



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CRIMINAL APPEAL NO. 304 OF 2010**

EVANS MUNYANZI ANDUKA ... APPELLANT

VERSUS

REPUBLIC ..... PROSECUTOR

*(Appeal from the Judgment of the Chief Magistrate's Court at Naivasha, Hon. P. M. Mulwa–Principal Magistrate delivered on the 8<sup>th</sup> October, 2010 in CMCR Case No. 1879 of 2009)*

**JUDGMENT**

The appellant **EVANS MUNYAZI ANDUKA** has filed this appeal challenging his conviction by the learned Principal Magistrate sitting at the Naivasha Law Courts. The appellant was arraigned before the trial court on 17/7/2009 facing a charge of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296(2) OF THE PENAL CODE**. The particulars of the charge were that

*“On the 28<sup>th</sup> day of June, 2009 at Green Park in Naivasha District of the Rift Valley Province, jointly with others not before court while armed with dangerous weapons namely pistol robbed AKALLA INDONYA of his mobile phone make Motorola C113, ignition keys, assorted house hold goods and a motor vehicle registration number KAK 365W make Toyota Prado all valued at Ksh 2,743,500/- and at or immediately before the time of such robbery, threatened to use personal violence to the said AKALLA INDONYA”*

The appellant entered a plea of 'Not Guilty' to the charge and his trial commenced on 27/1/2010. The prosecution led by **INSPECTOR MUIA** called a total of five (5) witnesses in support of their case. **PW2 HORST SCHOENEMANN** told the court that he is a German pensioner who has a home at Green Park Estate in Naivasha. On 29/6/2009 while away in Germany he received a phone call informing him that his house had been broken into and his Prado motor vehicle stolen. When **PW3** returned to Kenya he confirmed that indeed his home had been broken into and his vehicle Reg. KAK 365W were missing. Other house hold goods and jewellery were also stolen from his house.

**PW1 AKALLA INDONYA** told the court that he was a cook employed by **PW2**. On 28/6/2009 at about 7.15pm he was taking tea to the appellant who was the watchman. As he walked to the servants quarter's four (4) men accosted him. They held **PW1** and strangled him. One of the men had a pistol with which he hit **PW1** on the head; the four men led **PW1** back to the main house and forced him to open the doors. He was then ordered to tie up the dogs. The men began to ransack the house. **PW1** made an attempt to escape but the appellant alerted the men that he was running away. The men pursued **PW1** caught him and tied him up.

While lying bound in the garden the appellant came and demanded the car keys from **PW1**. **PW1** told the appellant to go and raise the alarm but he declined to do so demanding instead to be given the car keys. After the thieves left **PW1** managed to release himself. He realized that his employer's vehicle was missing and the appellant was also gone. **PW1** called the security firm and they alerted the police. The motor vehicle was never recovered but the appellant was arrested about ten days after the incident. He was brought to court and charged.

At the close of the prosecution case the appellant was found to have a case to answer and was placed on his defence. The appellant opted to make an unsworn statement in which he denied any involvement in the Robbery. On 8/2/2010 the learned trial magistrate delivered his judgment in which he convicted the appellant of the charge of Robbery with Violence and thereafter sentenced him to death. Being aggrieved by both his conviction and sentence the appellant filed this appeal.

The appellant who was not represented during the hearing of the appeal relied entirely upon his written submissions which had duly been filed in court. **MR. CHIRCHIR** learned State Counsel made oral submissions opposing the appeal.

The first question is whether the incident as described by **PW1** amounted to a Robbery with Violence. **PW1** told the court that four (4) men came into the compound. One was armed with a pistol. The men assaulted the witness by hitting him on the head and by tying him up. There was use of force in achieving their ends. **PW1** the owner of the premises confirms that his home was broken into and also confirms that his Toyota Prado Reg No. KAK 365W was stolen during the incident. **PW3 JEFFREY BERNARD** the Estate Manager at Green Park confirms having been called to the house by **PW1** after the thieves left. He noticed feces in the living-room a hole in the ceiling and saw that the vehicle was missing. We are satisfied that the ingredients of Robbery were shown to have been present and find that this incident did amount to a Robbery with Violence as envisaged by Section 296(2) of the Penal Code.

The next crucial question is whether the appellant was proved by the evidence to have been a participant in that Robbery. **PW1** told the court that he knew the appellant well. The two were both employees of **PW2**. The appellant was the night guard whilst **PW1** was the cook. The two related daily thus there could be no possibility of a mistaken identity. On his part the appellant readily conceded that he was the watchman on duty in the house of **PW2** on that material day.

**PW1** told the court that the robbers struck as he was taking tea to the appellant at the servant's quarters. The attackers concentrated their efforts only on **PW1**. They assaulted him and one hit him on the head with a pistol. Nothing was done to the appellant who just stood by watching. He was not roughed up nor was any attempt made to restrain him. On his part the appellant took no action to either call for help, raise an alarm or protect **PW1** – he just stood by and watched.

