IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CRIMINAL APPEAL NO. 38 OF 2014

BETWEEN

WILSON NGAO MBULA…....................................APPELLANT

AND

REPUBLIC...RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa (Odero & Nzioka, JJ.)

dated 25th September, 2012

in

H.C.Cr.A. No. 325 of 2010)

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JUDGMENT OF THE COURT

The appellant was a person well known to **Paul Njoroge Kimotho**, (*PW1*). PW1 operated motor cycle business commonly referred to as *"boda boda*". On 29th July, 2009 at about 9.30p.m.whilst at Kaloleni stage waiting for passengers, he was approached by the appellant who was in the company of **Hamisi Kenga** (*Hamisi*) and requested to be ferried to Chalani Trading Centre at an agreed fare of Kshs.200/- to be paid by Hamisi. Upon reaching the centre, the passengers requested him to take them a little further. He resisted the request claiming that he had run out of fuel. Hamisi then asked PW1 whether he had change for Kshs.1000/-. While standing astride the motor cycle counting the money he had for purposes of the change, he was suddenly struck on the back of the head with a hammer by Hamisi. By then the appellant had moved about ten metres away and watched with glee as the events unfolded not bothering to intervene at all. Sensing that the appellant and Hamisi meant no good, PW1 jumped off the motor cycle and confronted Hamisi whom he held and a struggle ensued. In the process, they both fell down. The motor cycle left unsecured also fell by the roadside. During the struggle, the appellant got opportunity, picked the motor cycle, started the engine and rode off into the night. Within no time, PW1 was overwhelmed by Hamisi whom he let go. Hamisi disappeared into the darkness. In the process, PW1 not only lost his new motor cycle, which he had yet to register with the authorities but also Kshs.1000/- as well as his cap. Luckily, the cap was recovered at the scene the following day. PW1, could not bear the loss and started screaming for assistance.

Those screams attracted **Kenga Mbando Kombe** (*PW2*), village elder who happened by. He was well known to PW1. Together they started looking for the suspects and the motor cycle but all in vain. Administration police officers on routine patrol came by and also joined them in the search. This again proved futile. PW1 informed the officers that he knew one of the suspects and even his home being the appellant who had taken off with his motor cycle. He even knew the suspects home. The police officers advised him to report the incident to the police station first before they could go to the appellant's home. They proceeded to Kaloleni Police Station where the report was received by **PC Daniel Muinde** (*PW5*) who told them that the appellant had infact been there earlier and reported the robbery. He claimed to have boarded a motor cycle with another passenger, Hamisi, and when they got to their destination, Hamisi accosted PW1, by hitting him on the head rendering him immobile and then rode off on the motor cycle. Accompanied by PW5, they proceeded to the home of the appellant whom they found and who in turn led them to the home of Hamisi. As they approached the home they saw two people outside the house talking animatedly to each other. On seeing them, one of them disappeared into the night whereas the other entered the house. The one who entered the house was called **James Katana** (*Katana*). He was duly arrested and on being interrogated, confirmed that the person who had fled was Hamisi who a few moments earlier had told him about a new motor cycle he had acquired from Mtwapa and wanted him to accompany him to Malindi. Katana together with the appellant were then taken to Kaloleni Police Station. At the station, Katana was released on police bond and that was the last time he was seen. He soon thereafter disappeared and has to date not re-surfaced.

The following day, PW1 visited Lukes Hospital where he was examined by **Jack Nyongesa Wekesa** (*PW3*) a clinical officer. He classified the injuries sustained by PW1 as harm and the weapon causing them as blunt.

The appellant was then arraigned before the Senior Resident Magistrate's Court at Mariakani on a single count of robbery with violence contrary to **Section 296(2)** of the Penal Code. Particulars being that the appellant jointly with another not before court on 29th July, 2009 at about 10pm at Chanagande village of Kaloleni District robbed PW1 of his motor cycle, make Haojin chassis No. 69986 valued at Kshs.88,000/- and during the robbery struck PW1 with a hammer on the head.

The appellant denied the charge and in his sworn statement of defence conceded to a large extent the occurrence of the incident as narrated by PW1. The only point of departure being that when he hired PW1 for the ride, he was alone and not accompanied by Hamisi. That Hamisi only joined him on the way and hired PW1's services separately. He alighted at his destination and paid Kshs.100/- being the agreed fare and left Hamisi and PW1 to proceed on. As he trudged home he suddenly heard PW1 screaming claiming that he was being killed. He dashed back to the scene and at a distance saw Hamisi engaged in a struggle with PW1. However, before he could reach the scene, Hamisi stood up, took the motor cycle and rode off. He called out PW1 and when he heard no response, he went home and thence to Kaloleni Police Station to report the incident. He was later at about 4a.m. sought from his house by police officers whom he took to Hamisi's home and who upon seeing them ran away. It was then that he was arrested and later charged with an offence he did not commit.

