**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**Criminal Appeal 100 of 2004**

**LAWRENCE NKONGE MWIANDI ……..…APPELLANT**

**VERSUS**

**REPUBLIC……...…….……..RESPONDENT**

**JUDGMENT**

LAWRENCE NKONGE MWIANDI, the Appellant was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the charge were that on the 10th day of November 2002 at Kenya Seed Company Limited in Nakuru District of the Rift Valley Province, jointly with others not before court, while armed with dangerous weapons namely electric wires they robbed Julius Kipchumba Cherono of one mobile phone make Erickson valued at Kshs.12,900/-, one spectacles case valued at Kshs.500/- and cash money Kshs.149,102/- all the total value of Kshs.167,502/- and at or immediately before or immediately after the time of such robbery used actual violence to the said Julius Kipchumba Cherono. He pleaded not guilty but after trial before the Senior Resident Magistrate at Nakuru he was convicted and sentenced to death. He has now appealed to this court against both the conviction and sentence.

The facts of this are fairly simple and straight forward. The Appellant was, at the material time, a guard employeed by Securicor Guards (Kenya) Limited and assigned to guard Kenya Seed Company Ltd at Nakuru. On Sunday 10th November 2002 at about 11.00 a.m., Julius Kipchumba Cherono, the Kenya Seed Product Promotion Manager, went to their offices to pick the company car and advertisements which he needed to take to Njoro Golf Club where there was a tournament sponsored by his employer. At the gate to their office premises he gave the vehicle gate keys to the Appellant who was guarding it to open the gate for him which the Appellant did and he went in. When he was in his office he smelt something burning and got out to check what it was. As he entered the reception three people emerged from the safe room tied his hands and beat him and then blind folded him with a gunnysack. They robbed him of a mobile phone, and a pair of spectacles. At about 2.00 p.m. when those people had left he managed to walk to the adjoining Milling Corporation premises where a guard untied him. He then called the Securicor Guards (Kenya) Ltd offices and its Nakuru District Manager, Bernard Macharia Ngugi went to their offices and was soon thereafter joined by police officers. At their offices they found the safe broken into and money stolen therefrom. The Appellant's uniform was found in the office but he himself was nowhere to be seen. He was arrested about three and half months later at Eldama Ravine Town and thereafter charged with this offence.

In his submissions the Appellant, while conceding that there was no break into the premises, contended that he was not among the 3 people who attacked and robbed the complainant at the reception or at all. He also argued that the police did not go to Uasin Gishu Hospital to verify whether or nor he lied that he had

been admitted there. At the time of his arrest he claimed he was on his way to the Securicor Guards (Kenya) Ltd's offices to report his abduction but he was arrested before he got there.

The Appellant also contended that he was detained in police custody for five months before he was taken to court. That is obviously false. The record shows that he was arrested on 10th April 2003 and taken to court on 23rd April, 2003. That allegation has therefore no basis.

On his part Mr. Mugambi, learned state counsel, submitted that the Appellant's conviction was safe as the evidence against him was overwhelming. Given the fact that there was no evidence of a break in, he argued that the robbers must have been in the premises and the Appellant knew about their presence there.

Nobody saw the Appellant rob the complainant. This case is therefore based on circumstantial evidence. It is trite law that circumstantial evidence "**Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say it is circumstantial." --Republic – Vs – Taylor Weaver and Donovan (1928) 21 Cr. App. R. 20.**

However, "…in order to justify an inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt."- Republic VS- Kipkering Arap Koske & another (1949) 16 EACA 15

This test was applied by the Court of Appeal for East Africa in the Uganda case of **SIMONI MUSOKE V.R. [1958] EA 715**, and recently by the Kenyan Court of Appeal in the case of **PARVIN SINGH DHALY V. REPUBLIC, Criminal Appeal No. 10 of 1997** in which it stated:-

"**For our part, we think that if there be other co-existing circumstances which could weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt and an accused is entitled to an acquittal."**

See also **Sawe –vs- Republic (2003) KLR 364 at P 375.**

How do these principles apply to this case?

When the manager was attacked the Appellant who was in the premises never raised any alarm. He disappeared soon after the robbery leaving behind his uniform. His allegation that he was ordered to remove his uniform and abducted by the robbers and taken to Chepchirchir forest where he was found the following day by charcoal burners, is an ingenious concoction which, however, is and cannot be true. If he was not with them we cannot understand why the robbers who had accomplished their mission at the Kenya Seed Premises from where they had stolen about Kshs.147,000/-, could have abducted him and taken him all the way to Chepchirchir forest. It does also not make sense why they could go as far as ordering him to remove his uniform before bundling him into their vehicle and taking him away. What would they have gained from that?

Although the Appellant had no burden of proof, it defeats logic why, when found the following day, he did not report to his rescuers or the nearest police station of his abduction. We find his story that he was taken to hospital where he incurred some bill that was settled by an unnamed woman for whom he had to work for three and a half months to repay her, a complete fantasy. When he was arrested at Eldama Ravine there is nothing to show that he was going to the Securicor Guards (Kenya) Ltd's offices to report as he claimed. If that were the case he could not have resisted arrest by his colleague PW2 who had to enlist the assistance of police officers who were guarding the Kenya Commercial Bank building next door.

Having carefully read the lower court record we are left in no doubt whatsoever that the Appellant was with the people who emerged from the safe room and robbed PW1. The record shows that there was no break into the premises and as PW1 said his robbers emerged from the safe room soon after he entered his

office. We find that they must have gone into the premises before PW1 went there. The Appellant's contention that the robbers must have had the keys to the workshops from where the welding machine that was used to break the safe was taken and to the offices as well as the safe room may very well be true but that does not help his case. What that tells us is that this was an inside job which the Appellant was part and parcel of.

In the upshot we find that the circumstantial evidence in this case irresistibly points to the Appellant as one of the robbers with no other explanation but that of his guilt. There are no other co-existing circumstances which weaken or destroy this inference of guilt. In the circumstances we find no merit in this appeal and we accordingly dismiss it in its entirety.

**DATED and delivered at Nakuru this 17th day of December, 2008.**

**D. K. MARAGA**

**JUDGE**

**M. MUGO**

**JUDGE**