REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 342 of 2011

FESTUS MUHIMI MUSYOKA..……..APPELLANT

VERSUS

REPUBLIC …….…….…….....…....RESPONDENT

(*An appeal from the original conviction in the Chief Magistrate's court at Kibera Cr. Case No. 3764 of 2008 delivered by D. O. Onyango, SRM on 15th December, 2011).*

JUDGMENT

Background.

Festus Muhimi Musyoka, herein the Appellant, was charged in three counts of robbery with violence contrary to **Section 296(2) of the Penal Code**. The particulars of count I were that on the night of 2nd December, 2008, 3along Mukinduri Road, Hardy Estate within Nairobi Area, jointly with others not before the court, while armed with machetes and crude weapons, robbed Fatima Abdulrasul Sidi of one laptop(make Mac), one bottle of perfume, one DVD player(make Samsung), two rings, one gold necklace, one camera(make Nikon), one mobile phone(make Nokia) and one alarm clock; all items valued at Kshs. 225,000/-, and immediately before or immediately after the time of such robbery threatened to use actual violence to the said Fatima Abdulrasul Sidi.

The particulars in count II were that on the night of 2nd December, 2008, along Mukinduri Road, Hardy estate within Nairobi area, jointly with others not before the court, while armed with machetes and crude weapons robbed Wanjiru Gikonyo of a ring, silver necklace, a mobile phone(make Nokia), and two pairs of shoes; all valued at Kshs. 47,000/-, and that immediately before or immediately after the time of said robbery threatened to use actual violence to the said Wanjiru Gikonyo.

The particulars of count III were that on the night of 2nd December 2008, the Appellant, along Mukinduri road Hardy Estate within Nairobi area, jointly with others not before the court, while armed with dangerous weapons robbed Joseph Munga Ngano of one mobile phone (make Nokia 1110) valued at Kshs. 4,000/- and immediately before of immediately after the time of such robbery threatened to use actual violence to the said Joseph Munga Ngano.

The Appellant was convicted in Counts 1 and II. He was then sentenced to 30 years imprisonment in each of the counts. He is dissatisfied with that court's decision and has decided to file the present appeal. In his amended grounds of appeal filed on 13th June, 2017 he has appealed on grounds that he was convicted on assumption that he had colluded with the robbers, prosecution's evidence was laced with

inconsistencies, that the burden of proof was not discharged, that crucial evidence was not adduced and that his defence was not considered.

Submissions

The Appellant relied on written submissions filed on 13th June, 2017. He submitted that the charge sheet was defective on ground that the value of the goods stated therein was not supported by the evidence on record. He was also of the view that he was convicted based on mere suspicion that he had colluded with the robbers. His view was that the mere fact that the dogs were locked up at the time of the robbery did not imply that he colluded with the robbers. Furthermore, it was not established that the guard uniform that was found in the sentry belonged to the company that employed him. He also faulted the fact that the exhibits that were identified were never produced as exhibits. Finally, he faulted the prosecution evidence for being contradictory and inconsistent as a result of which it did not support the charges. He accordingly urged that the appeal be allowed.

Learned State Counsel Miss Sigei opposed the appeal. She submitted that the prosecution had proved their case beyond a reasonable doubt. She emphasized that although the Appellant was convicted based on circumstantial evidence, the same was strong enough and sufficiently established the case for prosecution. In particular, she submitted that immediately after the robbery, the Appellant fled from PW2's home where he was employed. He also locked up the dogs so that they could not alert anyone in the house or outside that a robbery was going on. His uniform was also found abandoned in the sentry and according to PW3, he had removed it during the robbery. Further, some of the stolen properties were found in the sentry, an indication that he was part and parcel of the gang that robbed the house of PW2. Counsel submitted that the evidence of the Prosecution witnesses was consistent and that the Appellant's defence which was a mere denial did not dislodge the same. Her view was that although the Appellant was convicted only in two counts, the prosecution had established its case beyond a reasonable doubt in the three counts charged. Finally, learned counsel urged the court to substitute the 30 years imprisonment with a death sentence as the sentence imposed was illegal.

Evidence

PW1, Fatima Abdulrasul Sidi recalled that on 2nd December, 2008 she was at her parents' house along Mukinduri Road in Karen in the company of her friend, one Wanjiru Gikonyo, when at around 2000hrs she decided to go to the toilet. As she was finishing up two men came to the bathroom one of whom had a machete. They threw her down before carrying her to the sitting room where they tied her hands, legs, eyes and mouth. They also tied up her friend, PW3. They then started interrogating her calling her by name before removing the tape from her mouth and inquiring about the location of the jewelry and the money. They then carried her to her parents' bedroom where they removed her blindfold and she was able to show them where the jewelry was. She could make out nine members of the posse.

She was taken back to the TV room where she was again blindfolded but the men kept kicking her asking her where the money was and what time her parents would arrive. She testified that two men were left guarding them while the rest ransacked the house. They threatened to rape them. They kept making calls inquiring about the whereabouts of a vehicle and at the same time she could hear things being moved from the house.

