REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEALS NOS 619 AND 621 OF 1998 (CONSOLIDATED)

PATRICK ATEMO MSEMBE ……...…1ST APPELLANT

RONALD EZEKIEL MWACHIA…….....2ND APPELLANT

VERSUS

REPUBLIC…….....….RESPONDENT

JUDGMENT

The two appeals hereinabove arose from the same case in the Principal

Magistrate's Court at Kibera. They were consolidated for hearing together before us. For ease of reference, the appellant in Criminal Appeal No 619 of 1998, Patrick Atemo Msembe will hereinafter be described as first appellant and the appellant in Criminal Appeal No 621 of 1998, Ronald Ezekiel Mwachia as second appellant.

The first and second appellants together with one Jackson Mpemba were jointly charged before the lower court in count 1 with the offence of robbery with violence, contrary to section 296 (2) of the Penal Code (Cap 63).

Their colleague, Jackson Mpemba was acquitted while they were convicted as charged and sentenced to death. They appealed to this Court against both conviction and sentence.

The first appellant also faced in count 2 a charge of handling stolen goods, contrary to section 322 (2) of the Penal Code. The trial Court made no finding against him on this count.

The second appellant faced an alternative charge of neglecting to prevent commission of a felony, contrary to section 392 of the Penal Code. The trial court made no finding against him on this alternative charge.

We were informed by both appellants that they filed their original petitions of appeal in person prior to receipt by them of copies of the record of proceedings in the lower court. At the hearing of these appeals the appellants, who had subsequently received copies of the lower court proceedings and who were still unrepresented, put in amended grounds of appeal under section 350 of the Criminal Procedure Code (Cap 75) together with written submissions.

The first appellant listed six grounds of appeal which may be condensed into three:-

1. That the trial magistrate erred in law and fact in relying on identification purportedly done at the scene by PW 1, Peter Njuguna and PW 6, Miriam Wanjiku to form the basis for the appellant's conviction without taking into consideration that PW 1's identification was mere dock identification while that of PW 6 was unbacked by appropriate initial report. This means that the possibility of identification error cannot be ruled out.

2. That the trial magistrate erred in law and fact in believing the prosecution allegations, unsupported by independent evidence, that a carton and "*lesso*" were found in the appellant's possession while there was evidence that they were found in a woman's house and that the magistrate failed to direct herself sufficiently on the limitations of the allegations of possession as a basis for the appellant's conviction.

3. That the magistrate erred in law and fact in failing to find the information leading to the appellant's arrest as hearsay in the light of the defence raised by the appellant which raised reasonable doubts about the prosecution case.

The first appellant submitted that the magistrate should have warned herself, as the law requires, against the dangers of dock and unsupported identification. He drew attention to PW 1's evidence that the only part of the appellant which he saw well was the nose "as they (robbers) had put the caps very low." The appellant stressed that the prosecution case against him mainly rested on the doctrine of recent possession and circumstantial evidence, which required to be weighed carefully before being relied on as a basis for conviction. The appellant drew attention to the alibi he had raised at the trial and submitted that it was the prosecution's duty to displace the alibi after he raised it and that the prosecution never displaced his alibi. Finally, the appellant found fault with the prosecution's failure to call witnesses mentioned at the trial who in his view were essential to the just decision of the case. He urged that this omission be construed to mean that their evidence would have been adverse; that his conviction should be quashed and the sentence passed on him set aside.

In a lengthy memorandum and written submissions, the second appellant basically raised three grounds of appeal:-

1. Circumstantial evidence – that the prosecution relied on circumstantial evidence which was not conclusive.

2. Meagre and flimsy prosecution – that the case was not fully investigated.

3. Alibi defence – that his unsworn alibi was not negatived by the prosecution.

The second appellant's submissions on grounds 1 and 2 tended to merge into each other. We shall summarise his submissions on the two grounds together.

The second appellant submitted with regard to grounds 1 and 2 that the prosecution relied upon circumstantial evidence which was inconclusive.