The trial court believed the evidence of the prosecution and rejected the appellant's defence holding that the appellant was one of the two men gang that robbed PW1 of the motor cycle and that his act of reporting the incident to the police was a mere ploy to cover up his misdeeds. With the finding the appellant was convicted and subsequently sentenced to death.

On appeal to the High Court, **Odero** and **Nzioka, JJ** made a finding that there was no merit in the appeal as the appellant had been properly convicted. The consequence of this finding was that the appeal was dismissed.

Undeterred the appellant has now moved to this Court by way of second and perhaps last appeal initially on five (5) grounds. However, at the plenary hearing of the appeal, through **Mr. Muchiri**, learned counsel, the appellant abandoned four (4) grounds and instead focused on only one broad ground, the burden of proof in criminal cases. He submitted that it was wrong for the trial court as well as the High Court to shift the burden of proof to the appellant against the well-known principle of criminal law that it

is the duty of the prosecution at all times to prove its case against the accused beyond all reasonable doubt. That the questions posed by the trial court in its judgment were geared to fill the gaps in the prosecution case and in the process unwittingly shifted the burden of proof to the appellant. That the mistake was not corrected by the High Court. Secondly, that the trial court determined the guilt of the appellant on the basis of whose evidence between that of the appellant and PW1 was believable. The trial court however opted for the evidence of PW1 without any basis at all. Counsel further submitted that the conduct of the appellant manifested innocence. That the trial court had its own suspicions regarding the conduct of the appellant. However, those suspicions could not have formed the basis of a conviction. Finally, counsel submitted that **Section 199** of the Criminal Procedure Code was not complied regarding the demeanour of witnesses. The appellant lamented that all these omissions, were not as expected corrected by the High Court, hence his plea for our intervention.

Mr. Yamina, learned Principal Prosecution Counsel opposed the plea. He was of the view that the High Court had done a sterling job in re-evaluating and analyzing the evidence afresh and arriving at concurrent findings with the trial court which should not be interfered with. Those findings were based on sufficient evidence. That the trial court was faced with the evidence of PW1 and the appellant as to what had actually transpired. It was for this reason that both courts below went out of their way to keenly evaluate the evidence and believed PW1. In so doing, the two courts according to counsel, did not shift the burden of proof over to the appellant nor were there hypothetical questions posed by the trial court with the sole intention of filling the gaps in the prosecution case.

We have anxiously considered the broad ground of appeal canvassed before us, the submissions by learned counsel; the record and the law. Be that as it may, we must remind ourselves that this is a second appeal. Pursuant to the provisions of **Section 361 (1)** of the Criminal Procedure Code, only matters of law and not fact fall for our consideration unless shown that irrelevant matters were considered by the two courts below or that relevant matters were not considered in which case we would treat their consideration or lack of it as matters of law thereby invoking our jurisdiction.

The broad complain in this appeal is really about the evaluation and treatment of the evidence tendered during the trial by the two courts below. The appellant is saying that the trial court did not properly evaluate the evidence. The attempt to do so only resulted in the trial court advancing its own theories, casting suspicions and in the process shifting the burden of proof to the appellant contrary to the well-known principles of criminal law that the burden of proof always rests with prosecution and not on an accused. That when the appellant moved to the High Court, he expected that the court would perform its statutory duty of re-evaluating and re-analysing the evidence afresh so as to reach its conclusion. However, the High Court fell in the same trap as the trial court. Of course failure by the trial court to carefully and exhaustively evaluate the evidence and by the High Court to re-evaluate it afresh and reach its own conclusion becomes a matter of law that we must address.

Having looked at the judgment of the trial court in the light of the above accusations, we are not at all taken in by blemish sought to be heaped on that court. The evidence of both the prosecution and the appellant was subjected to careful scrutiny. The trial court may have posed pointed and hypothetical questions in its judgment. However, those questions did not come out of the blues, nor were they calculated to fill the gaps in the prosecution. By those questions, the trial court was merely attempting to draw inferences on matters that had been supported by evidence tendered. This, a court is allowed to do. In any event, we do not see how mundane questions and inferences regarding how the appellant who had solely hired the appellant to take him to his destination would allow PW1 to pick another passenger when there were other motor cycles, and why the appellant opted to report the incident to the police at Kaloleni as opposed to the local administration would amount to shifting the burden of proof, or justify the accusation that the trial court was advancing its own theories and or casting suspicions on the appellant so as to found the conviction.

