REPUBLIC OF KENYA

HIGH COURT OF KENAY AT NAIROBI

CRIMINAL APPEAL 479 OF 2009

BONIFACE NYONGESA BARASA…….. APPELLANT

VERSUS

REPUBLIC ..……..…….. RESPONDENT

(Appeal from original conviction and sentence in Criminal Case 8157 of 2007 in the Chief Magistrate's Court at Kibera – C. Maundu)

JUDGEMENT OF THE COURT

Kadebe, State Counsel

The charge –

1. The appellant, Boniface Nyongesa Barasa was on 30th November 2007 charged before Principal Magistrates' Court Kibera, in Criminal Case No.479 of 2009 with four counts of robbery with violence contrary to section 296(2) of the Penal Code. The charges read;
    a. Boniface Nyogesa Barasa. 2. David Ilakiti Emushata : on the 13th day of May 2005 at 4th parklands Avenue within Nairobi area province, jointly with others not before court being armed with dangerous weapons namely AK47 rifles and pistols robbed JYOTINDRA SHAH of his motor vehicle Reg. No.KAG 660S make Mitsubishi lancer, cash 66,000/=, gold jewelleries and Sony DVD player all valued at KSHS.672,000/= and at or immediately before or immediately after the time of such attempted robbery threatened to use actual violence against the said JYOTINDRA SHAH.
    b. Boniface Nyogesa Barasa. 2. David Ilakiti Emushata : on the 13th day of May 2005 at 4th parklands Avenue within Nairobi area province, jointly with others not before court being armed with dangerous weapons namely AK47 rifles and pistols robbed MANOJI KUMAR of his mobile phones make Nokia 2100 and Samsung 200, 4 wrist watches, gold ring and cash Kshs.5,000/= all valued at kshs.85,000/= and at or immediately before or immediately after the time of such attempted robbery threatened to use actual violence against the said MANOJI KUMAR.
    c. Boniface Nyogesa Barasa. 2. David Ilakiti Emushata : on the 13th day of May 2005 at 4th parklands Avenue within Nairobi area province, jointly with others not before court being armed with dangerous weapons namely AK47 rifles and pistols robbed RASHABEN JYOTINDRA SHAH of her mobile phone make Nokia 2100, wrist watch, three gold rings, two bangles and a pair of earrings all valued at Kshs.70,000/= and at or immediately before or immediately after the time of such attempted robbery threatened to use actual violence against the said JYOTINDRA RASHABEN.
    d. Boniface Nyogesa Barasa. 2. David Ilakiti Emushata : on the 13th day of May 2005 at 4th

parklands Avenue within Nairobi area province, jointly with others not before court being armed with dangerous weapons namely AK47 rifles and pistols robbed SNIGDHA JAYATILAL SHAH of her mobile phone make Nokia 2100, two diamond rings and a pair of earnings all valued at Kshs.80,000/= and at or immediately before or immediately after the time of such attempted robbery threatened to use actual violence against the said SNIGDA JAYATILAL SHAH