She testified that her father arrived and the men dispersed and she was able to untie her hands and press the alarm. The G4S security van then arrived and her father arrived a few minutes later. She recalled that she had not seen the house boy since the episode begun and that they later found him in the laundry room tied up. She testified that the dogs had been locked up by the Appellant who was the night watchman. She recalled that the Appellant reported for duty at 1830 Hours and that when her friend arrived at around 1930 Hours the Appellant was not wearing his uniform.

PW1 testified that she lost goods worth Kshs. 300,000/= including her phone and laptop. She testified that her computer, camera, perfume, alarm clock and shoes were recovered from the sentry box after the robbers left. The Appellant's uniform was also found in the sentry box. She testified that she did not hear

the Appellant blow his whistle before the incident. She recalled that the Appellant had to receive instructions from the main house before he could open the gate.

PW2, Abdul Rasul Hassan Sidi, was the owner of the home that was attacked on the fateful night. He arrived at home at about 2230 Hours. The gate was opened by two strange people and not the Appellant who was the night watchman. On entering the compound, he noticed a vehicle parked that he could not identify. He also saw about four to five people who were approaching him on foot and as he drove towards them they dispersed. The persons then entered in the car that was parked in the compound and drove off. He drove out of the compound towards Bomas where he came across police officers on patrol whom he alerted about the incident. The police accompanied him back to his compound where he found G4S security group personnel had arrived. On entering the house, he realized that he had lost goods worth about Kshs. 700,000/=. At the Appellant's sentry, they found his uniform plus some of his daughter's items which had been stolen.

PW3, Joseph Munga Ngano was a house boy employed by PW2. He recalled that at about 7.30 p.m., the Appellant sent him to the shop to buy some bread. When he returned to the compound, he was accosted by about four men who attacked him and tied him up. They demanded to know where his boss kept his money. He also overheard some of them talking to some people to alert them when 'mama' would be arriving at home. After a short while, he heard a vehicle drive into the compound and the entire compound became quiet. Apparently the robbers had left. He later realized that PW2 and some G4S security guards had arrived. The Appellant was not in the compound. He lost his mobile Phone Nokia 1100.

PW4, Wanjiru Gikonyo was a friend to PW1 whom she had come to visit on the fateful night. She entirely corroborated the evidence of PW1. She also testified that she lost cash Kshs. 2,000/=, a ring, a chain and an iPod. She confirmed that it was the Appellant who opened the gate for her when she arrived at about 1915 hrs.

PW5, PC Luku Maraya of Hardy Police Station investigated the case. He was alerted bout the robbery on 2nd December, 2008. On 3rd December, the Appellant was brought to the police Station by his supervisor. The Appellant explained that he had been abducted by some people. However, PW5 did not believe him because he had locked up the dogs at the time of robbery, had removed his uniform and left it in the sentry, had fled together with thugs and some of the stolen items were recovered in the sentry. PW5 specified the Appellant's uniform to consist of a cap, coat, tie, trouser and shoes. He preferred the charges against the Appellant.

After the close of prosecution case, the court ruled that the Appellant had a case to answer and accordingly put him on his defence. He gave an unsworn statement of defence. He stated that on 3rd December, 2008, the managing director of the company he worked for called him and informed him that the wanted to reshuffle the guards. The managing director visited him at PW2's home and later escorted him to Bell Top Magadi Road where he told him he would start working from the following day. He enquired from him about a robbery that had occurred in PW2's home but he denied he knew anything about it. He asked him to accompany him to Hardy police station to record a statement. He was locked up until the following day when he was taken to court to take plea. The police escorted him to his home where they conducted a search but recovered nothing connected with the robbery. He also stated that the police enquired about one Robert who used to work for PW2 but he knew nothing about him. He denied he was involved in the robbery.

Determination.

This is the first appellate court whose duty is to reevaluate he evidence on record and arrive at an independent finding. In so doing, the court must bear in mind that it has neither seen nor heard the witnesses and give due regard for that. See **Okeno vs Republic [1972] EA 32**.

After considering the evidence and the rival submissions, I have deduced the issues for determination to be, whether the charge sheet was defective, whether crucial witnesses were called, whether the offence

was proved beyond a reasonable doubt and whether the sentence imposed was proper. On whether the charge sheet was defective, the Appellant submitted that the value of the goods stolen was not supported by evidence on record. Under **Section 134 of the Criminal Procedure Code**, a charge sheet must contain such particulars as will reasonably enable the Appellant to understand the charge(s) against him. The basic rationale for this provision is that when the particulars of the charge are spelt out in unambiguous manner, it enables the accused to defend himself. It is also in the particulars of a charge that the elements of the offence are disclosed. These are crucial in the trial because the prosecution must adduce evidence that proves them failure to which the case must fail. In the present case, the particulars of the charges clearly spelt out the items robbed of from each of the complainants and the value for the goods. The mere fact that the exact value of the goods was not disclosed in the evidence did not render the charge sheet defective. I say so because at the time of drafting the charge, only the estimated value of the goods is given. What matters in evidence is whether the actual items named in the charge sheet are disclosed in evidence. This test was met by the respective witnesses. I find the submission then without merit and I dismiss it.

