**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL APPEAL CASE NO. 112 OF 2008**

**RICHARD MITALO MUKOTO .....APPELLANT**

**VERSUS**

**REPUBLIC ……..……RESPONDENT**

*(From the original conviction and sentence in Criminal Case No. **892 of 2007** of the Chief Magistrate's Court at Nairobi by S. Muketi – Senior Principal Magistrate)*

**JUDGMENT**

**Introduction**

1. This appeal stems from the appellant's dissatisfaction with the conviction in the Nairobi Chief Magistrate's court, in four counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code**.

**Facts of The Case**

2. The particulars of the offence were that on the 22nd day of December 2006 at Karen Tree Lane of Langata within Nairobi jointly with others not before court and armed with dangerous weapons namely pistols, they robbed Renzo Bernandi of one Beretta pistol S.No.089899 with 50 rounds of ammunition, cash Kshs.300,000, US $200, 1200 Euros, 800 pounds, cameras, suits and other clothing all valued at Kshs.2 million in **count I**. They also robbed Peroni Ferdinando of cash 2450 Euros, 3 pairs of shoes and assortment of personal belongings, Martina Bernandi of an assortment of jewellery, one camera, one Nokia mobile phone all valued at Kshs. 150,000/=, and Russo Salvatore of Kshs.10,000/=, one Nokia N-70 and one fossil watch all valued at Kshs.100,000/= in **counts II, III** and **IV** respectively. It was further alleged that at, or immediately before, or immediately after the time of such robbery they used actual violence against the said victims in the four counts respectively.

**Grounds of Appeal**

3. Mr. Wangila learned counsel for the appellant in his submissions, argued that the prosecution case was based on the evidence of the complainant, and that the evidence as a whole was incredible and the appellant's defence was not considered.

**Respondent's Reply**

4. The appeal was opposed by the state through learned counsel Miss Maina who urged the court to dismiss the appeal on grounds that the evidence was sufficient to support both conviction and

sentence. She pointed out that **PW1** had testified that the appellant, who was his watchman of 10 years, was the one who opened the gate for him. When he entered the compound he found other people waiting for him and they attacked him. A few minutes later the appellant opened the gate for the complainant's daughter. Miss Maina also urged that the appellant had just received a salary advance from **PW1** and there was no reason for **PW1** to implicate him in the robbery, since there were no grudges between them.

5. Miss Maina further submitted that the appellant fled after the robbery, switched off his phone permanently and was arrested in his rural home five months later. The only irresistible inference to be drawn from his conduct, it was urged, is that he was together with those who robbed **PW1**, and that his defence was considered.

**Summary of The Case**

6. The appellant was tried together with another who was acquitted at the close of the trial in the lower court. In sum, the case before the lower court was that the appellant used to work for the complainant as a watchman. That on the night of the incident the complainant returned from the airport where he had gone to pick some guests. That his gate was opened by his watchman of over 10 years, but when he entered the compound he and his guests were accosted by robbers who were waiting inside.

7. He was taken in to the house and in an ordeal that lasted for hours he was robbed of personal effects, cash and a gun. That the appellant was the said watchman and he had a remote control for the alarm in his pocket which he did not press. That the appellant disappeared soon after the robbery and was arrested much later in Western province.

8. The appellant's line of defence which was tendered without oath was that he too was a victim of the said robbery. That the robbers abducted him and left the compound with him and threatened him with dire consequences including death. That since he had been paid on that day, he made his way to his rural home where he remained until he was later arrested. He denied any involvement in the offence.

**Issues For Determination**

9. The two issues framed for determination by the learned trial magistrate were:

i. *Whether there was any evidence connecting the appellant to the offence, and*

ii. *Whether a doubt had been cast on the prosecution evidence.*

After a careful analysis of the evidence it is our considered view that the appellant's conviction was based on circumstantial evidence arising from his conduct during and after the robbery. We therefore weighed the evidence adduced in the case and the grounds advanced on appeal, to determine whether the weight of the evidence adduced by the prosecution was sufficient as a basis of conviction and whether the manner in which all the evidence on record was evaluated by the trial court was satisfactory.

**Analysis of Evidence**

10. We have analysed and re-evaluated the evidence on record, bearing in mind that the duty of the first appellate court is not merely to scrutinize the evidence on record, to see if there was some evidence to support the lower court's findings and conclusion, but to draw our own inferences and reach our own conclusions. At all times we were alive to the fact that we did not have the advantage of seeing and hearing the witnesses as they testified and gave due allowance therefor. In this we were guided by the case of **Kiilu and Anor v Republic [2005] 1 KLR pg 174,** Tunoi, Waki and Onyango Otieno JJA, held *inter alia* that:

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate courts' own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.***

11. On the question of the sufficiency of the evidence, Mr. Wangira contended and we also note, that the prosecution's case rested on the evidence of **PW1**. His guests left Kenya before they testified, as is discernible from the prosecution's application on record, to close their case without calling them since they had left the country.