Turning to the High Court, is it true that the High Court performed dismally in its statutory duty of re-evaluation of the evidence tendered in the trial court so as to reach its own independent decision on the judgment of the trial court? It is argued that had it done so, it would have noted the complaints already alluded to and proferred appropriate intervention and remedy? Again having looked at the judgment, we

do not think that this complaint is well founded. Granted that the manner in which the first appellate court must reassess or re-evaluate the evidence is not a term of art, however, such re-evaluation must be self-evident. As this Court has stated before in the case of **Bernard Zephania Omari v Republic, KSM CR.APP. No. 103 of 2009** (UR) citing with approval, the Ugandan case of **Uganda Breweries v Uganda Railways Corporation (EALR) [2002]:-**

> *"…..…There is no set format to which a re-evaluation of evidence by a first appellate court should conform. The extent and (sic) evaluation may be done depends on the manner in which 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 Alponts Services Uganda Limited [1999] LLR 109 (SCU), Tsekoko JSC*** *said at 11:-*
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>> *'I would accept Mr. Bukenya's submissions 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 scrutinize 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 court.…'*

We agree entirely with these propositions of the law. In this case, we have no doubt at all that the High Court performed this task exceedingly well. First, it reminded itself of its duty as a first appellate court thus:-

> *"………we however caution ourselves, that, our duty is to carefully re-examine, re-evaluate and analyse the evidence on record afresh to arrive at our conclusion. We further caution ourselves that we did not have the benefit of seeing the witnesses and observing their demeanor. This was so held in the case of* ***James Olengo Nyavorube & two others vs R Criminal Appeal No. 184 of 2002****…."*

This done, the High Court then isolated the issues in contention and related the same to the evidence on record. Indeed, the very issues raised before this Court regarding the conduct of the appellant prior, during and after the robbery were raised by the appellant and succinctly dealt with by the High Court. To the court, the questions and inferences drawn by the trial court were quite poignant, salient and so were the answers proferred. The High Court was of the view that what the trial court engaged itself in did not amount to shifting the burden of proof to the appellant, advancing its own theories so as to fill the gaps in the prosecution case, nor was it merely advancing its own suspicious so as to convict the appellant. The questions and inferences were valid and arose from the evidence so far gathered and on record. We have no quarrel at all with these conclusions by the High Court. Of course a judgment worth its salt must speak to the evidence. A magistrate, or a judge for that matter, is forbidden from anchoring a judgment on suppositions, suspicions or speculations. Nor is he allowed to advance his theories or draw inferences on evidence not canvassed before him. We are satisfied in the circumstances of this case that the judgments of the two courts below are not victims of any of the above misadventures.

We agree with the counsel for the appellant that the conviction of the appellant turned on whose evidence between the appellant's and PW1's was believable as to the circumstances of the offence. The trial court believed the evidence of PW1 and gave reasons as follows:- "*….I am satisfied that the complainant is a truthful and honest witness in (sic) his evidence is credible and sufficient to be relied upon to found a conviction for (sic) the accused….*" It also gave reasons why it did not believe the appellant's story. It said *"…I find the accused's account of what took place to be unworthy of belief and I reject it…"*

It is trite law that this Court cannot interfere with findings by the trial court based, as above, on the credibility of witnesses unless no reasonable tribunal could have made such findings or where the trial court made errors of law in arriving at the findings. (See **Republic v Oyier [1985] KLR 353**.) We discern no such misgivings in the circumstances of this case. The High Court was also alive to this consideration and stated:- "*……….we find the complainant (sic) evidence more cogent and reliable……. and for the appellant……….we find his defence unbelievable and not convincing….…"*

Given the foregoing, the appellant cannot say that **Section 199** of the Criminal Procedure Code was not complied with and or that his defence was not given due consideration by the two courts.

Finally, we may point out that this Court as a second appellate court does not normally interfere with concurrent findings of fact by the trial and first appellate courts unless the findings were based on no evidence. The two courts were unanimous that the appellant and Hamisi had hired PW1 to ferry them to a destination, that PW1 knew the appellant and not Hamisi, that the conduct of the appellant during and after the robbery was inconsistent with his innocence, that indeed the appellant in the company of Hamisi violently robbed PW1 of his motor cycle and finally, that infact it was the appellant who took off with the motor cycle. There are no grounds for interfering with these concurrent findings. We are therefore satisfied that the appeal was properly dismissed by the High Court. Accordingly, we too must dismiss this appeal in its entirety. It is so ordered.

Dated and delivered at Malindi this 31st day of July 2015

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

……………………….

JUDGE OF APPEAL

K. M'INOTI

……………………….

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR