IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KARANJA & MURGOR, JJ.A.)

CRIMINAL APPEAL NO. 398 OF 2010

BETWEEN

ISIKA MUTHAMA……..…….....……APPELLANT

NICHOLAS MUSYOKA MUTHOKA……...……..APPELLANT

AND

REPUBLIC…….....…….……..…..……...……RESPONDENT

An Appeal from a Judgment of the High Court of Kenya at Machakos (Warsame & Lenaola, JJ.) dated 17th December, 2009

in

H.C.CR.A. NO. 178 OF 2003)

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JUDGMENT OF THE COURT

Isika Muthama (1st appellant) and **Nicholas Musyoka Muthoka** (2nd appellant), and another were charged before the Chief Magistrate's Court, Machakos with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code.** The particulars of the charge were that on the 13th day of June 2005, at Machakos Township, in Machakos District, within the Eastern Province, jointly with others not before court, while armed with offensive weapons namely bows, arrows, pangas and metal bars they robbed **Mbole Nzivo** of four sewing machines, twenty eight pieces of cloth materials and three pieces of ready-made clothes all valued at Kshs. 39,450/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence on the said **Mbole Nzivo**.

After a full trial in which the prosecution called a total of eight witnesses and where the 1st appellant testified on oath and the 2nd appellant gave an unsworn statement, they were both found guilty, were convicted and were each sentenced to death.

Aggrieved by the said conviction and sentence, they moved to the High Court on appeal on the grounds; inter alia:

"that their fundamental rights were violated by being detained in police custody for a

prolonged period of time; that they were convicted on weak circumstantial evidence; that some crucial witnesses were not called to testify; that their defence was not considered, and that the charge against them had not been proved beyond reasonable doubt."

They urged the High Court to allow their appeals and set them at liberty. Their appeals were dismissed whilst that by their co-appellant was allowed.

Still aggrieved, the appellants moved to this Court on a second appeal. They each proffered eight grounds of appeal which are a replica of each other. Among their grievances is that the learned Judges failed to make a finding to the effect that the charge sheet was defective; that some crucial witnesses were not called to testify; that the circumstantial evidence relied upon to convict them was insufficient and that the High Court had failed to re-evaluate and re-analyse the evidence on record properly and hence arrived at the wrong decision.

Both appellants were represented in this appeal by learned counsel Ms. Mwango while the state was represented by learned counsel Mr. Kivihya and Mr. Chigiti.

Ms. Mwango urged grounds 3, 5, 6, 7 and 8 and abandoned the other grounds. She therefore, abandoned the issue of the defective charge sheet and the alleged contravention of the appellants constitutional rights espoused in **Section 72(3)(b)** of the retired **Constitution of Kenya.**

In her submission, learned counsel for the appellant faulted the learned Judges' reliance on the evidence pertaining to the wounds found on the 1st appellant. Her submission was that they were not gunshot wounds as no spent cartridges were recovered from the scene of the shooting. Further, that the doctor who examined the appellants was not competent to identify a gunshot wound contending that only a ballistic expert can identify a gunshot wound. Learned counsel also submitted that failure by the court to call the woman who had identified the clothes recovered from the 2nd appellant was fatal. She urged us to allow the appeal.

Opposing the appeal, Mr. Kivihya, learned counsel for the state, submitted that the witnesses i.e PW1 and PW2 had positively identified the exhibits in court. He submitted that it was the 1st appellant who had given the names of his accomplices including the deceased thus assisting the police to arrest other suspects and that information placed him directly at the *locus in quo*.

The fact that the appellants were found with master keys is also said to have accorded corroboration to the complainants' evidence to the effect that the outer doors to their premises had been accessed by opening the padlocks with master keys.

It was Mr. Kivihya's submission that the witness who was not called could not have aided either the appellants' or the prosecution's case as the clothes she identified were the subject of another case involving the appellants but not the charge giving rise to this appeal. He reiterated that a medical doctor was qualified to identify a gunshot injury and that was not a preserve of a forensic expert as submitted by learned counsel for the appellants. He urged us to dismiss this appeal for lack of merit.

