



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.74 OF 2015**

**(An Appeal arising out of the conviction and sentence of Hon. J. Wanjala – CM delivered on 24<sup>th</sup> April 2017 in Kibera CMC. CR. Case No.3103 of 2013)**

**SHADRACK BARASA BIKETI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Shadrack Barasa Biketi was charged with the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 17<sup>th</sup> July 2013 at Appleton Resort along Sports Road, Westlands in Nairobi County, the Appellant, jointly with others not before court, while being armed with dangerous weapons namely, a pistol robbed Margaret Wawira Njiru of 12 Sony Television sets, 1 Sony music system, assorted whiskeys, Sony Erickson mobile phone, a silver ring, assorted kitchen utensils, 1 bale of maize flour and Kshs.7,000/- all valued at Kshs.1.2 million and immediately before the time of the robbery, threatened to use actual violence to the said Margaret Wawira Njiru. The Appellant was alternatively charged with **failing to prevent the commission of a felony** contrary to **Section 292** of the **Penal Code**. The particulars of the offence were that on the same day and in the same place, the Appellant knowing that an offence of robbery with violence was to be committed and being the night guard in charge of the gate, failed to use reasonable means to stop its commission as a result of which property valued at Kshs.1.2 million was robbed from Appleton Resort. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial he was convicted of the main charge of robbery with violence. He was sentenced to death. He 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 insufficient evidence adduced by the prosecution. In particular, he faulted the trial court's decision that found that he had been employed as a guard and that he was at the scene of crime on the material night. The Appellant was of the view that the prosecution had failed to establish its guilt to the required standard of proof beyond any reasonable doubt. The Appellant was aggrieved that his defence had not been considered before the trial court reached the impugned decision. The Appellant faulted the trial magistrate for failing to appreciate that he had not been identified at the scene of the robbery and further that no evidence was adduced to support the prosecution's contention that he was at work at the scene of crime on the material night. The Appellant was aggrieved that the trial magistrate had failed to consider the fact that none of the robbed items were found in his possession and therefore the prosecution had failed to establish to the required standard of proof that he had participated in the robbery. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, the Appellant presented to the court written submission in support of his appeal. He further made oral submission urging the court to find that the prosecution had failed to prove the charge brought against him to the required standard of proof beyond any reasonable doubt. The key pillars of the Appellant's appeal were that the prosecution had failed to establish that he worked for the security company on the material night that the robbery took place. He submitted that there was contradiction in the evidence adduced by the security guards who worked on the material night and that the only inference that can be drawn is that they were not telling the truth to the court. The Appellant denied that he was found in possession of some of the items that were robbed from the complainant's premises. It was the Appellant's case that the said items were planted in his house so as to frame him with the charge. The other items belonged to him and not to the complainant. He complained that he was compelled to proceed with the case before being issued with prosecution witnesses' statements prior to the commencement of the trial. He urged the court to allow the appeal.

Ms. Akunja for the State opposed the appeal. She submitted that the Appellant was employed as a guard and on the material night, he was on duty guarding the premises of Appleton Resort. The Appellant was on duty with three other guards. He was assigned to guard the gate while the other guards were on duty guarding other areas of the Resort. She submitted that the Appellant allowed robbers who were armed with a pistol to access the premises whereby his fellow guards were incapacitated before property was robbed from the Resort. After the robbery, the Appellant was nowhere to be seen. Efforts to trace him through his mobile phone proved futile. A search for the Appellant took two

months before he was sighted by one of his former colleagues at his place of work. The police were informed. The Appellant was arrested. During his arrest, he was found in possession of guard uniform belonging to his place of employment. He was also found with spoons and folks which were part of the inventory of the items that were robbed from the Resort. She submitted that the defence offered by the Appellant was evasive and did not answer the core questions that the prosecution's case established to the required standard of proof. She urged the court to disallow the appeal.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellants. As was held by the Court of Appeal in **Njoroge -Vs- Republic [1987] KLR 19 at P.22:**

**“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwala v R [1957] EA 570)”.**

In the present appeal, the issue for determination by this court is whether the prosecution established the case against the Appellant on the charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