It was his case that the facts brought forth were not enough to enable the court to draw an irresistible inference of guilt on his part as required by law. The appellant complained that the magistrate put too much weight on PW 2's evidence that he (appellant) arranged to relieve her and to be on duty earlier than his due time. He said no register was produced to support PW 2's allegation that he relieved her before his time. He branded PW 2 a liar and posed a challenge that if it was true that he relieved her before time, she should have reported that uncommon arrangement to the complainant (PW 1) who was one of the supervisors. He submitted that there was no evidence of such report. Appellant insisted that it was the duty of the prosecution to prove that he was on duty at the material time and submitted that there was no credible evidence to prove this.

The second appellant challenged the prosecution evidence that he had absconded from duty at the material date and time and countered that he had gone to cerebrate Labour Day holiday, which falls on 1st May, with his family at Ruai. He urged that his failure to report back as required should not justify

inference of ill-motive on his part. He drew attention to the fact that members of his family were not employees of the company that employed him. He suggested that the fact that they were seen on the compound in the morning of the robbery but not seen again after the robbery could just be an odd coincidence and need not raise a presumption that he had prior knowledge of the robbery. His family's absence from the compound could have been arranged earlier. Appellant noted that PW 1 said in cross-examination: "Mwachia had escaped with the family that same night at 9.00 pm." He interpreted this to mean that the prosecution was saying he was on the compound with his family during and after the robbery and questioned why he was not arrested there after the robbery, which took place at 3.00 pm that day. In any case, he argued, PW 1's evidence on this point was not supported by any other witness.

The second appellant insisted that he returned to the scene the day following the robbery and was told all was not well. He retreated and went to Buruburu Police Station to seek advice from one Police Constable Shadrack Myambu who turned out to be on leave and he (appellant) was detained there. He denied PW 9's evidence that he was arrested as a result of information elicited from one Jane Aluoch or that his arrest was on the instructions of Chief Inspector Mugambi. Appellant complained about the fact that these people were not called to testify and submitted that adverse inference should be drawn from the omission.

Regarding recovery of exhibits, the second appellant denied involvement in leading police to such recovery. He posed a challenge that the officers involved in the recovery were of a rank below that of Inspector and that since leading to recovery is part of confession, caution should have been administered before any leading could be done properly. Appellant submitted that since no caution had been administered, the judges' rules had been violated.

The second appellant drew attention to PW 1's testimony that he (appellant) led him and others to Mathare North Estate where a timber cutting machine, which was one of the stolen items, was found. He said PW 1's evidence in this regard was not supported by anyone and that PW 3 lied. Appellant urged that PW 3 and PW 4 gave inconsistent evidence despite having been working together and that the inconsistencies and contradictions between their evidence was fatal to the evidence of recovery of the stolen items. He noted that while PW 3 testified in support of allegations that the appellant led the recovery party to the scene of recovery, PW 4 disowned the others and said: "I do not know who led us to the workshop."

Appellant submitted that this means he was not a party to the act of leading others to the recovery of the stolen items. He noted that most recoveries were made by officers from Buruburu Police Station and that none of them, not even the investigating officer, was called to testify. He submitted that they should have been called as witnesses to support the evidence of recovery.

Finally, the second appellant insisted that the relevant OB entry should have been produced to show his movements during the date and times of recovery. He submitted that whoever was found with the exhibits should have been charged with possession of stolen goods or should have been summoned to say how he or they received the machines and who sold the machines to them. He complained that no reason was given for not summoning the various mentioned witnesses, eg the investigating officer and the appellant's co-worker, Moses. The appellant urged that adverse inference be drawn from the omission.

Under ground 3, the second appellant drew attention to his unsworn alibi to the effect that on the material day he was away the whole day. He noted that this was Lablour Day Holiday and submitted that he left the scene of robbery with his family in the morning and proceeded to his inlaw at Ruai. He said it was for the prosecution to prove his guilt while his was to raise doubts as to the strength of the prosecution case. He said the prosecution had a duty to dislodge or negative his defence with tangible evidence. He added that the prosecution had a duty to avail his in-law whom he had visited at Ruai on 01.05.96. Also that the prosecution should have availed the workshop owner from Kariobangi industries and that the prosecution's failure to avail crucial witnesses left no doubts that their evidence would have destroyed the strength of the prosecution case. While appreciating that it was not necessary to call a superfluity of witnesses, the second appellant nevertheless urged that here it was essential to do so. He submitted that nothing on record connects him with the recovery of the stolen machines nor how they were ferried from the complainant company premises. In his view, doubts linger and he should be given the benefit of those

doubts.

