REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEAL NUMBER 65 OF 2011

BETWEEN

JARSO GALGALO
DIBA……..APPELLANT

VERSUS

THE REPUBLIC OF KENYA……..
RESPONDENT

[An Appeal from the Judgment of the Learned Principal Magistrate K. Bidali dated 22nd February 2011 in the Chief Magistrate's Court at Nairobi, Criminal Case Number 1192 of 2010]

Appeal before Justices Monica Mbaru and James Rika

The Appellant Jarso Galgalo Diba appearing in Person

The Respondent represented by Prosecution Counsel, Ms. Nyauncho

---

JUDGMENT

1. The Appellant Jarso Galgalo Diba was charged, tried and convicted for the offence of robbery with violence contrary to Section 296 [2] of the Penal Code. The details of the offence were as follows-:

On the 8th day of January 2009 at Runda Estate in Gigiri within the Nairobi Area, jointly with others not before Court, while armed with dangerous weapons namely pistols, robbed Biren Shah of Kshs. 1.2 million, 15,000 USD, 20,000 Indian Rupees, 1,250 Sterling Pounds, 1,000 Euros, a White Toyota Corolla Motor Vehicle KAQ 040, 7 Mobile Phones, One Laptop make H.P, 8 Wrist Watches, 3 DVD Players and Digital Video Cameras, One Bicycle, One Radio, Assorted Diamond and Gold Jewellery- all valued at Kshs. 13,913- the property of Biren Shan and at the time of such robbery threatened to use actual violence against the said Biren Shah.

2. The prosecution called nine witnesses and produced five exhibits. The Appellant gave an unsworn statement and called no witness.

3. PW1 Sudha Amrilal Shih testified she lived at Runda with her son Biren Shah and his family. The Appellant was their residential Guard. On 8th January 2009 at around 9.00 p.m. she was in her bedroom when two men, armed with a gun, entered her bedroom. Both had pistols. They asked her not to shout and

to just face the ground. The stole Jewellery, between Kshs. 70,000 to Kshs. 80,000, one Mobile Phone, and DVD make Nokia. A different set of two men brought in her daughter -in- law. They were armed with pangas and compelled her daughter-in-law to sit at a corner. Another two men brought in her son to the room, tied his hands and made him lie on his stomach. Later on the robbers shepherded two of PW1's house-helps, and her two visually impaired grandchildren. The robbers locked their victims in the house, asked them not to make any noise for the next twenty minutes, and took off. Police were called later, arriving at the scene two hours after the robbers left. She never saw the Appellant during the attack. Police however discovered that all the Appellant's personal items were all missing from the Servants' Quarters where the Appellant lived.

4. PW2 Rughita Shah testified she was the wife to Biren Shah. The Appellant was the family's Guard. He lived in the Servants' Quarters within the residence. She slept in a bedroom upstairs, while her mother-in-law used a bedroom downstairs. At around 9.00 p.m. PW2 was walking downstairs when she noticed the Appellant in the house. She asked him why he was in the house, as he was not ordinarily allowed in there. He was wearing his work uniform. He was not conversant in the English Language, and pointed to his behind. Suddenly a man appeared wielding a gun, and dragged PW2 down to PW1's bedroom. PW2 saw the Appellant barely four feet from her as she was being dragged down by the robber. She was bundled into PW1's house where she found two other armed men. One of the other men had a panga. The robber put a panga on PW2's neck and ordered her not to move. She noticed there were two or three other robbers. The robbers stole cash, phones and jewellery. PW2's two kids were then brought to the room, as were two house-helps who were brought in hooded. PW2 heard her husband's car approach. He had gone out earlier, about twenty minutes back, to drop the family electrician to catch a matatu. He was soon shepherded in and bound. The man with the panga stated that her husband had been mistreating the attackers while they worked. They escaped in the family's car KAQ O40 A. Before the escape, PW2 saw the Appellant. He had discarded his uniform, and wore his civilian attire. He was seen outside the bedroom talking to one of the robbers.