The next issue was that the prosecution did not call the arresting officers, one Mr. Mangiti, a Director of Cavalier Security who it was said effected the arrest of the Appellant. Needless to say, the witness was responsible for handing over the Appellant to the police. In his own defence, the Appellant was candid that the witness asked him to accompany him to Hardy Police Station to go and record a statement on 3rd December, 2008. It was while at the police Station that the arrest was effected. I emphasize that it is important that persons involved in the arresting and investigating a case should testify. However, where the absence of their evidence does not vitiate the prosecution's case, the court will always find that the absence of their evidence was does not render the trial a nullity. In the instant case, the prosecution adequately explained through the evidence of PW2 and PW5 how the Appellant was arrested. Their evidence therefore sufficiently explained the circumstances under which the Appellant was arrested. It is clear that he surrendered himself to the police after being lured into the trap by his supervisor. Accordingly, I hold that the evidence of the said Mr. Mangiti would not have added any value to the prosecution case other than repeat what PW2 and 5 had testified. In addition, it would only have established that the Appellant was his employee which fact, in any, event was not contested.

On prove of the case, it is clear that the Appellant was convicted based on circumstantial evidence. The case law has settled the factors that a court must consider before arriving at a conviction based on circumstantial evidence. See **R v. Taylor, Weaver & Donovan[1928] 21 Cr. App. CA 21** in which it was held that:

> **"Circumstantial evidence is very often the best evidence of surrounding circumstances which by intensified exam is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say it is circumstantial."**

Also in **Martin v. Osborne[1936] HCA 23,[1936] 55 CLR 367,**:

> **"If an issue is to be proved by circumstantial evidence, facts subsidiary to or connected with the main fact must be established from which the conclusion follows as a rational inference. In the inculpation of an accused person the evidentiary circumstances must bear no other reasonable explanation. This means that, according to the common course of human affairs, the degree of probability that the occurrence of the facts proved would be accompanied by the occurrence of the fact to be proved is so high that the contrary cannot reasonably be supposed. The circumstances which may be taken into account in this process of reasoning include all facts and matters which form constituent parts or ingredients of the transaction itself or explain or make intelligible the course of the conduct pursued."**

In the present case, the Appellant was charged with the duty of securing PW2's compound at night. He was required to release the dogs from their cage into the compound as additional back up for the security. Instead of doing so, he locked up the dogs. As fate had it, robbers struck when the dogs were locked up such that the persons in the house could not be alerted about the eminent robbery. One can safely conclude that he locked up the dogs so that they could not attack the robbers. Further, PW3 testified that

he handed over the gate keys to the Appellant. The Appellant was the custodian of the keys to the gate as he was charged for opening the gate at night. The gate was the only access point to the compound. He opened the gate for the robbers without raising an alert or alarm that the compounded had been raided. In addition, the Appellant had been issued with full uniform of the Cavalier Security Guard. It was not by coincidence that on this night, he chose not to wear the uniform, a fact that was confirmed by both PW3 and 4. His full uniform was found in the sentry after the robbers had left the compound. The inference to be drawn from such a conduct was that he did not wish to be identified with guarding the compound by the persons who were in the compound at the time. It was intended that he camouflages himself so that no one would know that he was amongst the robbers. It was a mandatory requirement for him to wear guard uniform while on duty. He did not give a proper explanation as to why he opted not to wear the uniform on that day. His explanation in the defence that he was 'hijacked' by robbers did not add up. After all, he never reported about his 'hijacking. His defence was therefore but an afterthought. In the circumstances, I find that the only inference available was that he was part and parcel of the robbery and that the circumstantial evidence squarely implicated him. The elements of the offence of robbery with violence as provided under **Section 296(2) of the Penal Code** were proved to the required standard. The Appellant's conviction was safe.

With regard to the sentence, the Appellant was sentenced to 30 years imprisonment. **Section 296(2) of the Penal Code** provides for a mandatory death sentence for the offence of robbery with violence. Where a mandatory sentence is provided by the law a trial court cannot impose anything less than the mandatory sentence. Before the appeal was heard, the Appellant was duly notified that if his appeal on conviction failed, the Respondent would seek enhancement of the sentence. He opted to proceed with the appeal nonetheless. He was therefore aware that should the appeal on conviction fail, he would embrace the consequence of an enhanced sentence. For that reason, this court has no alternative but to substitute the 30 years imprisonment with the mandatory death sentence.

In sum, this court finds that the prosecution proved its case beyond a reasonable doubt. I uphold the conviction, I set aside the 30 years imprisonment and substitute it with an order that the Appellant shall suffer death sentence. The death penalty shall be executed only in Count I. It is so ordered.

DATED AND DELIVERED THIS 27th DAY OF JULY, 2017.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of;

1. Appellant in person.

2. Miss Sigei For the Respondent.