The second appellant concluded his submissions by urging that this Court should re-hear all evidence from both sides afresh and exhaustively in order to reach a fair and independent decision. He urged that his appeal against conviction be allowed, his conviction quashed and the sentence passed on him set aside.

Learned Counsel for the respondent, Miss Nyamosi conceded the appeal of the first appellant. According to her, it was not shown if the first and second appellants knew each other and that the second appellant's word was used to arrest the first appellant. Counsel submitted that the first appellant should be given the benefit of doubt.

With regard to the second appellant's appeal, learned counsel for the respondent supported the appellant's conviction and sentence. Counsel noted that the robbery was perpetrated during the day, ie at about 3.00 pm. Two people in security guard attire burst upon the premises where the complainant (PW 1) was and ordered everybody to lie down. PW 1 said the invaders robbed him of the items indicated in the charge sheet.

His evidence was supported by PW 6. According to PW 2, the second appellant was to report for duty at the premises at 5.00 pm. that day.

However, he came earlier, at about 2.30 pm. and offered to relieve P.W.2 at that early hour. PW 2 obliged and left. Some minutes later the robbery followed. She (PW 6) and PW 1 were tied up by the robbers before they effected the robbery. When P.W.1 and P.W.6 eventually got their freedom from the robbers, they looked for the second appellant who was not at his house within the compound although he was supposed to be there. The second appellant eventually led police to the place where a machine was recovered. In counsel's submission the fact of the second appellant running away from his place of work shows that he was not innocent. Also the fact that he led the police to the discovery of items stolen from the subject premises shows he was involved in the robbery. Counsel urged this Court to uphold the second appellant's conviction and sentence.

The central issue for the determination of this Court is whether there was proper, credible and sufficient evidence to support the first and second appellant's convictions.

Regarding the first appellant, the evidence tendered against him came from Peter Njuguna (PW 1), Zedeus Mwamunge Mulolwa (PW 3), Miriam Wanjiku (PW 6) and No 50836 Police Constable Mutisya Nzioka (PW 7).

PW 1 essentially testified that he saw the first appellant in the company of two others at the scene of robbery immediately before it occurred. All the three were in security guard uniform. The witness said he did not identify any of the other two and that it was the nose of the first appellant that he saw well as the three had put on their caps very low. When crossexamined by the first appellant, PW 1 conceded failing to identify him at the police station but explained that he (PW 1) was still unwell. This witness cited the date of the offence as o1.04.96 at 3.00 pm whereas the rest of the prosecution evidence was that the offence took place on 01.05.96 at 3.00 pm.

If indeed PW 1 was able to identify the first appellant who appears to have been a stranger by his nose during the robbery and there were no special features about the nose, it does not come as a surprise that PW 1 failed to identify him later at the police station. The net result is that PW

1's identification of the first appellant at the trial on 15.11.96, ie some six and a half months later, was his first identification. It would be dangerous to rely on that dock identification as a basis for the first appellant's conviction. PW 3's evidence included testimony that on 04.06.96 he accompanied police officers to various places in Nairobi where different items stolen during the robbery were discovered and recovered. One of the places so visited was a house in Kimende village where a table cloth and a carton stolen from his house were found. He said he identified the table cloth which he had kept for a long time;

that it had been stitched in a unique way; and that it had a small hole where it was burnt. As for the carton, the witness said he had bought it two years earlier and that he identified it by the number 76 written on it by a felt pen. He said a lady in the house where these items were found described herself as the first appellant's wife and the house as belonging to the first appellant.