5. PW2 testified Police Officers eventually came and opened the door which had been locked by the fleeing robbers. The family had four big dogs which the Appellant used to handle. They were supposed to be roaming the compound between 6.00 p.m. and 6.00 a.m. but were at the time of the attack all locked in and asleep, in apparent sedation. The compound had a ten feet high, electrical, stone, perimeter fence. The gate was about 80 metres from the main house. The Appellant had a remote bell for alarm which he did not use. His clothes were not in his room at the Servants' Quarters after the robbers left. The phone lines had been cut off at the main box near the gate. After the robbery, PW2 never saw the Appellant. He was arrested one year after the incident.

6. PW3 Biren Shah confirmed he lived with his mother, wife and children at Runda. He had three house-helps, a guard and a gardener. The Appellant had previously worked for PW3 at PW3's company Rainbow Manufacturers Limited for a period of six months. PW3 dropped his electrician at Runda Barrier on the material night, and returned at 9.00 p.m. The Appellant took about ten minutes to open the gate for PW3 on return. PW3 asked him why he had taken so long. He claimed he delayed because he was positioned behind the house. When PW3 spoke to the Appellant at the gate, he was all alone. PW3 proceeded to the house where he was met by two robbers armed with guns. They pointed the guns at his head. He was taken to his mother's room where he found the rest of the family and the house-helps. The robbers accosted him and demanded for the keys to the safe. They opened the safe and emptied its contents. They ransacked the house for about thirty minutes and asked for the car keys. They took the family's Toyota KAQ O40 A. At the time the Appellant opened the gate for PW3, the Appellant wore a green work overall. As the robbers fled, PW3 saw the Appellant outside the house wearing civilian clothes. He now wore a sweater and a trouser. All the dogs were locked in and did not as much as bark. The compound had a solid stone wall, electrical perimeter fence, complete with alarm. The alarm was never raised. The stolen items were: Kshs. 1.2 million; 15,000 USD, 20,000 Indian Rupees; 1,200 UK Pounds; 1,000 Euros; Toyota Car; 3 DVD; 8 Digital Cameras; 7 Mobile Phones; a Bicycle; Wallet; Laptop; Sony Stereo Radio; 8 Assorted Watches; Jewellery comprising 3 Gold and 2 Diamond Bracelets-all totaled Kshs. 13.9 million. Nothing except the car was recovered. It was recovered six months later at Githunguri, where it had been used in another robbery. Its number plate had been changed. The Appellant was arrested at Kibera on 18th June 2010, and charged.

7. PW4 Washington Nyondo Hosea an electrician, was at PW3's residence on 8th January 2009. He had been called there by PW3 to mend an electrical fault. The Appellant opened the gate for PW4. PW4 had known the Appellant for about one year, as the Appellant had been employed at PW3's factory as a Casual Labourer. The Appellant was assisting PW4 with the ladder as PW4 was carrying on his work. At one point, PW4 realized the Appellant was not there to assist PW4 with the ladder, as PW4 climbed down from the ceiling. Eventually the Appellant returned. He told PW4 that he needed not finish all his electrical work on that day, as he could finish at a later day. The electrician found this strange. It was about 8.30 p.m. PW4 checked the electrical fence and found it in good working order. He asked his boss to drop him at KTTC stage after he was done. He was dropped, boarded a matatu and went home. The following day, he was informed that his boss had been robbed.

8. PW5 Judith Musimbi Andochi told the Court she served PW3's family as a house-help. On 8th January 2009, she was feeding the children when she saw three men- one armed with a panga, the other one armed with a pistol and the last one with a metal bar. The robbers took the house-help's mobile phone and took her and her colleague Mary to the old lady's bedroom. The victims were subdued and their items stolen. The Appellant was with the robbers and went round the house with them. After ransacking the house, the robbers locked the victims in the old lady's house, and asked them not to raise any alarm for the next two hours. Police Officers arrived later and opened the door. Previously, the Appellant had confided in Judith and Mary that he would harm their boss, as their boss had made the Appellant work day and night and also made him dig wells. PW5 confirmed the Appellant was not armed during the attack, but was in the company of the robbers as the incident unfolded and eventually left with the robbers.