This court has carefully re-evaluated the evidence adduced before the trial magistrate's court. It has also considered the rival submission made by the parties to this appeal. The Appellant has raised several grounds of appeal in a bid to have the verdict of the trial court overturned. The Appellant submitted that his right to fair trial as provided under **Article 50(2)(j)** of the **Constitution** was infringed in that he was not availed prosecution witnesses' statements before commencement of the trial. This court has carefully perused the proceedings of the trial court. On 14<sup>th</sup> October 2013, the Appellant asked the trial court to order the prosecution to avail him prosecution witnesses' statements. The request was granted. The prosecution was ordered to avail the Appellant with the witnesses' statements. It appeared that as of 2<sup>nd</sup> December 2013, the Appellant had not been provided with witnesses' statements. On 20<sup>th</sup> February 2014, he complained to the court that he would not be ready to proceed with the case before he was supplied with witnesses' statements. The trial court ordered that the Appellant be issued with the prosecution witnesses' statements within two days. When the hearing of the case commenced on 9<sup>th</sup> July 2014, the Appellant was ready to proceed with the case. It was clear to this court that the Appellant had been issued with the prosecution witnesses' statements that is why he did not complain to the court. This court therefore holds that the claim by the Appellant that he was not provided with prosecution witnesses' statements prior to commencement of trial is not supported by evidence. That ground of appeal lacks merit and is dismissed.

On the merits of the case, it was the prosecution's case that the Appellant was employed as a security guard by a company known as Allan Brown Security Company. According to PW5, Kennedy Omoi, a supervisor employed by the company, the Appellant was an employee of the company. He was employed on 2<sup>nd</sup> June 2013. On the material day of 16<sup>th</sup> July 2013, he was assigned to relieve one of the night security guards at Appleton Resort. Three security guards were supposed to work at the resort that night. They included PW4 Patrick Okumu and PW7 Silvester Ouma. PW4 and PW5 testified that when they reported on duty that night, they saw the Appellant. They wondered why the Appellant had come on duty yet their number was required to be three night guards and not four. PW5 was informed of this anomaly. He told the Appellant not to work on that night because he would be required to relieve another security guard on another day. The Appellant did not accede to this directive but instead remained at work at the Resort. The Appellant's refusal to go home was confirmed by PW4. PW7 testified that while assigning his colleagues work on the material night, the Appellant insisted that he wanted to man the main gate. PW7 wanted the Appellant to do the patrol of the compound but the Appellant insisted that he wanted to remain at the gate.

PW4 and PW7 testified that a few minutes past midnight, after the patrons had left the Resort, they were attacked by a gang of robbers. One of the robbers was armed with a pistol. He used the pistol to subdue them before tying their hands and feet. They were kept in a room. PW1 Margaret Wawira Njiru who was employed as a waiter, was also subdued and ordered to open rooms where the robbers had an interest. PW1 complied after a pistol was pointed at her. The robbers managed to remove twelve (12) 36" Sony television sets from the rooms. They also cleared assorted hot drinks from the bar. They also took kitchen utensils. While they were stripping the property from the Resort, they locked PW1 in a room with a guest. Before doing this, the robbers robbed the guest of her valuables. This court is not able to evaluate what was robbed from the guest because the guest did not testify during trial.

PW1, PW4 and PW7 testified that while they were subdued, they heard movements, including movements of motor vehicles. It later emerged that the particular goods were transported using motor vehicles. At 4.00 a.m., a taxi driver who had been requested by a guest to take him to the airport arrived at the Resort and found the gate open. The taxi driver is the one who was able to untie PW4 and PW7. PW2 Rosemary Humburg, the manager of the Resort was informed of the robbery. She notified the police. PW6 PC Stephen Oketch was assigned to investigate the case by OCS Kileleshwa Police Station. He went to the scene some minutes after 4.00 a.m. He found the gate open. He was able to free PW1. PW2 arrived at the scene soon thereafter. An inventory was taken of the items that had been stolen. It was noticed that the Appellant was nowhere to be seen.