The above remarks ascribed to the lady described as the first appellant's wife were inadmissible by virtue of section 127 (2) (ii) of the Evidence Act (Cap 80). PW 3 identified the table cloth in court as MFI 1 and the carton as MFI 2. These items were, however, not formally produced as exhibits and they never got round to becoming part of the evidence at the trial. They must, therefore, be excluded, with the result that their discovery is of no consequence as against the first appellant. PW 6 testified to having been tied up by two members of the robbery gang at the scene on 01.05.96 at 3.00 pm.; that the first appellant and his colleague went there to ask for PW 1 three times; and that she saw the two robbers very well. She added that she had never seen the first appellant before; that on 10.06.96 she attended an identification parade at Karen Police Station where she identified the first appellant by appearance as

having been involved in the robbery of 01.05.96. No other prosecution witness gave evidence about the identification parade.

Apart from PW 6's statement that she identified the first appellant by appearance in a parade of about ten people, there was no description of the appearance of the other parade members, ie whether they were of approximately similar age, height, general appearance, etc. The manner in which the so-called identification parade was conducted falls far short of the identification parade guidelines laid down in the case of *R vs Mwango s/o Manaa* (1936) EACA 29. We ignore PW 6's evidence of the identification parade. PW 7 testified that on 04.06.96 the second appellant and the man who was acquitted at the joint trial led him and other police officers to some village where the police arrested the first appellant in some house where "there was (sic) some women". In answer to a question by the first appellant during cross-examination, PW 7 also said: "We found you in the house of some lady." It was not made clear whether the house alluded to here was the same as or different from the one referred to by PW 3 earlier on. PW 7 admitted that he and his fellow police officers did not recover the items the appellants and their colleague who was acquitted at the trial were alleged to have had.

The evidence of PW 7 does not connect the first appellant with the robbery. The upshot of all the foregoing is that the evidence of PW 1, PW 3, PW 6 and PW 7, who were the only witnesses who gave evidence against the first appellant, did not prove his involvement in the offence with which he was charged in the main count beyond reasonable doubt as required by law. We find that the learned trial magistrate misdirected herself in concluding that there was proper, credible and sufficient evidence to support the first appellant's conviction for robbery with violence. The conviction is unsafe.

The appeal of the first appellant, Patrick Atemo Msembe against his conviction for robbery with violence, contrary to section 296 (2) of the Penal Code is hereby allowed, the conviction quashed and the sentence of death set aside. The first appellant shall be set at liberty forthwith unless otherwise lawfully held. We now turn to the appeal of the second appellant. The evidence tendered against him was purely circumstantial. It was extensively surveyed and recorded by the learned trial magistrate. For ease of reference, the crucial aspects of the evidence will have to be captured here but before that we note that PW 1, Peter Njuguna, a security officer - cum-supervisor supposed to have been on duty at the subject site on the day the robbery was committed cited the date of the offence as 01.04.96. The date of the offence was given in the charge sheet and by witnesses as 01.05.96. Even the Medical Examination Report (P3) in respect of injuries sustained by PW 1 cites 01.05.96 as the date of offence. PW 1 was clearly in error in citing 01.04.96 as the date of offence. We find the date of offence as o1.05.96.

Salient aspects of the prosecution evidence touching on the second appellant may be summarized as follows: That PW 1 was a security officercum- supervisor or watchman employed by a building construction firm called Morit Builders and Mechanical Engineers Ltd. The company belonged to Joham Singh (PW 4) and that it had been awarded a building contract at the subject site in Karen, Nairobi. According to PW 1 and Teresia Njeri (PW 2), the second appellant was supposed to report for security duty at the gate to the construction site from 5.00 p.m. The second appellant was housed within the

construction site compound. He stayed there with his wife and child. On 01.05.96 he left the compound in the morning and returned at 2.30 pm and went to his house. PW 2 opened for him. Out of the blues at 2.30 pm he reported back at the gate and told PW 2 that he wanted to relieve her early instead of 5.00 pm. The second appellant also told PW 2 not to complain if he was late next day. PW 2 was pleasantly surprised. She agreed to be relieved early, gave him the key to the gate and went home, at Dagoretti corner, Nairobi. Barely half an hour later, i.e. at 3.00 pm, gangsters invaded the site and committed the subject robbery as outlined earlier through the evidence of PW 1, PW 3, PW 6 and PW 7 already surveyed.