Further evidence from **PW1** reveals that the appellant was not just a passive bystander. He acted in a way as to assist the robbers achieve their goals. When **PW1** attempted to make a run for it, the appellant alerted the robbers that he was escaping. This led to the men restraining **PW1** and binding his hands and feet. It is telling that no attempt was made to restrain or bind the appellant. Further **PW1** told the court that it was the appellant who came to him where he lay bound and demanded the car keys. Why would the appellant be demanding the keys to his employer's vehicle during a robbery? As a watchman his role was to protect the property of **PW2** not to facilitate its theft. There was no evidence that the appellant was acting under any compulsion when he demanded the car keys. This action shows that the appellant was fully in cahoots with the robbers. If not they would not have left it to the appellant to demand the car keys – one of the other assailants would have done so instead.

**PW4 MATAYO MUSUNGU** was a gardener in the same compound. He told the court that he would work from 6.00am to 6.30pm daily. **PW4** however told the court that although he officially clocked off duty at 6.00pm he normally stayed in the compound chatting and enjoying the company of his colleagues (probably also enjoying a cup of tea from the cook) before he would leave for home. On the material day when the appellant reported for night duty at 6.30pm he informed **PW4** that he had seen his (PW4's) wife taking their child to hospital. This understandably caused **PW4** to leave immediately instead of hanging

around as he usually did. However **PW4** stated that upon arriving home he found that the appellant had lied to him as his child was not sick at all. This was obviously a ploy by the appellant to ensure that **PW4** left the compound before the robbers struck. His intention was to ensure that they faced as little resistance as possible. This we have a scenario where the appellant who by his own admission was the watchman on duty at the house of **PW2**, made no effort at all to prevent the entry of the robbers, made no attempt to raise an alarm or call for help, stood by and watched the cook **PW1** assaulted and tied up and even acted to alert the robbers when **PW1** made an attempt to escape and was the one who demanded from **PW1** the keys to their employer's Prado vehicle. This vehicle was stolen during the incident and driven away. The appellant left in the same vehicle with the robbers and tellingly took all his possessions with him.

In his defence the appellant says that he was forced by the robbers to leave with them in the vehicle. If he was compelled as he claims, then how did he have time to collect all his belongings from the servant's quarters? Why would robbers intent on kidnapping the appellant allow him time to collect all his clothes etc. We reject his defence as a fabrication.

The evidence on record, regarding the actions of the appellant during this robbery incident rule out the possibility that he too was a victim of the robbers. The appellant was clearly an active participant in the robbery. He facilitated and enabled the robbers to raid the house, steal the vehicle and house hold goods and ultimately left in the company of the same robbers leaving **PW1** lying tied up in the garden.

The actions of the appellant in the succeeding days only goes to strengthen this belief. In his defence the appellant claims that the robbers drove off with and drugged him. They later abandoned him near Mlolongo. He made his way back to Naivasha police station where ten (10) days after the incident he made a report. It is curious that these robbers would drug the appellant **after** leaving the scene of robbery with him yet they took no action to disable or drug him while the robbery was in progress. Why act to disable the watchman after they have succeeded in robbing the compound. We do not believe this tale by appellant that he was drugged after leaving the scene of crime. Further the appellant claims that he met a police man at the weighbridge near Mlolongo. He made no report to this policeman or to any other police station between Mlolongo and Naivasha. Instead he makes his way back to Naivasha and only makes a report on 8/7/2009 a full 10 days **after** the robbery. It is clear the appellant was out delay making any report for as long as possible at enable his accomplices make a clean escape (possibly across the border) with the vehicle. The appellant was a watchman. He could have contacted his employer immediately to make a report. He knew he had a duty to report at the earliest opportunity. The appellant made no report to the police officer he met at weighbridge. He made no report to any police station between Mlolongo and Naivasha. There are several police stations in Nairobi where he could have reported. We find that the series of events is not just a set of coincidences. The events show a calculated plan by the appellant acting with his accomplices to enable and facilitate the robbery and later portray himself as a victim. We find that the appellant was an active participant in this robbery.

Section 20 of the Penal Code, Cap 23. Laws of Kenya defines principal offender as

***“20(1) when an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say***

***a.....***

***b. Every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence***

***c. Every person who and or abets another person in committing the offence***

***d. ....***

The actions of the appellant fall squarely within the provisions of Section 20(1) (b) and (c) of the Penal Code. He is a principal offender and is liable to conviction as such. We are satisfied that the evidence on

record proved that the appellant acting with others not before the court perpetrated this robbery. His conviction was sound and we do confirm the same.

The appellant was allowed an opportunity to mitigate after which he was sentenced to death. The sentence was lawful and we do uphold the same. Therefore this appeal fails in its entirety and is hereby dismissed.

Dated in Nakuru this 30<sup>th</sup> day of September, 2016.

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**M. Odero**

**Judge**

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**A. Ndung'u**

**Judge**