REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVIISON

CRIMINAL APPEAL NO. 266 OF 2011

AMOS NABWERA KAYO……..…..APPELLANT

VERSUS

REPUBLIC …….……RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara Cr. Case No. 1464 of 2010 delivered by *Hon. T. Mwangi, SPM on 12th October 2011).*

JUDGMENT

Background

Amos Nabwera Kayo, the Appellant herein, was charged in the main count with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on 14th March, 2010, at Ital Products Limited in Industrial Area within Nairobi Area province, with others not before the court, robbed DAVIS ADONGO ODONGO of cash Kshs. 3,000/-, a mobile phone make Nokia 6030, assorted copper tubes and pipes, assorted welding ball valves, assorted bib cocks, assorted MIG welding wire, 100 pieces of water taps, assorted ALASPA padlocks and 200 pieces of assorted polish mob all valued at Kshs. 9,508,250.84/- and at or immediately before or immediately after the time of such robbery used personal violence to the said DAVIS ADONGO ODONGO.

He was charged in the alternative with the offence of neglect to prevent the commission of a felony contrary to Section 392 of the Penal Code. The particulars of the charge were that on 14th March, 2010 at ITAL PRODUCTS LTD in Industrial Area within Nairobi Area Province, having been deployed as a security guard by Klean Homes Security Services negligently failed to prevent the commission of a felony namely robbery with violence.

The Appellant was found guilty in the main charge and sentenced to life imprisonment. He was dissatisfied with that court's decision and has lodged the present appeal. His grounds of appeal were filed contemporaneously with the written submissions on 27th September, 2017. They are that the investigations were shoddy, that crucial witnesses did not testify, his defence was not considered and that the case was not proved beyond a reasonable doubt.

Submissions

In his written submissions, the Appellant doubted whether PW1 had been drugged which prevented him from raising alarm to alert the persons who were at the scene. He submitted that there was no evidence linking the cup that was produced with the alleged drugging of PW1. He questioned how the various guards assigned to the premises never raised an alarm. He submitted that this pointed to poor investigations in the matter.

He submitted that the prosecution failed to call crucial witnesses. These were the makers of the medical documents from Coptic Hospital and Kenyatta National Hospital. His view was that the prosecution failed to call them because they would have confirmed that PW1 was not poisoned. He also faulted the failure to call his seniors namely Kevin Orori Okwema and Festus David Nabiri who had severally visited the scene as the premises alarm kept going off. He also cited one Mbuvi Wambua, a colleague who had reported to work earlier than usual. He too had recorded a statement but failed to testify. He submitted that the two witnesses had recorded statements but the prosecution failed to call them. He relied on the case of **Daitany v. *R[1950] 23 EACA 179*** *to buttress the view that the failure to call these crucial witnesses gave an inference that the witnesses would have adduced adverse evidence for the prosecution.*

He was also of the view that the trial magistrate introduced into the case theories that were not canvassed during the trial. He gave reference to the finding of the learned magistrate that although he never saw who drugged him, an inference could be drawn that he did it himself or in conjunction with his accomplices. This, he submitted was erroneous as was held in the case of **Oketh Okale v. *Republic[1964] EACA 179*.**

Finally, the Appellant faulted the learned trial magistrate's failure to consider his plausible defence. He urged the court to find that he had a meritorious appeal which should be allowed.

Learned State Counsel**,** Ms. Atina opposed appeal. She submitted that the Appellant, although employed as a security guard was nowhere to be seen after the robbery. He was later traced at his home in Kakamega where he travelled without his employer's permission. She submitted that the Appellant was arrested three weeks after the robbery and he had yet to inform his employers that he had gone to a funeral. Furthermore, the Appellant did not dispute giving the tea to PW1. He also confirmed that the alarm was going off often during the day but that when PW3 went to find out what was happening, he assured him that everything was fine. She submitted the circumstances of the case pointed to the guilt of the Appellant.