This being a second appeal, by dint of **Section 361** of the **Criminal Procedure Code,** only matters of law fall for our determination. (See **Kaingo vs Republic, [1982] KLR 219** where this Court pronounced itself as follows;

"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 (Reuben Karari C/O Karanja v. R (1956) 17 EACA 146)"

The court on second appeal will also be wary of upsetting concurrent findings of fact from 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 acceptance and clear evidence which was adduced at the trial. See **Bernard Mutua Matheka vs Republic (Criminal Appeal No. 155 of 2009** unreported**).**

In order to appreciate the findings of the two courts below, it is important to recapitulate the evidence adduced before the trial court.

A brief summary of the evidence before the trial court was as follows:-

Rose Nduku Ngundo (PW1), Joseph Wambua Paul(PW2) and others were operating tailoring kiosks at the Machakos municipal council Market. PW3 Mbole Nzivo was employed to guard the said kiosks. In their kiosks were several sewing machines, cloth materials, ready-made clothes and other items that would normally be found in a tailoring shop.

On the 12th June 2003 in the evening they locked their shops/kiosks as was their practice and went home leaving PW3 to guard the premises as usual.

In the meantime, P.C David Musyoki (PW5) was at his place of work at Machakos Police Station where he was on crime standby duties. He received a tip off from a member of the public to the effect that some people were plotting to carry out robberies at the municipal council market between 11.00 pm and 1.00 am the same night. He passed this information to the duty officer – Sergeant Njue and other police officers who accompanied him to the municipal council market and laid an ambush. While there at about 2.00 am, they heard a man screaming from within the market area. They rushed to the scene where they saw about five people who were removing sewing machines, cloth materials and ready-made clothes and other items from the kiosks.

They challenged the suspects to identify themselves but instead of doing so, they started throwing stones and shooting arrows at the police officers. The officers shot towards the suspects who dropped the items they were holding and started running away. One of them was unfortunately caught in the gunfire and he dropped dead at the scene. The others managed to escape. The deceased's body was taken to the mortuary.

The following day, the same police officers received another tip off to the effect that a suspect was being treated for a gunshot wound in a house at Lower Kariobangi. The police officers were led to the said house which they surrounded. They knocked at the door and when they were let in, they found the 1st appellant hiding under the bed. He was nursing a gunshot wound on his right forearm. They carried out a search inside the house and recovered a master key which they suspected to have been used to open the main door to the complainant's kiosk. The first appellant was consequently arrested and taken to Machakos Police Station.

The following day, he led the police officers to a house he identified as belonging to the 2nd appellant. Upon enquiry, they were informed that the 2nd appellant and another had left while carrying some items in a sack heading towards the bus stage. They followed that direction and they caught up with the two. They were arrested whilst in possession of two sacks full of assorted clothings. The 2nd appellant was also found with a gunshot wound which had penetrated his right thigh. The two suspects were escorted to Machakos police station where on being searched, they were found with master keys. The 2nd appellant was escorted back to his house where several clothes which were the subject of another case were recovered. They were taken to the police station together with the recovered items.

Later the same day, the two appellants were escorted to Machakos general hospital for treatment. Dr. Cyrus Gakuo Karuga (PW6) examined them and treated their wounds. According to the doctor, the 2nd appellant had a gunshot wound in his right thigh. The doctor was able to point out the entry point (for the bullet) and the exit point on the outer side measuring 1 cm with a minimum tissue loss. He also had

an x-ray taken and he was confident that the wound in question was caused by a gunshot. The x-ray film and treatment notes were produced before the trial court as an exhibit.

The same doctor examined the 1st appellant who he found with an entry wound on the posterior right forearm measuring 1.6 cm in diameter with an exit wound on the ulterior part of the forearm measuring1.5 cm with a minimal tissue loss. He concluded that the wound was from a gunshot. The x-ray film and clinical notes were also availed to the trial court as exhibits.

The appellants were ultimately charged with the offence in question. In his sworn defence the first appellant denied having committed the robbery. He admitted that he was arrested from his house by PW5 and the other police officers and escorted to Machakos police station. He denied that the injury he was found with had been caused by a gunshot saying that he had been punctured by a spike which is used to pierce maize sacks in the normal course of his work. He also denied having been found in possession of a master key.