None of the prosecution witnesses identified the second appellant as having been among the robbers when they physically committed the robbery. PW 2 was the last witness to see the second appellant at the site at 2.35 pm on 01.05.96 when he relieved her from guard duty prematurely.

Thereafter he disappeared from the site, taking his wife, child and household belongings away with him. He stayed away from work until his arrest by the police on 04.06.96 ie slightly over a month later. His employer, PW 4 testified that the second appellant did not have permission to be away from the construction site and that he absconded from there since the day of the robbery and he, PW 4 never saw him again until he was arrested by the police in June, 1996. During the robbery various items, such as machinery, furniture and household goods, were stolen. PW 4 told the trial Court that his company did not allow strangers into the main building of the construction site.

Only employees including watchmen were allowed into the main building and would know what was inside. Yet the main building was broken into and various items stolen therefrom. PW 1 said he did not identify the second appellant as having been among the three-man gang that actually broke into the site premises during the robbery. The people he saw were strangers. They told him he had been paid his salary and demanded to be given the money. When he told them he had no money, they assaulted him with axes and "*pangas*" (swords) and caused him actual bodily harm. This was confirmed by Dr. Francis Njoroge Nganga (PW 10) who medically examined PW 1. The robbers gagged PW 1, tied him up and hang him upside down. They beat him up then fled and returned shortly afterwards to effect the robbery. During the robbery, PW 1 just heard footsteps outside and did not know what the invaders were doing on site. PW 6 who had visited PW 1 and was in his house within the site on 01.05.96 was also bound up by the robbers before they effected the robbery. They eventually left the compound around 6.30 pm when she heard a sound like that of lorry passing by. According to PW 4, a lot of the items stolen from the site were heavy and would not be carried away by hand. PW 2 returned to the site on 02.05.96 and found the place had been invaded, PW 1 injured and various items stolen. She (PW 2) added that the second appellant had disappeared with his wife and child plus his household belongings; that when she left the previous day only PW 1, the second appellant plus wife and child were on the compound. She said it was not normal for the second appellant to relieve her early as he did that day and added that she bore him no grudge. PW 3 was a supervisor in gardening at the subject construction site and lived there. He was employed by Karuna Holdings. On 01.05.96 he left the compound at 9.00 am, leaving behind PW 1, PW 2 and the second appellant plus his wife and child. He returned at 9.00 pm and found the main gate entrance open with no one to open the gate, which was unusual. Various things had been stolen. The second appellant who was supposed to be on guard duty was nowhere to be found. On 04.06.96 PW 3 and

others went to Buruburu Police Station, Nairobi where the second appellant offered to take the police, himself and others to various places in connection with the stolen items. One place so visited was Eastleigh near Suncity, Nairobi. There, some side tables, sofa set and vibrating machines "belonging to the Asian boss" (PW 4) were discovered and recovered by the police.

The items listed in the robbery charge against the second appellant include two bedside tables. It is not quite clear from the evidence whether the side tables alluded to by PW 3 are the same things as bedside tables. We shall give the benefit of doubt about the identity of these items to the second appellant.

According to PW 3, the next items discovered and recovered at Suncity in Eastleigh, Nairobi when the second appellant led the police and him (PW 3) there on 03.06.96 were sofa sets "belonging to the Asian boss" (PW 4). Other items alluded to by PW 3 as having been discovered and recovered there on the same

date were vibrating machines, also "belonging to the Asian boss". Among the witnesses who testified at the trial, there was only one with an Asian sounding name, i.e. Joham Singh (PW 4). As stated earlier he told the trial Court that he was a builder/constructor with a company called Morit Builders and Mechanical Engineers Ltd which belonged to him. He said he had a contract in Karen (the subject site) and that Karuna Holdings Ltd were his clients. We find PW 4 to be "the Asian boss" alluded to by PW 3. PW 4 identified the second appellant as one of his watchmen at the subject site and that he had been in his employment for about a year.