Facts

2. The facts of the case are that there are four (4) complainants Joytindra Shah Kanji, Manoji Kumar Shah, Rashaben Kumar, and Snigdha Jayatilal Shah at the trial outlined as PW1, PW2, PW3, and PW4 where PW1 and PW2 are brother and PW3 and PW4 are their wives respectively all resident in one place at 4th Parklands Avenue within Nairobi. On 13/5/05 about 7.00 p.m. all the complainants left their home in one vehicle Reg. No.KAG 040H Toyota van to go to their sister's house along Waiyaki way to take a bath since they did not have running water in their house. The appellant who was their security guard was left behind guarding the gate and when they returned at 11.00p.m. He opened this gate and PW1 proceeded to open the door to the house but heard screams from PW3 and PW4 who had been left behind. 4 men who were in police uniform entered the house and introduced themselves as police officers and said they were investigating if there were drugs in the house, two were armed with AK47 rifles, the third had a pistol and the 4th had a rungu. One of the men with a pistol said they were robbers and that the complainants should surrender their entire valuable, they ransacked the house, took money, jewelleries, mobile phones and electronic goods. They locked the 4 complaints in the toilet and then left using a family car No.KAG 660S Mitsubishi Lancer. Ten minutes later they managed to open the toilet and came out. The appellant was not there he had disappeared. They did not see him again until 23/11/07 when the complaints were summoned at Parklands Police Station to identify him. Nothing was recovered from the robbery.
3. PW1 said that the 2nd accused used to visit the appellant while working at their house. He however did not identify him as one of the attackers. PW2, Pw3 and PW4 supported PW1 evidence; they all identified the appellant as the one who was on duty the night of the robbery. In defence the appellant advanced an alibi on the basis that at the time of the robbery he had left his employment and was not working for the complainants. This defence was rejected, the appellant was found guilty for robbery with violence under section 296(2) of the Penal Code. His appeal is against the conviction and sentence.

Grounds of appeal

4. The appellant filed six (6) grounds of appeal, these grounds challenge the evidence that the prosecution failed to proof its case beyond reasonable doubt, that the court relied on hearsay evidence, there was no proof that the appellant had signed the master roll book with his employer, the evidence before court had contradictions, the alibi wad not countered and hence a violation of section 212 of the CPC. To this, the appellant filed a further record, Supplementary Grounds of Appeal which outline 7 grounds which upon examination has 4 grounds being that the learned trial magistrate erred in law by;

i. *Failing to analyse and re-evaluate the entire trial record and observe that the case was framed up and the evidence was impeachable under section 163(1) (c) of the Evidence Act, thus unreliable.*
ii. *Relied on inconsistent and contradictory evidence to base a conviction and sentence*
iii. *That vital witnesses were not called and hence the case was not proved to the required standard*
iv. *That the burden of proof was shifted to the appellant when the court disowned the alibi.*

Submissions

5. In his written submissions, the appellant supported his appeal that the first report to the police is significant as it provides a good test by which the truth and accuracy of the subsequent statements may be gauged and provide a safeguard against any later embellishment of the case. In this case

the complainants all stated that the appellant was guarding their residential premises on 13/5/2005 at Parklands Avenue which is in contrast to other witnesses especially PW5 who said that he was on duty at Kiambu Fertilizer and that MF1 indicate in the month of May 2005, he was at Kiambu fertiliser. That MF1 was with regard to a master roll of many pages attached together to form a book but this was detached and the authenticity of it in doubt. That MF1 was submitted as a substitute to the O.B. which was used by PW5 to record attendance but was said to be missing. That in the absence of these records where a supervisor is unable to identify the person who was on duty at the complainants premises it creates a vacuum in the prosecution case. He relied on the decision in ***Charles Njoroge Ndura versus Republic, Criminal Appeal No.5 of 2006*** **thus;**

> *… The visual identification of suspect or defendant by witnesses many years has been recognised as problematic and potentially unreliable, it is easy for an honest witness to make a confident but false identification of a subject, evening some cases where the subject is well known to him. …such problems may be compounded by the understandable, but often misguided, eagerness of many witnesses to help police by making positive identifications …*

6. That in this case, the complainant was in shock after their attack and their visual memory may have failed them.
7. The appellant also submitted that vital documents were not produced in evidence especially there was no record that he was employed to guard the premises of the complainants, the persons he replaced was not called and thus the prosecution case had gaps. On his alibi, the appellant submitted that the trial court made an error to ignore it as he had by then vacated his job and was incumbent on the police to undertake proper investigations in rebuttal in that he was by then working in Eldoret Panacle security and not in Nairobi. He cited the case of ***Wangombe versus Republic (1980) KLR 149,*** where the court held;

> *…when accused raises an alibi defence as answer to burden of proof and the burden of proofing his guilt remains on the prosecution…*