In his unsworn testimony, the 2nd appellant on the other hand told the court that he was arrested at the bus stage while waiting for a matatu to take him to Machakos. He denied any knowledge of the offence he was charged with. He did not say anything about the bullet wound the doctor found on his body.

The High Court (Lenaola J & Warsame, J *as he then was*.) after considering this evidence along with the grounds of appeal and the submissions of the appellants found their conviction sound and upheld the same and affirmed the death sentence against each of them.

It is that dismissal that is the subject of this appeal. We shall now proceed to consider this evidence along with the grounds of appeal paraphrased earlier on together with the submissions of both counsel and determine whether this appeal is merited.

On grounds three and five, we note as rightly submitted by Mr. Kivihya, learned counsel for the state that the witness the appellants faults the state for not calling an essential witness at all. This was the witness who identified some of the clothes allegedly recovered from the appellants. The said clothes were the subject of another charge and not the charge giving rise to this appeal. Her evidence would therefore, have been of zero relevance and would not have aided either the prosecution or the defence case.

On ground six, we do not understand the basis of the complaint that **Section 77** of the **Evidence Act** was not complied with. We say so because the medical evidence produced in court as exhibits was actually by the doctor who examined the appellants treated them and completed the P3 forms. He was definitely the right person to produce the same as evidence. There was no contravention of **Section 77** of the **Evidence Act** or any other provisions of the Evidence Act. On the issue of the doctor's competence to identify a gunshot wound, our finding is that a doctor is competent to tell a gunshot wound from a wound of any other nature. It does not require a forensic expert to identify gunshot wounds. We have no reason to doubt the doctor's competence in this case nor do we doubt that the wounds found on the appellants were indeed gunshot wounds with entry and exit points as identified by the doctor. Those gunshots were still fresh when the appellants were arrested. It is noted that none of the appellants had gone to hospital to seek treatment for them and no reasons were advanced for that. We appreciate that the appellants were under no obligation to offer an explanation but considering the proximity of the discovery of the wounds on their bodies to the commission of the offence, it was probably sufficient to draw an inference that failure to seek medical attention was on account of fear of being detected and therefore, proof of guilty conduct on the part of their part.

We note that when PW5 and the other police officers went to the 1st appellant's house, they were following a lead to the effect that he had a gunshot wound and he was being treated at home, which aroused suspicion. True to their tip off, they found the appellant who was hiding under the bed.

Again we agree with Mr. Kivihya that his conduct was not that of a normal person because human

beings do not ordinarily hide under beds in their houses unless they are hiding from something. For this proposition we find solace in the provisions of Section 119 of the Evidence Act which provides that:-

> ***"The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."***

We have no reasons to depart from the concurrent findings of the two courts below that the wounds found on the appellants were fresh bullet wounds. We have gone through the judgment of the High Court and observed that contrary to Ms. Mwango's submission, the court re-evaluated the evidence and analysed the same afresh and in detail before arriving at the decision to uphold the conviction and sentence passed by the trial court.

They analysed the facts and the law on circumstantial evidence and found no exculpatory circumstances that could have pointed to the innocence of the appellant. The police after laying an ambush had confronted the robbers, shot in their direction killing one of them and apparently injuring others who escaped. Following another tip off, they found the 1st appellant who was nursing a bullet injury just like they had been informed. It was the 1st appellant who led the police officers to the 2nd appellant and to the recovery of the clothings that were nonetheless not related to the matter before us.

We are satisfied that though circumstantial, the evidence against the two appellants presented an unbroken chain of events right from the laying of the ambush to the shooting of the appellants and their arrest and confirmation by the doctor that they had sustained bullet wounds. We note that the two courts below considered the entire evidence before them, including the defences proffered by the appellants and arrived at the right conclusions. We have no reasons to depart from their concurrent findings of fact. We have considered above the issues of law raised in the memoranda of appeal herein and found no merit in the arguments advanced by learned counsel for the appellants.

We find no fault with the judgment of the trial court and that of the High Court. We hold the view that this appeal lacks merit. We dismiss the same and affirm the decision of the High Court.

Dated and delivered at Nairobi this 21st day of February, 2014.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

A. K. MURGOR

……..…….

JUDGE OF APPEAL

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

REGISTRAR

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