9. PW6 PC James Rono investigated the matter after the Appellant was arrested on 18th June 2010. He went through the file, and statements recorded after the incident. He interrogated the Appellant who confirmed he was the Guard on duty on the 8th January 2009 at PW1's residence when the robbery took place. After the robbery he deserted work. He disappeared with all his personal belongings. When interrogated by PW6, the Appellant explained that he had travelled to Eastleigh and then Moyale after the robbery. The Appellant was arrested at Kariobangi, where according to the arresting officer; he was engaged in goat trading. PW1's stolen car was recovered on 28th June 2009 complete with a new number plate, while being used at another robbery at Githunguri. PW6 was convinced the Appellant was involved in the robbery and charged him with the offence.

10. PW7 Susan Mulandi stated she too served as a house-help in the residence of PW3. She narrated the events of 8th January 2009 much along the same line as her fellow house-help PW5. She revealed in her evidence that the Appellant served as a shamba boy during the day and a guard during the night. On the material night she witnessed the shamba boy being held on the shoulder by a young man who wielded a gun. The shamba boy called out to Susan, saying he was being killed. After they were taken to the old lady's bedroom by the robbers, PW7 never saw the shamba boy again.

11. PW8 Sergeant Simon Kamau was at Kihara Police Post which in under Gigiri Police Post. He received a report on 8th January 2010, around 11.00 a.m. that a robbery was underway at House Number 199 Ruaka Drive in Runda. He proceeded there, accompanied by another Officer Yusuf Galpo. They found the occupants locked in a room. The Officers opened the house and freed the occupants. The victims narrated what had taken place. The guard was missing from the compound, and his personal effects were not in his room. The robbers took off with the stolen items using the family's vehicle KAQ 040 A, a Toyota Corolla. There was no breaking into the family's residence, and the witness got the impression the robbers gained free entry the time Biren Shah escorted his electrician to catch a Matatu. PW9 CPC Christopher Kithuka received a report while at his base that the Appellant has been sighted at Kariobangi on 18th June 2010. The Officers rushed there with their informer and arrested the Appellant. PW1 identified him as the guard who was on duty on the night of the robbery. PW9 confirmed the identity of the Appellant from his identity card and personal data from the Registrar of Persons.

12. Placed on his defence the Appellant initially indicated he would remain silent. The proceedings were throughout interpreted to him from English to his native Borana language. The Court informed him that the offence carried a mandatory death sentence. The Appellant answered that he was aware of this. He

later on 8th February 2011 changed from remaining silent to giving an unsworn statement, explaining that he had not understood the previous proceedings.

13. The Appellant stated he worked as a Guard and Shamba Boy at the Biren Shah Residence. In the evening of 8th January 2009, Biren Shah asked the Appellant to open for him the gate as he went to drop the electrician. When he opened the gate, a group of five men came in with guns and rungus. They held the Appellant hostage. They tied him up, took him to the house where they forced him to sit with the complainant's family. Later on, two of the robbers took the Appellant to the gate and asked him to open for Biren Shah. They asked him not to raise any alarm, and he obliged as he was scared. The gangsters robbed their victims who included the Appellant. They ransacked the house, bound the Appellant and left with him in a blindfold. He was abandoned in a forest. He spent the night there. In the morning, he was rescued and taken to Kariobangi. He was scared, and decided not to report back to work. The person who had taken the Appellant to work at Biren Shah Residence was arrested. The Appellant continued to do his business normally at Kariobangi until his arrest in the middle of the year 2010.

14. The Trial Court found the following issues were uncontroverted: that, the Appellant was employed by the complainant as a Shamba Boy and Guard at Runda Residence; the complainant and his family were attacked and robbed of the items listed on the charge sheet, on the 8th January 2009; the robbers were armed with dangerous weapons which included guns, pangas and other crude weapons; the Appellant left the homestead with the robbers after the attack; and that the Appellant never went back to work after the incident. The only issue that came up for consideration was whether the Appellant was a principal offender as defined by Section 20 of the Penal Code. Was the Appellant a willing participant in the commission of the robbery?