Upon PW5 being informed of the robbery and the absence of the Appellant, he tried to raise the Appellant on phone. The Appellant could not be reached. In September 2013, while PW7 was at Kangemi, he saw the Appellant. He notified PW5 and PW8 APC Daniel Odhiambo. They tracked the Appellant to his house. He was arrested. They found the Appellant with the Company's uniforms including the boots that had been assigned to PW4. They also found spoons and folks with stamped **“AR”** that were positively identified to belong to the Resort. The Appellant was taken to Kileleshwa Police Station where he was charged with the offence for which he was convicted after investigations had been concluded.

When the Appellant was put on his defence, he denied that he was ever been employed as a security guard by Allan Brown Security Company. He insisted that he was a mason working in the construction industry and had never worked as a security guard. He called his wife DW2 Concepta Nabwoba and his brother DW3 Moses Biketi as witnesses in his defence. The two witnesses corroborated the Appellant's

defence that he had never been employed as security guard. The Appellant denied that he was at the scene when the robbery took place. In essence, the Appellant was saying that he had been framed up with the charge.

From the above evidence, it was evident that the prosecution relied on circumstantial evidence to secure the conviction of the Appellant. The prosecution further relied on the evidence of the Appellant's disappearance from the scene of crime as further proof of the Appellant's guilt. On re-evaluation of this evidence, this court is persuaded to the required standard of proof beyond any reasonable doubt that the Appellant participated in the robbery or was an accomplice in the robbery. The prosecution was able to establish that the Appellant was on duty on the material night. He was requested by his supervisor to stand down from duty because there were sufficient guards on duty on the particular night. The Appellant refused to step down. He remained on duty. When he was assigned patrolling duties by PW7, he declined. The Appellant insisted that he wanted to man the gate. He was allowed to man the gate.

It was while PW4 and PW7 were patrolling the compound of the Resort that they were accosted by robbers who subdued them after threatening them with a pistol. The robbers gained access to the Resort through the main gate which at the time was being guarded by the Appellant. When the police and a taxi driver arrived at the Resort at 4.00 a.m., they found the gate open. The trial court drew the inference, just as this court is drawing the inference, that it was the Appellant who opened the gate for the robbers. He was the one who facilitated the robbers to gain access to the Resort. He was the one who gave intelligence to the robbers to enable them subdue his colleagues PW4 and PW7. After the robbery, he was not at the scene. He disappeared from the scene.

The disappearance of the Appellant from the scene leads this court to draw the inference that he disappeared from the scene because he was part of the gang that robbed the Resort. The questions asked by the court in **Republic –vs- Joseph Ankole [2013] eKLR** are valid questions which this court can ask of the Appellant:

**“Why would the accused disappear from the scene and remain out of the scene for almost one year when his name was mentioned to the authorities as a possible suspect? His action of disappearing was of course a reflection of his guilty conscious and was sufficient circumstantial evidence establishing beyond reasonable doubt that he was criminally responsible for the death of the deceased either on his own or acting in concert and with a common intention with his late brother Richard (see Malowa –vs- Republic [1980] KLR 110).”**

In the present appeal, the questions that can be asked of the Appellant (as he pleads his innocence) are the following: *Why did he leave the scene of crime if he was not part of the gang that robbed the Resort? Why was he spared by the robbers when his colleagues and other employees at the Resort were terrorized before being subdued by being bound and incapacitated? Why didn't he go to the assistance of his colleagues during the robbery? Who opened the gate for the robbers? Where was the Appellant when the gate was opened and used by the gang of robbers to gain access to the Resort? Why did the Appellant decline to receive the call that was made to him after the robbery by his supervisor? Why did the Appellant go underground after the robbery incident? Why did the Appellant change his mobile number after the robbery incident? What was the Appellant doing with the uniform belonging to the security company if he was not an employee of the security firm?* The answer to all these questions are straight forward. The Appellant did not do what was expected of him because he was one of the robbers or at the very least he acted with common intention with the robbers. The robbery would not have succeeded had it not been for the critical role that the Appellant played in enabling the robbers to access the Resort.

The upshot of the above reasons is that the Appellant's appeal against conviction and sentence lacks merit and is hereby dismissed. A firearm was used in the course of the robbery to subdue and terrorize the victims of the robbery. The death sentence imposed by the trial magistrate fitted the crime. It is so ordered.

**DATED AT NAIROBI THIS 14<sup>TH</sup> DAY OF JUNE 2018**

**L. KIMARU**

**JUDGE**