12. In assessing the evidence of **PW1** who was the lone material witness we took into account the Court of Appeal decision in **Ogeto v Republic [2004] 2KLR**, in which the Hon. Judges of Appeal Omolo, Githinji and Onyango Otieno, JJA held, *inter alia*, that:

> ***"It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken".***

**PW1** was however sure that he had seen among his attackers, his watchman who had been in his employment for more than ten years. All the same, we still saw it fit to approach the evidence of the single witness with great circumspection because the question that arises is whether the appellant had any part to play in the robbery.

**Undisputed Facts**

13. The undisputed facts of this case are that the appellant was in the employment of **PW1** as a watchman and had been so engaged for a period of more than ten years. That when **PW1** returned home with his guests at about 11.30 p.m. on the night of 22nd December 2006, the appellant was the watchman on duty and he opened the gate for **PW1** to drive into the compound. That once inside the compound the car was immediately surrounded by six men, three of whom were armed with guns and they removed the occupants of the car therefrom and ordered them to lie down.

14. It was also not disputed that it was the appellant who opened the gate for the daughter of **PW1** to drive in a short while later, with her friend. That when the robbers took their victims into the house, they took more than an hour to go through the contents of the safe and thereafter took even more time to take all the other items that are set out in the charge sheet. That when they finally left with their loot the appellant went with them and did not return or report the robbery to the police. Apart from those undisputed facts there was no evidence that the appellant himself participated in the robbery directly.

**Inculpatory Facts**

15. The inculpatory facts that arise from the circumstantial evidence herein, are that the appellant opened the gate for **PW1** and later opened it for his daughter to enter the compound. While **PW1**, his family and visitors were bound and confined, the appellant did not suffer the same fate. We note however, that in the several hours that the victims were under siege, the appellant made no effort to call for, or go for help on behalf of the family whose security was the core business of his employment, although he had not been bound.

16. The robbers were so relaxed as to go out of the house to get a suitcase that was still in the car, empty it and fill it up with their loot, without eliciting any reaction from the appellant who was outside the house. When **PW1** finally freed himself and went outside the house, he found the appellant's security uniform abandoned in the compound while the appellant himself was nowhere to be seen.

17. **PW4** Mr. Mabea, a CID officer attached to Langata CID who investigated this case testified that when he visited the scene of the robbery and inspected the compound, no breach was found in the perimeter fence, which was composed of a Kei-apple hedge. This leads to a strong inference that someone let the robbers in through the gate. As stated earlier, it is undisputed that the appellant was the man at the gate on that fateful night.

18. **PW4** also testified that he visited the appellants abode in Kawangare on 23rd December 2006 and found that the appellant had vacated it a day before, which would be the day of the robbery. The appellant therefore knew that he would not be returning to that house when he left for duty on the evening of 22nd December 2006.

19. The appellant would have the court believe that he was forcibly taken away by the robbers and that he did not flee with them out of choice. If indeed he was abducted, his demeanor upon release does not lend itself to his innocence. He did not report the robbery to any police station in Nairobi or Kakamega where he took refuge, until he was smoked out by the Investigating Officer several months later. It was also noteworthy that his mobile phone was switched off once he left the compound and remained in that state thereafter.

20. We are alive to the fact that this being a criminal trial the appellant was under no burden to prove his innocence or to explain himself at all. Indeed it is settled law that even the burden of proving facts which justify the drawing of an inference of guilt, from circumstantial facts to the exclusion of any other reasonable hypothesis of innocence, is on the prosecution and always remains as such. See **Muchene v Republic [2002] 2 KLR page 367.**

21. We tested the circumstantial evidence herein against the test set out in the said case of **Muchene v Rep** (supra), in which Chunga, Tunoi & Owour JJ A held inter alia that:

> **"It is trite law that where a conviction is exclusively based on circumstantial evidence, such conviction can only be properly upheld if the Court is satisfied that the inculpatory facts are not only inconsistent with the innocence of the appellant, but also that there exists no co-existing circumstances which would weaken or destroy such inference."**

22. The learned trial magistrate did consider the appellant's defence in which he said that he too was a victim of the robbery, and found that was untenable. In the circumstances of this case we humbly agree with her findings.

23. None of the inculpatory facts taken on their own would suffice to found a conviction. Taken cumulatively however, they lead irresistibly to the inference that the appellant acted in concert with the gang of robbers that raided his employer's house on the night in question, and are incapable of explanation on any other reasonable hypothesis other than that of guilt.

24. On the basis of the foregoing we find that the evidence adduced against the appellant was sufficient and that the trial court evaluated it properly. For those reasons this appeal is found to have no merit and dismiss it in all four counts.

25. On the sentence, we hereby order that the appellant shall suffer death as by law prescribed, in **count No. I**. The sentences in **counts No. II, III** and **IV** respectively, shall remain in abeyance.

It is so ordered.

**SIGNED DATED** and **DELIVERED** in open court this **5th** day of **December 2013**.

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**R. MWONGO** **L. A. ACHODE**

**JUDGE** **JUDGE**