15. The Lower Court concluded that the Appellant was a willing participant. PW3 testified that the Appellant took un-normally long time to open for him the gate after he had dropped the electrician. PW1 and the Appellant had a conversation on the driveway. At this time the Appellant had already been inside the Residence and knew there were robbers in there, as borne out in the evidence of PW2. He never alerted Biren Shah that there were robbers in the house. PW3 only realized they were under attack when confronted by gun wielding robbers once he had entered his house. Even then the Appellant remained outside and never raised any alarm. He instead ushered in Biren Shah to his house where he knew the robbers were lying in wait. According to PW2 and PW3, a few moments before the robbers left, the Appellant had a change of clothes. Some days before the attack, he had confided in PW5 that he had labour grievances with his employer and had vowed he would therefore, visit harm upon the complainant. His defence that he was a victim of the robbers was found untenable in light of the abundant evidence implicating him. The Trial Court convicted the Appellant and sentenced him to suffer death.

16. The Appellant presented the following grounds in his Petition of Appeal-:

[a] The Learned Trial Magistrate erred by finding the prosecution to have discharged its burden of proof beyond reasonable doubt;

[b] The Learned Trial Magistrate erred in holding the Appellant to be a Principal Offender within Section 20 of the Penal Code;

[c] The Learned Trial Magistrate erred by convicting the Appellant on indirect evidence; and

[d] The Trial Magistrate erred by failure to consider there was no positive identification, no exhibit recovered on the Appellant, and relied on contradictory evidence adduced by the prosecution.

17. The Appeal was heard on 22nd October 2013. The Appellant submitted that the Trial Court failed to properly consider his defence. This resulted in the erroneous conclusion that the Appellant was a principal offender under Section 20 of the Penal Code. No one saw the Appellant involved in the commission of the offence. The Appellant restated to us, the facts as narrated to him in his defence before the Trial Court. His conviction was grounded on mere suspicion. He was under stress throughout the robbery, and had been ordered by the robbers not to reveal anything to Biren Shah, after he had returned from dropping

off his electrician. He also explained to us that he was taken hostage by the robbers, and abandoned in a bush. He denied that he was ever involved in the robbery. Ms. Nyauncho asked us to find the Lower Court to have properly applied Section 20 of the Penal Code. The Appellant was seen walking around with the robbers as the robbery took place. He did not alert Biren about the robbers after he returned from dropping of his electrician. Six witnesses who were present gave evidence. They were corroborative and consistent. The Appellant had the opportunity to raise the alarm but opted not to. He had hinted to PW5 that he would harm PW3. His defence that he was a victim of the robbery was properly rejected. The State submitted the Appeal ought to fail, and the decision of the Lower Court upheld.

18. As stated in the ***Shantilal M. Ruwala v. the Republic [1975] E.A. 570*** we have the responsibility to re-evaluate the evidence of the Lower Court, weigh conflicting evidence and draw our own conclusions. The High Court as the first Court to which the Appeal has been submitted, does not merely scrutinize the evidence recorded by the Trial Court to see if there was some evidence to support the conviction; we must do our own re-evaluation, while cautioning ourselves that the Trial Court had the advantage of hearing and observing the witnesses, as laid down in ***Peters v. Sunday Post [1958] E.A. 424.***

19. We are ready to concur with the findings of the Lower Court that a robbery took place in the house of Biren Shah on the night of 8th January 2009. It was not in controversy that the Appellant was employed by Biren Shah as a Shamba Boy by the day, and Guard by night. It was common evidence that the Biren Shah family lost enormous properties that included a motor vehicle, money in different currencies, jewellery and assorted electronic goods. The loss was estimated at a staggering Kshs. 13.9 million. There was evidence that the Appellant left in the company of the robbers either voluntarily or involuntarily, and did not return to work any day thereafter. There was non-contested evidence that the Appellant was arrested on 18th June 2010 at Kariobangi where he was trading in goats. The arrest came one and a half year after the robbery.

20. The Lower Court phrased the issue in convicting the Appellant as revolving around Section 20 of the Penal Code which is in the following words:

‘’*When an offence is committed, each of the following persons is deemed to have taken part in committing the offence, and may be charged with actually committing the offence, that is-*

[a]. every person who does the act, or makes the omission which constitutes the offence.

[b]. every person who does or omits to do any act for the purpose of aiding another person who commits the offence.

[c]. every person who aids or abets in commission of the offence.