PW 4 testified that on 30.04.96 he was at the subject site in Karen and that business there closed at the usual time. The place was a kind of open shed. They used to chain their small machines to a big machine and lock with a padlock. He left at the close of business on 30.04.96 and went away. Next day, ie 01.05.96 was a holiday. PW 4 reported back at the site at 7.30 am. on 02.05.96 and found the place had been broken into and various items belonging to his company stolen. PW 1 who was his watchman at the site had been assaulted during the breaking and he was badly injured. PW 4 told the Court that when he was leaving the site on 30.04.96, the second appellant was not supposed to be on duty at day time but at night. PW 4 said the various items stolen included vibrating building machines and sofa sets. According to him, the company never allowed strangers in their building and only employees, including watchmen, would know what was inside.

Subsequently PW 4 was shown by the police various of the stolen items recovered by them from various areas within Nairobi. Since he needed the various machines for use and also because the police were short of storage space for the items of furniture PW 4 asked for their release to his company. The police released them to him after taking photographs of them. The photographs were taken by PW 8, Police Constable John Munyi.

They were processed under his supervision. He compiled them into a photo album which he produced as Exhibit 1. PW 4 identified photographs of several of the stolen items in the photo album. He said photograph 1 in the album included one of the stolen vibrating machines (vibrators) while photograph 3 included one of the stolen sofa sets (the photograph shows, *inter alia*, a sofa set comprising a one-seater and a two-seater).

The vibrating machine and sofa set alluded to by PW 3 and PW 4 above are among items listed in the charge sheet as having been stolen during the subject robbery. In this connection, it is to be recalled that the second appellant and his colleague submitted that recoveries like these are part of confessions and that they were inadmissible since the recovery parties were led to them by police officers below the rank of Inspector. Section 31 of the Evidence Act provides as follows:

"31. Notwithstanding the provisions of sections 26, 28 and 29 of this Act, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

The information given by the second appellant leading to the discovery of the above stolen vibrating machine/vibrator and the sofa set together with the fact of discovery of those items was properly admitted in evidence as against the second appellant.

There is some muddle in the lower court record as regards the identity and ownership of a number of the items listed in the charge sheet and also some muddle as to which suspect led the police and other witnesses to the discovery and recovery of those items. As far as the vibrating machine and sofa set alluded to above are concerned, however, the evidence is clear as to what they were, that the second appellant led the police and PW 3 to their discovery and recovery; and that PW 4 identified them as belonging to his company. The question then arises as to how the second appellant came to know where these items were to be found and to lead police and other witnesses to their whereabouts soon after his arrest.

The second appellant made an unsworn statement at the trial in which he raised an alibi to the effect that

at the material date and time he was away from the subject site enjoying labour day holiday with his wife and child at Ruai. He submitted that the prosecution witnesses were unworthy of belief and that their evidence should have been rejected in favour of his defence. The learned trial magistrate, who heard the evidence live, was entitled to accept the prosecution evidence and reject the second appellant's defence.

It is trite law that an accused person who raises an alibi defence does not thereby assume any burden of proving it: see *Saidi s/o Mwakawanga vs Republic* [1963] EA 6 cited with approval by the Kenya Court of Appeal in *Kiarie vs Republic* [1984] KLR 739. Where an alibi is raised by an accused person as his defence, the prosecution is expected as far as possible to check on it. Here it would appear from the evidence of PW 3 that the police made some kind of attempt to do that. PW 3 testified that after the second appellant's arrest, the police asked him to take them and him (PW 3) where his (second appellant's) child and wife were and that he took them to Ruai village. PW 3 said they found the child but were told the wife had gone to Buruburu Police Station to look for her husband. When they went to look for her at the police station they found she had not arrived and the matter appears to have been left at that. Of course even if the second appellant's wife was found, she would not have been a competent and compellable witness against her husband in view of the provisions of section 127 (2) (ii) of the Evidence Act. It would, therefore, have been an exercise in futility.

