REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)
Criminal Appeal 28 of 2008

FREDRICK OCHOTSI MUNGALA .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT
(From original conviction and sentence in Criminal case Number 1934 of 2005 in the Chief magistrate's Court at Nairobi – L Nyambura (SRM) on 28th

January 2008)

JUDGEMENT

1. The appellant herein, Mr. Fredrick Ochatsi Mungala was charged with robbery with violence contrary to **Section 296 (2)** of the **Penal Code.**

2. The brief particulars of the charge were that on the 6th of March 2002, along General Mathenge Drive within Nairobi area jointly with others not before the court, while armed with dangerous weapons namely iron bars, robbed Mrs. Jaymin Shah of assorted Jewellery, one mobile phone make motorolla, two pairs of shoes, cash Kshs. 5000/= all valued at Kshs 222,000/= the property of Jaymin Shah, and at or immediately before or immediately after the time of such robbery caused the death of Jaymin Shah.

3. A brief statement of the prosecution's case is that on the 6th of March 2002, the complainant, **PWI**, Mr. Shirish Shah left his residence off General Mathenge Drive, Prime Wood Estate, at about 6.30 a.m, to go to his place of work. While there, a friend called him and told him that his wife had not turned up for a game of bridge. He tried to call her on the telephone but it went unanswered. He then called his neighbour Mrs. Kantaenben Shah and sent her to inquire if his wife was at home. Mrs. Kantaenben proceeded to **PWI**'s house and rang the door bell, but got no response, though she could see the car parked outside. She informed **PWI** of this and he decided to go home and find out what was going on.

4. On arrival, he entered through the kitchen door into his house since the main door was locked. He found his wife lying still and lifeless on the kitchen floor. She had no pulse and her mouth was gagged. She was blind folded and her legs and hands had been tied up with strings. He immediately called the Police. The appellant who was the complainant's employee, was later arrested and charged in court in August 2005 following investigations.

5. At the end of the prosecution's case, the learned trial magistrate found that the prosecution had proved their case beyond reasonable doubt, and convicted the appellant for the offence of Robbery with Violence contrary to **Section 296 (2)** of the **Penal Code**. He was sentenced to suffer death as by law prescribed. The appellant immediately filed an appeal faulting the trial court's findings on three fronts.

6. The learned state counsel, Miss Maina in opposing the appeal on behalf of the state, gave a brief

summary of the events that occurred on the day the deceased was killed, and urged that the conduct of the appellant on that day clearly pointed to his guilt. She urged the court to dismiss his appeal as untenable.

7. We have anxiously 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. In **NZIVO V REPUBLIC CR. APP NO. 81 OF 2003 [2005] 1 KLR PG 700** the learned Judges of Appeal, Tunoi, O'Kubasu and Waki JJA, held *inter alia* that:

"1. 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.

2. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

8. On the 1st ground, in his amended supplementary grounds of appeal, the appellant urged that the original trial was a nullity for violation of the appellant's fundamental constitutional rights to freedom as enshrined in Section **72(3)** of the repealed Constitution.

9. In Our analysis we revisited the persuasive views of Anyara Emukule, J. in **Republic vs. David Geoffrey Gitonga**, ***Criminal Case No. 79 of 2006*** **(Meru)**(unreported). In that case, the trial Judge declined to acquit the appellant saying that a breach of **Section 72 (3) (b)** does not render a trial a nullity, but entitles an accused person to compensation as stipulated in **Section 72 (6)**. The trial Judge reasoned thus:

"I am aware that contrary opinions have been expressed by others in this court. I do not share those views. I hold the considered view that such trial is not a nullity at all. These are my reasons. Firstly, the principle of nullity presupposes that the process of trial is void either because it is against public policy, law, order, and indeed, nullity is non-curable. Secondly, for a trial to be void in law it must be shown either that the offence for which the accused is being tried is non-existent, or that the authority or court seized of the matter has no authority to do so. It is a public policy of all civilized States that offenders be subjected to due process in respect of defined offences, and by duly competent courts or tribunal.

10. In the case of **JOSEPH ONYANGO OWUOR AND CLIFF CHIENG ODUOR VS REPUBLIC HC.CR.A NO.142 OF 2006**, the appellate court observed that the 14 days provided by the Constitution was not an absolute rule. The court stated as follows on the question of violation of **Section 72(3)** of the **Constitution**:-

"In exercising that power the court is in effect exercising judicial discretion for the benefit of an accused person. That, in our view, would explain the wording of section 72(3) of the Constitution. The 14 days duration is not absolute. The delay could be even for a month, provided that the delay may be justified in one way or another."

11. In the more recent case of **JULIUS KAMAU MBUGUA VS REPUBLIC CR. APPEAL No. 50 OF 2008**, the Court of Appeal reviewed a wide range of previous decisions on the issue of remedies available to accused persons who are taken to court later than provided for. The court rendered itself in the following manner:

"Moreover, it was not shown that the alleged unlawful detention had any link or effect on the trial process itself or that it caused trial related prejudice to the appellant which affected the validity of the trial. The alleged unlawful detention occurred long before the appellant was charged. The alleged

unlawful detention does not exonerate the appellant from the serious crime he is alleged to have committed. The breach could logically give rise to a civil remedy – money compensation as stipulated in *Section 72 (6).* ***That is the appropriate remedy which the appellant should have sought in a different forum."***

12. We also noted that the appellant did not raise the matter at the earliest possible opportunity so as to enable the prosecution to obtain an explanation on the delay. We find the invocation of this section at this late stage to be an afterthought by the appellant.

13. On the second ground of appeal, the appellant cites irregularity in the conduct of the trial vis a viz the adequacy of the explanation of the charge and every element thereof to the accused as is required by **Section 207 (1)** and **(2)** of the **Criminal Procedure Code, Cap 75** Laws of Kenya.

The section reads:

"(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.

(2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary.....".

14. We re-evaluated the proceedings of the trial court and found that the court record clearly indicates that the accused person in his defence began by stating categorically thus: **"I know what I have been charged with. I heard the evidence in court. I deny the charge."** He not only therefore, pleaded to the charge of his own accord, he confirmed in the defence statement that he understood the charges against him. We find therefore that there was no irregularity in the conduct of the trial.

15. On the third ground the appellant urged that the learned trial magistrate erred in both law and fact, by convicting him in reliance of circumstantial evidence which was too weak, and did not conclusively link him to the commission of the offence. It is instructive to note that **PW3** Julius Lurandi Ambani who was working as a security guard with EAR Security Ltd, at Prime Wood Estate, in General Mathenge area, recounted that he was already at work when he saw the appellant entering the compound at 8.00 a.m. on the material date.

16. PW3 knew the appellant before as an employee in the complainant's home within the estate. On the material day **PW3** saw the deceased drive out with her child at 8.30 a.m and later returned 10.00 a.m. The appellant was still in the house. At 11.30 a.m. he saw the appellant walking away from the house bare-footed carrying a small paper bag which contained **PWI**'s sports clothes. Later on at 12 noon **PW3** saw **PWI** crying and many motor vehicles had parked outside his gate. Shortly afterwards the police arrived. **PW3** later learnt that the lady of the house had been found dead in her kitchen. The next time he saw the appellant was in court after he was arrested.

17. The evidence of **PW3** was corroborated by that of **PW4,** Charles Otieno George, and **PW5**, Joseph Auma who worked with him at the security company called EARS. **PW4,** also confirmed having seen the appellant report to work at about 7.00 a.m. on the fateful day, and later leave at 11.30 a.m carrying a bag with sports gear for **PWI**, but did not come back thereafter as he ordinarily did. He testified that he also saw the deceased leave at 8.30 a.m. to take her child to school leaving the appellant in the house and that she returned at 10.30 a.m. **PW4** talked to the appellant as he had not seen him in 3 days, which was unusual.

18. The evidence of **PW1, PW3, PW4** and **PW5,** was circumstantial. To establish whether the circumstantial evidence adduced herein was conclusive and strong enough to sustain a conviction, we considered the case of **NZIVO V REPUBLIC** *(supra)* page 700**,** wherein the Court of Appeal held *inter alia,* as follows:

"In a case dependent on circumstantial evidence, in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other coexisting circumstances which would weaken or destroy the inference."

