



IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL NO. 34 OF 2017

BETWEEN

PETER OBUYA OBIERO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence dated 11th December 2015 in Criminal Case No. 2732 of 2013 at Chief Magistrates Court in Kiambu before Hon. J. Kituku, PM)

JUDGMENT

1. The appellant, **PETER OBUYA OBIERO**, was charged and convicted of the offence of robbery with violence contrary to **section 296 (2)** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. According to the charge, on 30th October 2013 at Nyari Estate within Nairobi county, jointly with others not before the court while armed with dangerous weapons namely AK47 rifles and pangas stole from Narendra Guru Raval cash Kshs. 500,000/-, two wrist watches make Rolex valued at Kshs. 3,000,000/-, two mobile phones make iphone 4 valued at Kshs. 200,000/- all valued at Kshs. 3,800,000/- and at the time of such robbery threatened to use actual violence to the said Narendra Guru Raval.
2. The appellant was sentenced to death and he now appeals against conviction and sentence. The thrust of this appeal is that the prosecution did not prove its case beyond reasonable doubt.
3. As this is a first appeal, I am required to review all the evidence and come to an independent decision whether or not I should uphold the conviction, bearing in mind that I neither heard nor saw the witnesses testify.
4. It is not in dispute that the appellant was a security guard with Securex Security Company and he was assigned to guard the house of one Narendra Guru Raval at Nyari Estate. He was on duty on the night of 30th October 2013 having reported to work earlier in the evening. In his defence, the appellant did not dispute the fact that a robbery took place. What is in dispute is whether he was involved in the robbery as urged by the prosecution. On this issue the evidence emerging at the trial court was as follows.
5. On the material night at about at about 10.45pm, the appellant opened the gate for Narendra Raval (PW 1) and after he opened the gate, PW 1 parked the car. As he got out two people emerged and pushed him into the house, they threatened him with a gun and started demanding money. They took money and jewelry. They forced his wife to go to the bedroom and give them her jewelry. After the sating themselves on his property, he was forced into a vehicle with four people, among them the appellant who had by that time removed his Securex uniform changed into civilian clothes. The assailants drove him around and dumped him but he sooner located by police officers from Pangani Police Station. The appellant was later arrested. PW 1 told the court that the appellant did not called him after the incident

even though he had worked for him for 8 years without incident.

6. Divesh Gupta (PW 2), PW 1's cook, confirmed that there was a robbery. He was in the kitchen when 3 assailants entered the house. One had a panga and the other, a gun. They took his phones, gold ring and bracelets and his watch. He testified that before he was blind folded, the appellant came into the kitchen before he was told to lie down. In cross-examination he stated that he did not record the fact that he saw the appellant come into the kitchen.

7. Jane Nambelo Omute (PW 3) who was PW 1's house maid recalled the night they were attacked. Although she remembered that she saw the appellant, she stated in cross-examination that she saw one assailant holding the appellant by the collar. Sylvia Sidari (PW 4) also a house help recalled that during that evening as she was in the kitchen fetching water. She recognized the appellant before she was pushed, tied and blindfolded. In cross-examination she stated that she saw the assailants holding the appellant by the collar.

8. PC Robert Mwanja (PW 6), a police officer from Flying Squad, was informed that after the robbery, the appellant had disappeared. After they were given his phone details, they could not trace him initially as his phone was off but he was later traced to Migori where he was arrested. The investigating officer, PC Antony Kashu (PW 7), told the court that he investigated the robbery and decided to charge the appellant because he left the scene with the assailants without being coerced, that he sat at the front of the car with PW 1 who was driving the vehicle and that when PW 1 was dumped, he left with the robbers and that he never returned or called PW 1 or the police.

10. In his defence, the appellant stated that he was on his normal duties when he was confronted by assailants and a gun pointed to his head. He was ordered to surrender by two armed men who directed him to disable the alarm. He was also ordered to remove the Securex uniform. The assailants took him to the kitchen where the other employees were where they tied him and demanded he gave up all the security details. He could hear all the commotion and after sometime, he was thrown into a vehicle and driven around with PW 1 and then once again thrown into a bush. He was rescued by Samaritans who gave him money and he decided to go to Migori where he was arrested.

11. The trial magistrate rightly noted that the issue whether the appellant committed robbery revolved around his conduct, before, during and after the incident. There is inculpatory and exculpatory evidence. The inculpatory evidence is that the appellant is the one who opened the gate, he was seen by PW 2, PW 3 and PW 4 in the kitchen and finally he was in the same car with the assailants who went away with PW 1. His act of proceeding to Migori and failing to disclose to his employer of 8 years or reporting to the police made him appear complicit. On the other hand, the exculpatory evidence is that he appeared to have been under some form of coercion as PW 3 and PW 4 saw him being held by his collar when he was brought to the kitchen. Further, PW 1 did not testify that the appellant did anything, apart from opening the gate, which would have implied active participation in the robbery. It is therefore not strange that PW 1 applied for the charges against the appellant to be withdrawn at the end of his testimony.

12. I am mindful of the fact that the prosecution must prove its case beyond reasonable doubt. The inculpatory and exculpatory evidence leave the prosecution case open and the appellant's defence reasonable. In these circumstances, I find and hold that there is reasonable doubt as to his involvement to the robbery. I therefore quash the conviction and sentence.

13. The appellant is set free unless otherwise lawfully held.

DATED and DELIVERED at KIAMBU this 14th day of February 2018.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Kinyanjui, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.