.

17. As far as the second link is concerned however, we ran into some difficulty. This is because the Government chemist (PW7) was emphatic that he received the blood samples and the other exhibits on 4th December, 2009. On cross-examination, this witness stated that blood in a bottle disintegrates and biodegrades after a few weeks if it is not properly stored; about 2 weeks if it is refrigerated but only for a day without refrigeration. He concluded by saying:-

> ***"From the date of offence to the date I examined the items about 6 months had lapsed".***

The witness also stated he could not tell when any of those items were recovered as the date was not indicated in the exhibit memo form, nor was there evidence as to how the blood sample had defied science and lasted for all those days without disintegrating. The two courts below failed to analyse this important link. We are persuaded that had they done so, they would have come to the conclusion that the evidence on record did not meet the threshold set for circumstantial evidence to be sufficient to convict. There was, in our view, a break in the chain link as there was possibility of interference with the blood sample. In a case which was purely based on that one piece of circumstantial evidence, the evidence as to how and when the blood sample was taken was very crucial and needed to be watertight.

18. On the two counts of being found in possession of a firearm and ammunition without a licence, the evidence on record was that the firearm was not recovered from the appellant but at the scene. This evidence was not properly analysed by the two courts below as the possibility of another suspect having dropped it at the scene could not be overruled. For the foregoing reasons, we are not persuaded that the circumstantial evidence on record sufficed to support conviction on all the counts the appellant was charged with. This appeal therefore succeeds. We allow it, quash the conviction on all charges, set aside the sentence and order the appellant be set at liberty unless he is otherwise lawfully held.

Dated and delivered at Mombasa this 9th day of May, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR