IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI (PCA), KARANJA & KANTAI, JJ.A)

CRIMINAL APPEAL NO. 157 OF 2016

BETWEEN

ABDIRAHMAN SHEIKH MOHAMMED …….…..…..……. 1ST APPELLANT

ABDIWELLI WARSAME SALAT ……..…… 2ND APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nairobi (Mbogholi & Achode, JJ.) dated 14th August, 2014

in

HC. CR.A. 184 OF 2011)

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JUDGMENT OF THE COURT

This is a second appeal from the conviction and sentence of the appellants by the Senior Resident Magistrates court at Mandera. By dint o**f Section 361** of the **Criminal Procedure Code** we are to consider only issues of law but not matters of fact which have been tried and reevaluated by the two courts below unless we were to find that those findings are based on no evidence or that those courts reached the findings on a basis that no reasonable tribunal would reach. This principle has been considered in various decisions of this Court such as **Karingo v Republic [1982] KLR 213** where at page 219 the Court expressed the principle in the following words:

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did."***

The appellants **(Abdirahman Sheikh Mohammed** and **Abdiwelli Warsame Salat)** were charged with the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code** particulars being that on the 20th day of September, 2007 at about 2 a.m. at township location in the then Mandera District, jointly with others not before court and being armed with dangerous weapons namely AK47 rifles, they

robbed **S S A** of cash **Kshs.8,700/=** and a bed sheet being the property of the said complainant. A second count against the 1st appellant was dismissed and is not relevant here.

The appellants were tried by **R. Mibei** (Senior Resident Magistrate), convicted and sentenced to death. An appeal to the High Court of Kenya at Nairobi (**A. Mbogholi Msagha and L.A. Achode, JJ**) was dismissed in a judgment delivered on 14th of August, 2014. The appellants being dissatisfied with those findings filed this appeal.

We shall review the evidence that was presented to the magistrate as reevaluated by the High Court to see whether the legal standards we have enumerated at the beginning of this judgment were met and whether the appellants' conviction was sound and should stand or not.

20th September, 2007 fell within the Holy Month of Ramadhan. **S S A(Sofia) (PW1**), a mother of seven, was at home with her children some of who slept in the house and others chose to sleep outside probably because of the hot weather conditions in that region. S and her daughter **H S S (H) (PW5)** were sleeping outside the house. At about 1.40 a.m. S walked to a toilet situate away from the house. Upon her return and before reaching her sleeping quarters she observed three men walking towards her. She enquired from them what they were up to. Two of them came to where she was and because there were security lights in the compound she was able to see them well. They both had big guns. The 2nd appellant pointed a gun at her and demanded keys to a shop, her mobile phone and money. The 1st appellant was all along standing next to her. She told them that she did not have a key, a phone or money. The 1st appellant asked the 2nd appellant to shoot her. The 2nd appellant hit her on the back with the butt of the gun whereupon H woke up, saw what was happening and screamed. H, then aged about 8 years, pleaded with her mother S to give out the key. The 1st appellant ordered the 2nd appellant to shoot S. He cocked his gun aimed at her head and fired but the bullet missed. The spent cartridge was later collected in the compound by police. S realized that the appellants were serious about their threats to her life and she then told them that she was going to look for the key and give it to them. She pretended to be looking for it in the compound but she was able to hide and telephone the local chief.

The 2nd appellant followed her into the house. The 1st appellant went to a drawer in the house and removed cash Kshs.8,700/= which had been put in the drawer by H. According to S she was able to see the appellants very well because the house and compound were well lit by electric light. S observed that the 1st appellant had a wound on his leg which was bleeding profusely. She saw him pick her bed sheet which he used to wrap the bleeding leg trying to stem the bleeding. This bed sheet was recovered later that night near a mosque.

After all this drama the appellants left; police arrived and after interviewing S and H they followed a trail created by blood stains and this led to the arrest of the 1st appellant who had gone to a local clinic for treatment. The 1st appellant was arrested by police officers who found him admitted at that clinic for treatment of the wounded foot or leg.

Farah Mohamed Mohamud (Farah) (PW2), a policeman based at Bulla Hawa in Somalia was at a Police Station in Somalia when he received information that two people had been seen who were armed with rifles and one of them had a wound on his leg. Farah accompanied by the reportee went to where the reportee had seen those people; noticed a trail of blood which he followed to a clinic and this led to the arrest of the 1st appellant. Upon questioning the 1st appellant he looked for the 2nd appellant and arrested him.

Abdi Ade Amin (Abdi) (PW3) also a policeman in Bulla Hawa accompanied Farah as they arrested the appellants.

No. 23510 I.P. Isaiah Langat, conducted two parades on the 28th September, 2007 at Mandera Police Station where S identified both appellants as the people who had attacked her. Apparently twelve people were placed on the parade and the same members were used to identify both appellants at the parade.

No. 76999 P.C. Mohammed Golicha attached to C.I.D. Office, Mandera Police Station was the Investigations Officer. He narrated how the appellants were arrested and he produced an expert report from a ballistic expert to connect the spent cartridge that had been recovered from S compound and a blood sample report where the blood sample of the 1st appellant was matched with blood on the bed sheet that was recovered near a mosque. This evidence was accepted by the learned trial magistrate but was dismissed by the High Court because it was not properly produced.

That was the totality of evidence on which the trial court found that the appellants had a case to answer and upon being placed on their defence the 1st appellant in an unsworn statement stated that he was a teacher in Bulla Hawa in Somalia and that he had a girlfriend who was a daughter of the District Commissioner. He stated that the District Commissioner was unhappy with that relationship and it was upon this relationship that he had been framed and charged with the offence. The 2nd appellant gave sworn testimony where he stated that he did business of sale of water. He denied committing the offence and stated that there was a dispute about some land and that he was being charged so that the land could be taken from him.