[d]. any person who counsels or procures any other person to commit the offence.’’

21. We think in determining whether the Appellant should have been deemed a principal offender, there ought to have been careful consideration of the evidence given by the prosecution witnesses as well as the evidence given by the Appellant. The findings of the Lower Court appear to us, to have been inferred from the conduct of the Appellant, before, during and after the robbery. He was said to harbor grievances on account of unfavourable labour conditions against his employer and had confided he would do harm to his employer; during the robbery, he was seen walking around with the robbers, failed to alert his employer of their presence, failed to set off the alarm; and after the robbery, took off with the robbers and never reported again for duty. The evidence against the Appellant was circumstantial, and there was need to evaluate evidence carefully before characterizing the Appellant’s role as that of a principal offender in a capital offence.

21. In the ***Court of Appeal Criminal Appeal Number 51 of 2004 between Elizabeth Gitiri Gachanja and 7 Others v. the Republic [2011] e-KLR,*** it was emphasized that evidence relied upon to convict in capital offences must be of high quality, credible and beyond reasonable doubt. In a chain of judicial authorities preceding ***Elizabeth Gitiri Gachanja and 7 Others v. the Republic*** such as ***Simon Musoke v.***

the Republic [1952] E.A. 715; Teper v. the Republic [1952] AC 480; Rex v. Kipkering arap Koske and Another [1949] E.A.C.A; and ***Mkadisho v. the Republic [2002] 1 KLR,*** the principles applicable to circumstantial evidence have become distilled, and we have a duty to pay heed to these time-tested tools for testing criminal culpability based on indirect evidence. The inculpatory facts must be shown to be incompatible with the innocence of the accused person, and incapable of explanation upon any other reasonable hypothesis, than that of the guilt of the accused person. ***Taylor on Evidence- 11th Edition 74*** clarifies that the circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt. Under ***Teper v. the Republic*** the trier of fact must be sure there are no co-existing circumstances which would weaken or destroy the inference.

22. The Lower Court neglected certain aspects of the prosecution evidence, which viewed together with that of the Appellant; raise doubt in our minds whether the evidence relied upon by the Lower Court to convict the Appellant was of high quality, credible and beyond reasonable doubt. Were the inculpatory facts as listed by the Trial Court, incompatible with the innocence of the Appellant, and considering what he said in his defence and restated on appeal, incapable of any other reasonable hypothesis, than that of the guilt of the Appellant? PW7 Susan Mulandi testified she was upstairs feeding Biren's Children when she saw the Appellant along the corridor. A young man was holding the Appellant by the shoulder, with a pistol in hand. The Appellant called out to Susan, saying he was being killed. She never saw the Appellant again after this. This was consistent with the evidence of Mrs. Biren Shah PW2, who testified she saw the Appellant enter the house. She enquired from him why he was in the house, yet the domestic rules did not permit him in. He pointed behind him without saying anything and a man appeared from behind the Appellant, holding a gun. The Appellant acknowledged he was walking and talking around with the robbers, but explained these actions were not of his own free will. He was threatened, and compelled to the do the acts or omissions for which the Trial Court concluded he was a principal offender. We beg to differ with the conclusion arrived at by the Trial Magistrate. The suggestion that the Appellant was not acting or failing to act of his own free will was not given adequate consideration by the Learned Magistrate. Nothing in his Judgment indicates that he considered the exculpatory aspects of the narrative contained in the evidence of PW7. All the facts did not point to the free will of the Appellant. There was evidence of a gun placed upon him to act, or fail to act. Other peripheral events on the night that should have been flagged for consideration by the Trial Court include that no one saw the Appellant remove anything from the wealth of Biren Shah. Nothing was recovered from the Appellant after a heist where Kshs. 13.9 million was lost. He was found a year later in Kariobangi selling goats. He did not direct the robbers to any of the hidden treasures. Susan for instance was asked by Biren to show the robbers where his briefcase containing cash was. She did not direct the robbers to the briefcase out her own free will.

23. There was no convincing evidence that the Appellant, of his own free will, did an act or made an omission which would constitute the offence of robbery with violence. He was not shown to have done or omitted to do any act, of his own free will, to aid the robbers. There was nothing to suggest he counseled or procured the robbers.