It has to be born in mind, however, that in the present case the prosecution did not purport to link the second appellant with the robbery through his physical presence at the scene at the material time. Rather, the prosecution case was premised on the following acts and/or omissions on his part:

That whereas he was supposed to report for duty at 5.00 p.m on 01.05.96 and be on night guard duty, he surfaced at the duty station and relieved PW 2 at 2.35 pm, ie well before his due time. That barely half an hour later gangsters invaded the site, assaulted and injured PW 1, roughed up PW 6 and committed the subject robbery with violence using axes and *pangas*. That he (second appellant) was conspicuously absent from, or at least nobody came forth to testify to having seen him at, his actual work place at the site or his house within the compound together with his wife and child who were staying with him there. That the second appellant had also removed his household belongings from his house at the site.

That he had no permission from his employer (PW 4) to be away and that he remained in abscondment until he was arrested by the police on 04.06.96, ie about a month later. That after his arrest he led police and other witnesses to various places, including Suncity in Eastleigh, Nairobi where a sofa set and vibrating machine/vibrator belonging to his employer (PW 4) were found; and that these discovered items were among the various items stolen from the subject site on 01.05.96. It is instructive that the second appellant volunteered to take over guard duty from PW 2 prematurely and then left the site unguarded just when the robbers were about to arrive at the site; and also that he went into abscondment and remained at large until his arrest on 04.06.96.

As noted earlier, the evidence tendered at the second appellant's trial was purely circumstantial. In the case of *Simon Musoka vs R* [1958] EA 715, the then Court of Appeal for Eastern Africa, *inter alia*, held as follows: "in a case depending exclusively upon circumstantial evidence, the Court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of

explanation upon any other reasonable hypothesis than that of guilt."

Earlier on, in the case of *R vs Kipkering arap Koske & Another* (1949) 16

EACA 135, the same Court had, *inter alia*, held as follows:

"That in order to justify, on circumstantial evidence, the 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, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused."

As indicated earlier, the evidence on record shows that the prosecution case against the second appellant was not premised necessarily on his physical presence at the scene but on various acts and/or omissions on his part pointing to his complicity in the robbery plan. Section 20 of the Penal Code provides, *inter alia*, as follows:

"20. (1) when an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence and may be charged with actually committing it, that is to say –

(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence".

In our view there were far too many inexplicable coincidences about the second appellant's apparent absence from the site when he should have been on guard duty and the simultaneous invasion of the site followed by his prolonged abscondment for such coincidences to have been accidental.

Indeed the act of the second appellant leading the police and PW 3 to the place of discovery of the stolen sofa set and vibrating machine/vibrator shown in photographs 1 and 3, respectively, of Exhibit 1 shows that the presence of those items where they were found was within the knowledge of the second appellant. Such knowledge can justifiably be deemed to constitute possession thereof within the meaning of section 4 of the Penal Code. The definition of "possession" under the aforesaid section is reproduced here for ready reference: "possession"-

(a) "be in possession of " or "have in possession" include not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person;

(b) if there are two or more persons and any one or more of them with knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them".

Having considered all the circumstances surrounding the commission of the subject robbery, we find the inference irresistible that the second appellant was a party to the subject robbery plan in terms of section 20 (1) (b) of the Penal Code. His knowledge of the whereabouts of the subject sofa set and vibrating machine/vibrator shows his complicity in the robbery plan. He was rightly convicted in respect of the sofa set shown in photograph 1 and in respect of the vibrating machine/vibrator shown in photograph 3 of Exhibit 1.

The appeal of the second appellant, Ronald Ezekiel Mwachia against his conviction for robbery with violence, contrary to section 296 (2) of the Penal Code is hereby dismissed.

There is only one penalty for an offence under section 296 (2) of the Penal Code, ie death. The second appellant's appeal against the death sentence is hereby also dismissed.

Dated and delivered at Nairobi this 4th day of August, 2003

T. MBALUTO

…….

JUDGE

B.P. KUBO

…….

JUDGE

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR