Case Number:	Criminal Appeal 31 of 2012
Date Delivered:	20 Feb 2014
Case Class:	Criminal
Court:	High Court at Malindi
Case Action:	Judgment
Judge:	Roselyn Naliaka Nambuye, Hannah Magondi Okwengu, Patrick Omwenga Kiage
Citation:	Charo Karisa Katana v Republic [2016] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Kilifi
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT MALINDI

(CORAM: NAMBUYE, OKWENGU & KIAGE JJ.A)

CRIMINAL APPEAL NO. 31 OF 2012.

BETWEEN

CHARO KARISA KATANA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the High Court of Kenya at Malindi (Meoli & Tuiyott JJ.)

dated 13th March, 2012

in

H.C.CR.A NO. 119 OF 2010

****

JUDGMENT OF THE COURT

The appellant **CHARO KARISA KATANA** appeals to this Court against the dismissal of his first appeal to the High Court challenging his conviction and sentence on a charge of robbery with violence. The offence was alleged to have occurred on 14.5.08 when he, while armed with a dangerous weapon, namely a panga, robbed one **SAFARI KOI NDUNDI** (PW1) of some Kshs. 4,000 and used actual violence in the process.

The grounds upon which the appellant appeals were apparently filed by himself while in custody under sentence of death. The said grounds are not clearly formulated but we glean from them the following points of complaint;

a) That the charge sheet did not specifically establish the time of the offence.

b) That the evidence by a single identifying witness in difficult conditions was not treated with the requisite degree of caution.

c) The injuries allegedly suffered were not established to the required standard.

d) The evidence did not reach the requisite threshhold some two witnesses having failed to appear when recalled for further cross examination.

e) The appellant's defence including that in the nature of an alibi was not properly considered.

Mr. Katsoleh, learned counsel appearing for the appellant in this appeal appeared to compress all these grounds into one namely that the learned Judges (Tuiyot & Meoli JJ.) of the first appellate court failed to re-evaluate the whole evidence. They thereby failed to note and make appropriate conclusions from the prosecutions failure to produce medical evidence in proof of the alleged injuries. Counsel further contended that on a proper evaluation of the evidence, theft of Kshs.4,000 was not established as **PW1** did not have the money in the first place. Counsel concluded that the only evidence before the courts below regarding the alleged robbery was that of **PW1** and it was not sufficient to found a safe or proper conviction.'

In response to these submissions **Mr. Oyiembo**, the Assistant Director of Public Prosecutions was content with simply stating that all the ingredients of the offence charged were present. He urged us to dismiss the appeal.

This being a second appeal, our jurisdiction is circumscribed by **Section 361(1)** of the Criminal Procedure Code in explicit terms; "The Court of Appeal shall not hear an appeal ....on a matter of fact" against a decision of the High Court in its appellate jurisdiction. Our jurisdiction is confined to matters of law only. As such, we pay due respect to concurrent findings of the two courts below and are slow to interfere therewith. See **M' RIUNGU Vs. REPUBLIC** [1983] KLR 455; **KOMORA Vs. REPUBLIC** [1983] 583. The approach the Court of Appeal takes was stated in **NJERI Vs. REPUBLIC** [1981] KLR 156 thus (at p

158);

"*On a second appeal this Court is concerned only with points of law. Once it is established that there was some evidence to support a conviction, this Court will not on a second appeal examine the sufficiency of that evidence ..... It is only if a conviction is based on no evidence or if the courts below have misapprehended the evidence or misdirected themselves in relation thereto, that a question of law arises on a second appeal"*

It is also a question of law when the complaint by an appellant, as was urged by Mr. Katsoleh before us, is that the first appellate court has not discharged its duty to analyze, re-assess, and re-evaluate all the evidence before the trial court before forming its own independent opinion as to the guilt or otherwise of the appellant. This is a duty the High Court had and which the appellant was entitled to expect. See **PANDYA Vs. REPUBLIC** [1957] EA 336 and **OKENO Vs. REPUBLIC** [1972] EA 32.

Upon our perusal of the record, and with due respect to the learned Judges, we are not satisfied that they discharged that duty satisfactorily. Had they done so, they would have found that there were certain gaps, inconsistencies and contradictions in the prosecutions case that rendered the conviction of the appellant unsafe. We note for instance that the learned Judges stated this of the evidence;

"In total four (4) witnesses testified and the facts do not present any difficulty."

That sweeping and determinative statement is not borne by the record. The witnesses who testified for the prosecution were originally three. They were the complainant (**PW1**); his wife **PATE JUSTIN** (**PW2**), who was not at the scene and **P.C BEN WAFULA** (**PW3**), who did some kind of investigation of the case. There was a twist in the case however in that after numerous pleas and orders that he be supplied with witness statements, the appellant finally got them after these witnesses had testified. He thereupon successfully applied on 1.10.09 for those witnesses to be recalled for further cross-examination. In the end, however, and after many adjournments, it is only the

complainant, by that time serving a jail term for a sexual offence, actually appeared and was further cross-examined. On 18.5.10 the prosecutor informed the court that **PW2** had since relocated to some unknown destination and could not be traced.No explanation was given why **PW3**, also ordered recalled, did not appear for the further cross-examination.

Had the learned Judges carefully evaluated and analyzed the record, they would have concluded that the evidence properly and fully cross examined was that of **PW1** only. They would also have noted that by the time the prosecutor closed his case on 18.5.10 without objection from the appellant, the appellant had complained about the inordinate length of the trial while he languished in custody. They would not have made the rather cursory finding that the appellant had waived his right to insist that the other two witnesses be recalled. He had in fact previously insisted in vain.

The learned Judges would also have viewed the prosecution's failure to produce medical evidence of **PW1 's** injuries more seriously than they did. The record shows a serious failure by **PW1** and the prosecution to have the P3 filled in not only prior to the commencement of the trial but for the entire two years it lasted notwithstanding their being alive to that omission and promises to deal with it that are on record. The P3 Form would have been important in this particular case because the appellant's case was that the complainant received his injuries elsewhere in the course of the complainant's criminal activities. The learned Judges did not adequately analyze this aspect of the case and that amounted to a misdirection.

The appellant's other complaint, which still reflects the learned Judge's failure to properly and exhaustively analyze and re-evaluate the evidence, relates to the prosecution's failure to call the mason (‘fundi’) that the appellant had allegedly gone to visit the evening in question and who alone would have confirmed whether or not the appellant did in fact have some Kshs... 4,000 allegedly robbed him. It is on record that at 5.00pm of that evening the appellant had met the complainant who gave him some Kshs. 50 and declared that he had no money. **PW1** testified that he in fact did have some money which he wanted to give the fundi but the latter told him to pay the next day. That fundi, who is unnamed, would have been an important witness given the sequence of events as recounted by **PW1** when he was recalled for cross examination;

"Offence committed at Idsowe Offence was on 14.5.08. I was from my fundi,s home. I met you earlier when I was going to see the fundi. We met at 5pm. I told you that I had no cash. You had asked for Kshs. 100 and I gave you Kshs. 50. I told you I was going to pay the fundi ..... You even told the fundi that you wanted to see me. The fundi told you not to get into his house..... ,,

It appears to us that far from forming a firm basis for an assured conviction of the appellant, the evidence of the complainant, which was the only eye witness evidence, raised more questions than answers

The evidence on record was to all intents and purposes inadequate, or barely adequate at best, and the failure of the prosecution to call the fundi without any explanation being offered for such failure, ought to have invited the inference that his evidence would have been adverse to the prosecution had it been tendered in court. See **BUKENYA & OTHERS Vs. UGANDA** [1972] EA 594. It little helps that **PW2**, when she first testified, told the court that **PW1** had reported to her an assault by the appellant without making any mention of loss of money.

The totality of the matters we have raised herein is that the appellant's complaints are well-founded. His conviction was not based on evidence and there were sufficient gaps to leave reasonable doubts as to

his guilt. Those doubts ought to have been resolved in his favour and the High Court, as a first appellate court, would have discovered them had it conducted a thorough and exhaustive analysis.

The upshot is that this appeal succeeds. The appellant's conviction is quashed and the sentence of death imposed on him set aside. He shall be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Malindi this 20th day of February, 2014.

R.N.NAMBUYE

.....

JUDGE OF APPEAL

H.M.OKWENGU

.....

JUDGE OF APPEAL

P.0. KIAGE

.....

JUDGE OF APPEAL

I certify that this is a true copy

DEPUTY REGISTAR