8. That the circumstances of the appellants arrest were not investigated or his alibi countered and thus his appeal should be allowed.
9. In response, Kadebe for the state submitted that the appellant was properly convicted in that on the night of the robbery he was the guard at the Complainants residence, when at 11.00p.m. The complainants return home, the appellant opened the gate; PW1 opened the door to the house and was attacked by 4 armed men who robbed them of their valuables. This evidence was corroborated by that of PW2, PW3, and PW4. That the appellant was arrested since he failed to stop the robbery from taking place and the court relied on section 20(1) (b) of the Penal Code. After the robbery the appellant did not report the offence, he disappeared and was only arrested 2 years later and the trial court drew the inference that the appellant had worked in cohorts with the armed robbers.

Determination of the issues

10. The appellant is charged under the provisions of section 296(2) of the Penal Code. On the analysis and evaluation of the evidence and the challenge that the learned trial magistrate failed in this regard, we note from the record that PW1 stated that the appellant as the security guard in the premises was there on temporary basis as a replacement, this is the person who opened the gate for them when they left their house and returned to on the material night of 13/5/05 and his wife PW2 was familiar with him and asked him if water had resumed and if there were any visitors when they were away. This evidence is supported by PW3 and PW4 who were all present on this night and were robbed. PW5 equally supported this evidence that the guard placed at the complaints residence disappeared after the robbery and from their records, the appellants was on duty at this residence and when they tried to trace him they were told that he had died while on escape to Tanzania, they went to Malakisi his home and the parents were shocked with this information. The appellant was later traced to Eldoret working for another company and was arrested. He was positively identified by the complainants and PW5 as the person who was the guard at the

complainants house on the night of the robbery and the employee placed to guard. In defence the appellant stated that he stopped work with the company that had placed him at Kiambu Fertilizer on 6/2/05 and moved to Eldoret from where he was arrested. However, when the appellant cross-examined PW5, he noted that he was deployed at Kiambu Fertilizer but was temporality placed at the complainants' residence. This therefore creates the inference that the appellant was on 13/5/05 still in the employment of the Eurosec and was on temporary placement at the complainants' residence. He was positively identified by all the complaints. His disappearance soon after the robbery on 13th May 2005 and location to Eldoret create a link that he was running to evade justice.

11. In effect, the appellant's arrest proceeded from the description given by the complainants and the assistance of his then employer Eurosec Limited. In those circumstances, it is correct that the complaints were able to positively identify him as confirmed by PW6, Ronald Anyona who booked the report and conducted the investigations and noted that the appellant led them to arrest the 2nd accused who was discharged by the lower court. The trial court in disregarding the alibi of the appellant was correct in that way before his arrest, the complainants and PW5 had been able to give a good description of him and made a record of this when they recorded their evidence with PW6. On the ground that material witnesses were not called, we note in the case **of *Bukenya and others versus Uganda (19720 EA 549,*** the court of Appeal for East Africa stated;

> *It is well established that the Director has the discretion to decide who the material witnesses are and whom to call, but this needs to be qualified in three ways. First, there is a duty on the Director to call and make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the court itself has merely the right, but the duty to call any person whose evidence appears essential to the just decision of the case. thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tendered to be advance to the prosecution case.*

12. We, with respect share the view of the lower court on the finding that the witnesses called by the prosecution before the court, sufficiently established that the appellant was the person on duty at the residential house of the complainants, a robbery took place and he failed to prevent it or make a report, he disappeared immediately after the robbery and was only traced many months later.
13. In totality of all the above is that, the evidence before the learned trial magistrate was properly analysed as required, and correctly convicted the appellant.
14. In conclusion, the appeal lodged by the appellant Boniface Nyongesa Barasa is dismissed.

Dated and delivered at Nairobi this 20th day of December 2013

M. Mbaru **J. Rika**

Judge **Judge**