With regard to witnesses who were not called, counsel submitted that the evidence on record established a strong case for the prosecution. She added that the Appellant's defence was considered. She also was of the view that the elements of the offence of robbery with violence were proved beyond a reasonable doubt. On sentence, she urged the court to impose the mandatory death sentence as provided under ***Section 296(2) of the Penal Code****, thereby set aside the life imprisonment that was unlawfully imposed.*

Evidence

The prosecution called a total of seven witnesses. **PW1 Davis Adugo Odongo** was a security guard with Gillys Security Services based at Adams Arcade in Nairobi. On the material date 14th March, 2010 he was deployed to guard Ital Products premises along Lunga Lunga Road. He was to relieve the night watchman and he worked along another guard from Klean Homes Security Services. On reporting to work, he found the watchman he was relieving in the sentry box. He then patrolled the compound and confirmed that all was well which information he recorded in the occurrence book. The company had deployed one of its staff members to open the gate for them (guards). On this day, the staff was one, Karovo whom he found cleaning his dust coat. The watchman in the sentry was making tea. The latter offered him a cup of tea and after taking two or three sips he started feeling dizzy then blacked out. He recalled that before he fell unconscious, he saw his colleague walking away from where he was. He regained consciousness in the night when he found himself in a toilet within the compound which was locked from outside. His hands and legs were tied with shoe laces which he identified in court. He heard some footsteps outside and he started alerting for help by banging on the door of the toilet. He was rescued on the following day by a co employee, one Mrefu and another who demolished the toilet door. They untied his hands and legs. He was thereafter taken to Coptic Hospital by the Chief Operations Manager. He was referred to Kenyatta National Hospital where he was treated and discharged. His evidence was that he lost Kshs. 3000 in cash and Nokia mobile phone. On returning to the work premises, he noted that both the gate and the barrier had been broken into. The Appellant who was the guard from the Klean Home Services was charged with the offence. He confirmed that he is the one who drugged him with the tea and had worked with him for between three and four months.

PW2, Rodah Romano *was a store keeper with Ital Products. He confirmed that he was in the office on 14th March, 2010 when she locked up the premises including the store save for the fire ex*it. She confirmed that the Appellant was one of the day guards. She learnt about the robbery on 15th March, 2010 after reporting back to work after a weekend. She testified that the company lost goods worth Kshs. 9,503,250/=.

PW3, Robert Mwangangi was a security guard supervisor with Ital Products Company. Amongst his duties were to oversee the checking in and out of guards between 6.00 a.m and 5.00 p.m. On 14th March, 2010 on arrival at work at about 8.00 am, he found two day guards namely, PW1 and the Appellant waiting for him. He released the night watchman and allowed the two in. When he returned to the premises at 5.00 p.m, he found no one and nobody opened for him. He then learnt from the persons who manned the alarm that during the day, the alarm had been going on and off. He confirmed that PW1 was rescued from the toilet the following morning with his hands and legs tied up. He was present when this took place.

PW5, Sergent Johan Chesire then stationed at DO's office at South Kabaras Kakamega was one of the arresting officers. He was approached by two CID offices from Embakassi Nairobi namely Corporal Wanyonyi and Sergeant Christine Rono who informed him that they were looking or the Appellant. The two had directions to the Appellant's home and photograph. They went to his rural home where they arrested him. He was thereafter escorted to Nairobi and charged accordingly.

PW5, Francis Mbusura Adaha *worked for Klean Home Security Services as operations Manager. He was on duty at Ital Products on 14th March, 2010. He visited the scene after report of the robbery was made. He found the main gate locked and accessed the premises by jumping over the gate. Together with other security guards, they rescued PW1 from the toilet. He confirmed that on the material day, the Appellant had been deployed to the premises as a guard.*

PW6, CIP Michael Kinyeru then of CID Industrial Area *was the investigating officer in the matter. He summed up the evidence of the prosecution and preferred the charges against the Appellant. He visited the scene and confirmed that the main gate was broken into to gain access to the building.*

PW7, Dr Zephania Kamau of police surgery examined the Appellant on 29th June, 2010. He found that he had scars or healed bruises on his left forearm and lateral aspect of his right forearm. He concluded that the weapon used was blunt and assessed the degree of injury as harm. He filled his P3 Form

The Appellant gave a sworn statement of defence and did not call witnesses. He testified that he was a temporary relief guard with Klean Homes Security Services. He recalled that on 14th March, 2010 he was on duty until 4.00 p.m. He confirmed that during the day the alarm kept going off after which security personnel would arrive and confirm that all was well. He questioned why the guard who relieved him did not testify. He stated that he travelled upcountry on 15th March, 2010 after receiving a call the day before that his uncle had died. He confirmed he was arrested on 30th March, 2010.