The 2nd appellant's wife testified and she said that the 2nd appellant could not have committed the offence.

As we have already stated the appellants were convicted and the High Court upheld that conviction after throwing out evidence of the cartridge and that of a blood sample but finding ample evidence in the case against the appellants.

This appeal came for hearing before us on 27th March, 2017 when learned counsel for the appellants **Mr. Victor Obondi** urged the appeal through the Supplementary Memorandum of Appeal filed on 22nd April, 2016. Three grounds are set out where it is stated that the appellants' rights were violated contrary to **Article 50(2) (c) (h) and (k)** of the **Constitution of Kenya, 2010.** It is also stated that the learned judges in the first appeal erred in law in failing to critically reevaluate the evidence presented before the trial court. And finally that the learned judges in the first appeal erred in law in failing to appreciate that **Article 50 (2) (a)** of the **Constitution** accords the appellants the right to be presumed innocent until proven guilty. According to learned counsel, the appellants' rights were violated because they were not issued with witness statements. Learned counsel was not able to show from the record that witness statements were requested for and denied. Learned counsel also submitted that the High Court failed to reevaluate the evidence on doctor's and ballistic reports. This submission has no basis because the record shows that the High Court reevaluated the evidence and because those reports had been produced by a police officer and not the makers thereof and in view of the provisions of **Sections 33** of the **Evidence Act**, the High Court found the reports inadmissible and expunged them from the record. Learned counsel also took issue with the identification parade which according to him was not properly conducted and that there was no evidence that Sofia had not seen members of the parade before attending the same.

Mrs. G. Murungi, **Senior Assistant Director of Public Prosecutions,** conceded the appeal in respect of the 2nd appellant principally on the ground that the parade had not been properly conducted since the same members were used to identify both the 1st and the 2nd appellants. The record shows that the same members of the parade were used and this was contrary to the Police Force Standing Orders that require that that should not happen. Mrs.

Murungi also pointed out that S had identified the 2nd appellant because he had a silver tooth and a mark on his face features that no other member of the parade had. That concession by learned counsel is well founded and although there was other strong evidence against the 2nd appellant this violation of his rights in law accords a benefit and we allow the appeal in respect of the 2nd appellant whose conviction we hereby quash.

In respect of the 1st appellant learned counsel submitted that there was sufficient evidence because the *locus quo* was well lit by electric light and that Sofia described in detail what role the 1st appellant played

during the robbery.

Learned counsel in reply to the appellant submissions pointed out that **Article 50** of the **Constitution of Kenya, 2010** was not applicable as the trial was conducted pre that constitution. That scenario was however covered by **Section 72** of the retired **Constitution** where fair trial was provided for. We have perused the record and agree with learned Senior Assistant Director of Public Prosecutions that the trial was fairly conducted. We can detect no violation of the 1st appellant's rights at all. The trial magistrate admitted a ballistic report made by an expert but this report was rejected by the High Court as being improperly produced. The trial magistrate also admitted a blood sample report which linked blood on the stolen bed sheet with the 1st appellant's blood but again this evidence was rejected by the High Court on 1st appeal for being produced by an unqualified person.

On the issue of whether there was violation of the 1st appellant's trial rights and the effect of failure to be availed witness statements we have perused the record and can see no evidence of the 1st appellant requesting for witness statements at all. This would have been an issue if such statements had been requested for and denied. In the case here the 1st appellant did not even take the issue on 1st appeal and we cannot deal with the same on a 2nd appeal like this one.

On the way the parade was conducted according to learned counsel for the Republic, S made a report at the police station and described the 1st appellant while making that report as a person who had an injury on the leg which was bleeding. During the parade the police officer who conducted the same ordered that the members of the parade sit down so that S would not see the injury on the 1st appellant's leg. Sofia identified the 1st appellant as her attacker without any hesitation. Her evidence was simple and straight forward; it was well corroborated by her daughter and it is not surprising that the court believed it and the High Court on 1st appeal after reevaluating it found that the case against the 1st appellant had been proved as required in law.

Learned counsel for the appellants with due respect took a very narrow view of the case he had to deal with on this appeal. The trial was conducted and concluded on 10th March, 2008 more than 2 years before the **Constitution of Kenya, 2010** came into force. The rights set out in **Article 50** of that Constitution were not available in the retired Constitution in the elaborate way that they are set out in the **Constitution of Kenya, 2010**. Even if we were to pay a visit to the retired Constitution which provided for fair trial rights, it would still be a requirement that the appellants request statements and the same are denied for a violation to be alluded to. And even then the issue would have to have been taken on first appeal. It is not available on second appeal.

The evidence against the 1st appellant was in our considered view overwhelming and the trial court and the first appellate courts were right in convicting the 1st appellant. S and her daughter H saw the first appellant clearly during the whole incident that took a long time. He had not covered his face or concealed it in any way. The 1st appellant had a bleeding wound on his leg and the police were able to follow stains of blood to a clinic not far from the scene of robbery where the 1st appellant was found as he sought treatment for the injury. There is hardly any break in the chain of events that led to the arrest of the 1st appellant. Sofia had no hesitation in identifying the 1st appellant at the identification parade after she had given a description to the police. The conviction of the 1st appellant was safe and this appeal has no merit and we dismiss it accordingly. The appeal by the 2nd appellant having succeeded he shall be set free forthwith unless otherwise lawfully held.

Orders accordingly.

Dated and Delivered at Nairobi this 12th day of May, 2017.

P. KIHARA KARIUKI, PCA

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR