**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.104 OF 2016**

***(An Appeal arising out of the conviction and sentence of Hon. B.M. Ochoi – PM delivered on 6th June 2016 in Kibera CMC. CR. Case No.2008 of 2014)***

**SAMUEL OTIENO ODUOR.....APPELLANT**

***VERSUS***

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Samuel Otieno Oduor was charged with two counts of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code.** The particulars of the offence were that on the night of 18th and 19th May 2014 at Varsani residence along East Church Road in Kileleshwa, Nairobi County, the Appellant, jointly with others not before court while armed with dangerous weapon namely pistols, robbed Valji Mauji Varsani and Hermant Valji Varsani of their two motor vehicles, assorted electronics including television sets and video cameras, mobile phones, jewelleries, wrist watches, assorted perfumes and cash (as listed in the charge sheet) and at the time of such robbery threatened to use actual violence to the said Valji Mauji Varsani and Hermant Valji Varsani (hereinafter referred to as the complainants). He was alternatively **charged with handling stolen property** contrary to **Section 322(1)** and **(2)** of the **Penal Code.** The particulars of the offence were that on 12th June 2014 at Kariandutu in Baba Dogo, Nairobi County otherwise than in the course of the robbery, the Appellant dishonestly retained one wrist watch make Rado and one silver ring valued at Kshs.130,000/- knowing or having reason to believe it to be robbed property.

He was further alternatively charged with **neglecting to prevent the commission of a felony** contrary to **Section 392** of the **Penal Code**. The particulars of the offence were that on the night of 18th and 19th 2014 at Valji Varsani residence along East Church Road in Kileleshwa, Nairobi County, being an night security guard at the said residence, knowingly failed to use reasonable means to prevent the commission of a felony, namely robbery. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, he was convicted of the main counts of robbery with violence. He was sentenced to death in respect of the 1st Count while the sentence in respect of the 2nd Count was held in abeyance. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of defective charges. He faulted the trial magistrate for convicting him yet, according to him, the case had not been properly investigated. He was aggrieved that he had been convicted on the basis of evidence that had not established his guilt to the required standard of proof beyond any reasonable doubt. He faulted the trial magistrate for wrongly applying the doctrine of recent possession to convict him yet the alleged robbed items were not found in his possession. The Appellant took issue with the fact that he had been convicted yet his consistent and cogent defence had not been taken into account. He faulted the trial magistrate for relying on exhibits which were irregularly produced by the prosecution to convict him. For the above reasons, the Appellant urged the court to allow his appeal, quash his conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. In the said submission, the Appellant urged the court to properly re-evaluate the evidence and find that the prosecution had failed to prove its case to the required standard of proof beyond any reasonable doubt. On its part, the prosecution was opposed to the appeal. Ms. Aluda submitted that the prosecution had established to the required standard of proof that the Appellant, with others, was involved in the robbery that was the subject of the trial. She urged the court to dismiss the appeal. This court shall revert to the argument made on this appeal after briefly setting out the facts of this case.

At the material time, the Appellant was employed as a night security guard. He was employed by a firm known as Guardex Security Services. Its proprietor, PW2 Anne Wambura Kimunja testified that the Appellant was employed on 5th of April 2014 and was assigned to guard the premises of the complainants. PW1 Hermant Valji Varsani and PW3 Valji Mauji Varsani testified that on 18th May 2014 at about 8.30 p.m., they returned to their home after attending prayers at their temple. They recalled that the gate to their residence was opened by the

Appellant who had worked as their guard for about two months. They were in motor vehicle Registration No.KBQ 511U Subaru Tribeca. When they approached the parking, they saw five armed men approach their car. One of the occupants in the car tried to scream to alert the neighbours. She was however warned that she would be shot if she continued to scream. She kept quiet.

The complainants and other occupants of the vehicle were escorted into the house. They were then held in the sittingroom while the robbers ransacked the house. PW1 testified that he was ordered to open rooms in the house where the robbers managed to steal electronic goods, wrist watches, jewelry and cash. The robbery ordeal took about four hours. After the robbery, the robbers ordered PW1 to accompany them to the parking area of the house. There was another motor vehicle parked there. It was a Hummer Registration No. KBA 211A. The robbers drove the two motor vehicles with PW1 in one of the vehicles. PW1 was tied with rope before being dumped in Kabete area. He managed to untie himself before walking to a nearby road. He then made a report to Kabete Police Station. He was rescued and taken back to the house. The complainants listed the properties that were robbed from them which were provided in the charge sheet.

On the following day, PW2 the proprietor of the security firm was informed of the robbery. She looked for the Appellant but could not find him. The Appellant did not report back to duty after the robbery incident. PW4 Corporal Evans Karanja then based at Kilimani CID Office was assigned to investigate the case. He visited the scene of the robbery and recorded statements from the witnesses. He then embarked on the task of looking for the whereabouts of the Appellant. Three weeks after the robbery incident, he received information regarding where the Appellant was. PW4 testified that he gathered information that the Appellant was in Ruaraka area. Accompanied by his colleague, he found the Appellant and arrested him. The Appellant escorted him to his house where the following items were recovered: a Rado wrist watch, a silver finger ring and a bracelet. These items were positively identified by the complainants as being among the items that were robbed from them. An inventory was prepared. It was signed by the Appellant. It was produced in court as an exhibit.

When the Appellant was put on his defence, he denied participating in the robbery. He told the court that on the night of the robbery, he was also a victim of the robbery. He testified that he was accosted by the gang who tied him up before robbing the complainants. They also assaulted him while restraining him. After the robbery incident, he was put inside one of the complainants' motor vehicles and then dumped in a place that he did not know. He was able to retrace his steps to his house. He called the employer and informed her of what had transpired. The employer (PW2) told him that she already had the information. She asked him to stay at home until the time she would contact him. He was therefore surprised when three weeks later he was arrested by the police and charged with the present offences. He denied committing the crimes that he was accused of. He reiterated that he was equally a victim of the robbery.

This being a first appeal, it is the duty of this court to re-evaluate and to reconsider the evidence adduced before the trial court before reaching its own independent determination whether or not to uphold the decision of the said court. In doing so, this court is required to always keep in mind that it neither saw nor heard the witnesses as they testified and therefore give due regard in that respect. ( **see Njoroge – vs- Repubic [1987] KLR 19**). The issue for determination by this court is whether the prosecution proved its case on the charges brought against the Appellant of **robbery with violence** contrary to **296(2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

This court has carefully re-evaluated the evidence that was adduced before the trial court. It has also considered the submission made by the parties to this appeal. It was clear from the evidence adduced that the prosecution relied essentially on three pieces of evidence to secure the conviction of the Appellant. The first piece of evidence was the evidence adduced that established that the Appellant had been employed to guard the residence of the complainants on the night of the robbery. PW2, the director of Guardex Security Services produced documentary evidence which established the fact that the Appellant had been employed as a guard by the said firm. He had been assigned to be the night guard at the residence of the complainants. The Appellant did not dispute this fact. It was the prosecution's evidence that the Appellant colluded or facilitated the robbers to gain access to the complainant's residence on the material night of the robbery. Although the complainants did not specifically identify the Appellant as being in the gang of five men that robbed them, they gave cogent and consistent evidence that pointed to the fact that the Appellant acted in cahoots with the robbers.

The complainants testified that when they returned home on the material night of the robbery, it was the Appellant who opened the gate for them. This was the Appellant's usual duty. While inside the compound, they were accosted by the gang of robbers who were armed with pistols. The complainants justifiably wondered why the Appellant did not raise alarm if indeed he was not part of the gang that robbed them. The Appellant explained this assertion away by stating that he was equally a victim of the robbery. He had been tied and immobilized by the robbers. He was assaulted. After the robbery, he was bundled into one of the complainants' vehicles, abducted before he was dumped in an unknown place. After the robbery incident, he did not return back to work. The Appellant explained the reason why he did not return to work was because he had been instructed not to return to work by his employer.

On re-evaluation of this evidence, it was clear to this court that the Appellant's conduct during the entire robbery pointed to only one fact: that he was part of the gang that robbed the complainants. His role was clearly spelt out in the evidence that was adduced by the complainants. The Appellant opened the gate for the complainants. He had earlier allowed the robbers access into the compound. When the complainants drove into the compound, they were accosted by the gang of robbers. If the Appellant was to be believed, *at what point was he tied up by the robbers? Was it after he had opened the gate for the complainants or after the robbers had already subdued the complainants?* What is apparent from the evidence is that the Appellant had every opportunity to warn the complainants of the presence of the robbers at the time they sought to enter their residence through the gate. The Appellant did not do this. If there was any doubt, that the Appellant was part of the gang that robbed the complainants, that doubt was removed by the Appellant's conduct after the robbery incident.

The Appellant disappeared from the scene and was not seen again until when he was arrested three weeks after the robbery incident. The Appellant switched off his mobile phone and broke off communication with his employer after the robbery incident. This was not a conduct of an innocent person. The court (Ngenye Macharia J) in **Republic –vs- John Ekule Nakwai [2014] eKLR**, held thus:

> "***The Judge observed as follows: "after stabbing the deceased, the accused disappeared from the scene. In the circumstance of this case, this court can infer that the act of the accused in disappearing from the scene was an indication that the accused knew that he had fatally stabbed the deceased. As was held by Etyang J in Republic –vs- Ernest Gathecha Kariuki Nairobi HC Criminal Case No.64 of 1997 (unreported) at Page 19 of the Judgment:***

> ***"In the case of Malowa –vs- Republic [1980] KLR 110 where the Appellant had disappeared from his home for six months after committing an offence, the Court of Appeal held that the Appellant's conduct, his disappearance from his home and remaining absent from home for six months, was a piece of circumstantial evidence which sufficiently corroborated the deceased's dying declaration."***

In the present appeal, the Appellant's disappearing act after the robbery incident was not a conduct consistent with that of a victim of the robbery; rather it was the behaviour of a person who had actively participated in the robbery by facilitating access into the complainants' residence by the robbers.

Another piece of evidence that the prosecution relied on to secure the conviction of the Appellant is the recovery of the some of the items that were robbed from the complainant in the Appellant's possession. It was the prosecution's case that three items which were positively identified by the complainants were recovered in the Appellant's possession. These items were established to have been robbed from the complainants' residence on the night of the robbery. The doctrine of recent possession was properly applied by the trial court in convicting the Appellant. As was held by court in **Malingi –Vs- Republic [1989] KLR 225** at Page 227, Bosire J (as he then was):

> "***By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution have proved certain basic facts. Firstly that the item he had in his possession had been stolen; it had been stolen a short period prior to the possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the item. The doctrine being a presumption of fact is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver."***

In the present appeal, the complainants were able to positively identify the three items being the Rado wrist watch, the bracelet and the Silver finger ring as their property. These were some of the items that were robbed from the complainants on the night of the robbery. They were recovered in the Appellant's house when the police conducted a search. The Appellant signed the inventory confirming that the items had been recovered in his possession. These items were recovered about three weeks after the robbery incident. It was a period proximate to the robbery incident. The Appellant did not give any explanation as to how these items came to be in his possession. The only inference that was drawn by the trial court, and is drawn by this court, is that the Appellant obtained possession of the same items during the robbery incident. The doctrine of recent possession therefore applies in this case.

The upshot of the above reasons is that the prosecution established, to the required standard of proof beyond any reasonable doubt the two counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code** laid against the Appellant. The Appellant appeal against conviction lacks merit and is hereby dismissed.

As regard sentence, following the recent decision of the Supreme Court in Francis **Karioko Muruatetu & Another –vs- Republic [2017] eKLR** this court is mandated to consider whether the death sentence imposed upon the Appellant should be sustained. This court has considered the circumstances in which the robbery took place. It has also considered the fact that a firearm (pistol) was used during the robbery. Although the complainants were not injured, they were obviously terrorized and traumatized during the robbery incident. One of the complainants was abducted and dumped after being driven around for several hours. This is obviously a matter that requires the harshest possible punishment that can be imposed. This court therefore sees no reason to interfere with the death sentence that was imposed by the trial court. The death sentence imposed on the Appellant is therefore upheld.

The appeal, in its entirety, lacks merit and is hereby dismissed. It is so ordered.

**DATED AT NAIROBI THIS 12TH DAY OF APRIL 2018**

**L. KIMARU**

**JUDGE**