Determination

It is now the duty of this court to reevaluate the entire evidence on record and come up with its own independent conclusions. In doing so however, the court must bear in mind that it has neither seen nor heard the witnesses and give due regard for that. See: See **Pandya vs. Republic [1957] EA. 336.**

I have deduced that the only issue arising for determination is *whether the case was proved beyond reasonable doubt.*

The prosecution's case was hinged on the evidence of PW1. He testified that the Appellant drugged his tea which led him to fall unconscious after which the robbery took place. The trial court relied on this evidence as crucial and even found that, **"[the Appellant]" plotted the whole robbery and how they could drug PW1 so that he could not interfere with their smooth operation."** But the evidence of PW1 was tested by other witnesses.PW3 testified that there were three keys to the gate and that the keys were in the possession of the supervisor on duty, BM security and Klean Homes Security Services. He also testified that he let the Appellant and PW1 in on the morning in question. This demonstrated that the watchmen could not leave the premises of their own volition. They had to be let out or to break out. The latter is what the prosecution supposes happened.

The evidence of PW3 and PW5 was that they received news later that the evening shift could not take over since the small gate was locked from the inside. PW5 testified that the latch had been locked. But one thing pointed to the guilt of the Appellant; the fact that after the gate was opened that evening he was nowhere to be found whereas his colleague was tied up and locked in the toilet. This piece of evidence though acted like a double edged sword, igniting suspicions pertaining to the conduct of PW1. This is because the gate was locked from the inside. The evidence of other witnesses was that only PW1 was found on the premises the following morning. The question arising therefrom is, who locked the gate from inside yet the robbers had fled? It can only reasonably be construed that it was the person inside the compound. This was none other than the Appellant himself. In addition, PW6, the investigating officer testified that he visited the scene and confirmed that the robbers accessed the compound by breaking into the gate. Another question arises; which gate is this that was broken into yet a gate was found locked from inside. In these circumstances, is it not safe to conclusively rely on the evidence of PW1 as doing so is tantamount to vindicating accomplice evidence.

This is further called into question by the happenings on the evening of the 14th. PW1 testified that he regained consciousness at around 7.00 a.m. and could hear foot steps outside the latrine in which he was marooned. He testified that he got himself free in 10 to 15 minutes and then started knocking to attract attention. In an absurd turn of events, when PW5 and others rescued him they found him still tied up. So then, did he untie himself specifically so that he could knock on the toilet door, and thereafter retied himself so as to create the impression that he was under siege? Why did he also not scream at the point he heard the footsteps after untying himself? These are pieces of evidence that do not add up at all and which point to the fact that PW1 knew what was happening. His sole evidence could not, in the circumstances, be a basis for a conviction.

Further, the statement (recorded) of Festus David Nambiri was that they responded to an alarm at the premises past 12.00 p.m. and found both guards around and that the guard from Gillys Security Services, PW1, informed them that there had been a power fluctuation. This clearly flies in the face of PW1's evidence that he was drugged early in the morning before he even minuted his findings from the morning patrol in the occurrence book. This is corroborated by the statement of Kevin Orori that they responded to two alarm disturbances at the premises, one at 10.30 a.m. and another at 12.30 p.m. They returned with information that the watchmen had informed them that all was well and they had verified the same. This is clearly the strongest pointer at PW1 being more than a mere victim.

These two witnesses were never called by the prosecution and the trial court when analyzing their statements which were produced as defence exhibits held that:

> **"I have read through the said witness statements. The two intended witnesses were only referring to the responses they made after the Ital alarms went off on a number of occasions. It was the evidence of the two that every time they arrived, accused assured them all was well and that the activation of the alarm was due to power fluctuation. This in my view corroborated prosecution's case that accused had a hand in the robbery and was only responding to the alarm team as a cover up of what was going on."**

My analysis of the statements is that one of them clearly stated that one of the witnesses went round the compound and found that all was well. The statements then watered down the prosecution's case contrary to the learned magistrate's finding that they corroborated it. The failure to call these witnesses therefore seems premised on the fact that they were detrimental to the prosecution's case. If the reverse were the case, nothing stopped the prosecution from calling them.

With the above observations, I add that the only other evidence that would have implicated the Appellant was if he had been found in possession of any of the stolen goods. This did not happen leading me to conclude that the circumstantial evidence was too weak to warrant the conviction. I further add that had the court upheld the conviction, I would have substituted the sentence of life imprisonment with the mandatory death sentence provided by the law.

The upshot of my findings is that the prosecution failed to discharge its burden in proving the case beyond a reasonable doubt. I quash the conviction, set aside the death sentence and order that the Appellant be forthwith set free. It is so ordered.

Dated and Delivered at Nairobi this 17th November, 2017

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. Appellant in person.

2. Miss Sigei for the Respondent.