24. In our view, the inculpatory facts were not incompatible with the innocence of the Appellant. They were capable of explanation as shown by the evidence of Biren's wife, Susan and the Appellant; he did not act or fail to act of his own free will. It was plausible the Appellant was throughout driven by fear. He failed to raise alarm, alert Biren and return to duty through fear. It was not convincing that the Appellant organized the robbery to revenge against his employer because he was made to dig wells during the day, and guard the Biren residence at night as they slept. Robberies are not centred on revenge, but are purposed on unjust enrichment. The fact that the Police found the Appellant's personal items missing after the robbery could not lead any reasonable tribunal, exercising its mind judiciously, to conclude that he Appellant had pre-arranged for a change of residence. Evidence given by the house-helps demonstrated the robbers did not distinguish between the master's and the servant's property; they stole from the master as well as the servant. There was nothing to prevent them from carting away the Appellant's personal items. It was possible the Appellant had grievances against his employer, as many other employees are alleged to have had, but the idea that the Appellant participated as a principal to get back at Biren appears to us way out of line.

25. There was nonetheless strong suggestion from the prosecution evidence that the Appellant should perhaps have taken a greater risk in preventing the felony against his employer. Should he not have taken the risk and whispered in the ear of Biren, or shouted that danger lurked? Should he have taken more risk and darted to where the alarm was and set it off? Should he have taken more risk and set the dogs lose before they were alleged to be sedated? Our answer to these questions is that perhaps yes, he should have assumed the risk. Guards by the nature of their work are daily encountered with these of risks. It is inherent in the nature of the work they do. In our view it would be wrong however, if Courts were to find that every time a Guard fails or neglects to prevent a crime against their employers, or employers' properties, they become principal offenders or accomplices. The circumstantial evidence against such Guards must be carefully examined. In sum, we are persuaded that there were certain aspects of the evidence which if considered, would not have led to the conclusion that the Appellant was a principal offender. There were very compelling reasons to find the Appellant was not a willing participant in the undoubted offence committed against the Biren Family.

25. Ultimately, we find there were some bits and pieces of evidence to conclude the Appellant, on the 8th January 2009, failed to use all reasonable means to prevent the commission or completion of a felony. He knew there were robbers who had raided the Biren Shah family, and while they were at it, he failed to use all reasonable means to prevent the robbery. That in our respectful view disclosed that the Appellant was guilty of neglect to prevent a felony. His attitude may have arisen from the employment relationship he had with Biren. Under Section 392, he should have been tried and convicted of the offence of neglect to prevent a felony, which attracts the maximum penalty of two years imprisonment. Charging, trying and convicting the Appellant under Section 296 [2] and sentencing him to forfeit his life, was disproportionate to his contribution in the criminal enterprise. His was an act of neglect, which even, perhaps well defended, may have resulted in acquittal. From our re-evaluation of the evidence, Jarso Galgalo Diba could at most be convicted for the offence of neglect to prevent a felony under Section 392 of the Penal Code. The facts disclosed he was a negligent guard, not a principal robber. We have observed that the Police do not appear to have exhaustively investigated the crime, even after recovering Biren's getaway Toyota at Githunguri. The principal robbers are still out there, and the public is least served by the nailing of a Guard cum- Shamba Boy, in the loss of property worth Kshs. 13.9 million. We are persuaded to give the Appellant the benefit of doubt and make the following orders-:

[a] The conviction of the Appellant for the Offence of robbery with violence contrary to section 296[2] of the Penal Code is quashed;

[b] Sentence imposed under that law is set aside;

[c] We substitute the conviction for one of neglect to prevent a felony contrary to Section 392 of the Penal Code, and sentence the Appellant to serve two years imprisonment from the date of his sentencing in the Lower Court, the 22nd February 2011; and,

[d] Considering that period has been served in prison by the Appellant, ending 21st February 2013, we order that the Appellant shall be set at liberty forthwith, unless otherwise held for lawful reasons.

Dated and delivered at Nairobi this 22nd day of November 2013

_____ _____

Monica Mbaru James Rika

Judge Judge