19. The inculpatory facts in the circumstantial evidence in the case before us, were that the appellant who was the house help at the deceased's house had not turned up for work for the three days preceding the ill-fated day, according to the testimonies of **PW1** and **PW4** respectively. The 3 security guards, **PW3, PW4** and **PW5,** told the court that they were all on duty at Prime Wood Estate, on the said date of 6th March 2002, and their evidence was in agreement that the appellant reported to work that morning, and later left the compound at around 11.00 a.m. or 11.30 a.m. carrying a bag which the guards identified as **PWI**'s sports bag. **PW3** also observed that he was barefooted when he left the house. They did not search the appellant because he explained that he was taking the bag to **PWI**.

20. PWI found the appellant's shirt and shoes in the kitchen where he found the lifeless body of his wife, but the appellant himself was nowhere to be seen. He had not left the appellant nor his clothes or shoes in his house when he went to work at 6.00 a.m. that morning. The deceased returned to the house from her child's school at 10.00 a.m. From then on the appellant was alone in the house with the deceased till he was seen exiting the house at 11.30 a.m. by the guards. There were no signs of forced entry into the house.

21. PWI confirmed that he had seen the appellant in that shirt most of the time when he was working. The appellant used to go off duty on Saturday and evening and return to work on Monday morning. This time he did not return until the fateful Wednesday morning. It was also noted that he had removed all his personal effects from the servant's quarter.

22. The facts that would weaken the inculpatroy facts are that there was another worker in the complainant's house called Stephen Makau. However, he did not come to work when he went off duty on the Saturday preceding the robbery. If he had come on duty the guards would have seen him just like they did the appellant. That fact is therefore discounted.

23. The difference in the evidence of the guards was because they were stationed at different points. **PW3** was on the paths within the estate and saw the appellant leaving the deceased's house No. 34 bare-footed and carrying a bag which contained **PWI**'s sports gear. He said he was taking the items to **PWI**. He walked towards house No. 26 which was towards the gate. According **PW3** the occupants of house No. 26 had a relationship with **PWI**'s family and would deliver anything he forgot at home to him in the office if he required it. By the time the appellant reached the gate said to be some 200 metres away, he was wearing shoes. **PW4** was manning the gate.

24. PW6, PC Josiah Nyabera attached to November Squad, told the court that on 6th March 2002, while attached to Gigiri CID, he visited the scene of robbery at Prime Wood Groove, within Spring Valley area, and observed that from the set up of the estate there was only one entry and exit point, and that, there was no chance of a person entering the compound without the security personnel seeing him. The estate was properly manned, and there was no sign of forced entry into the complaint's house.

25. We respectfully agree with Miss Maina the learned state counsel that the evidence adduced against the appellant was sufficient to sustain a conviction and sentence against him. The circumstantial evidence pointed irresistibly to the guilt of the appellant and was incompatible with his innocence.

26. PW9, Dr. Jane Wasike Simiyu produced the post mortem report for the deceased on behalf of the pathologist Dr. Kirasi Olumbe. In Dr. Olumbe's expert opinion the deceased met her death as a result of asphyxiation from being smothered.

27. The essential elements of **Section 296(2)** of the **Penal Code** under which the appellant was charged

are set out as follows:

"If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons if at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes, or uses any other personal violence to any person ..."

It has been established elsewhere in this judgment that the appellant was alone with the deceased in her house at the time of the robbery. There was therefore no eye witness to the actual robbery, to establish whether the appellant was armed. We find however, that the evidence of asphyxiation points to the use of personal violence, against the deceased by the appellant during the robbery. We therefore, find that the offence of robbery under **Section 296(2)** of **Penal Code** has been proved against the appellant.

28. The appellant gave unsworn testimony and called no witnesses in his defence. He denied the charge stating that he had sought permission to take leave from work and go to his rural home for 2 weeks in March 2002. He further stated that he was unable to return due to lack of funds, and obtained new employment as a boda boda operator. It was while there that he was arrested and charged. We note that the appellant was arrested in early August 2005. His defence flies in the face of the overwhelming evidence on record and did not dislodge the prosecution's case against him.

In the circumstance, we are satisfied that the Appellants appeal is without merit and we accordingly dismiss it.

SIGNED DATED and **DELIVERED** in open court this **26th** day of **July 2012**.

F. A. OCHIENG **L. A. ACHODE**

JUDGE **JUDGE**