



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 479 OF 2009

BETWEEN

**BONIFACE NYONGESA BARAZA.....PPELLANT**

AND

**REPUBLIC.....RESPONDENT**

*(An Appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera Cr. Case No.8157 of 2007 delivered by Hon. Maundu (PM) on 26<sup>th</sup> October, 2009).*

**JUDGMENT**

1. The Appellant, **Boniface Nyongesa Baraza**, was charged alongside another with four counts of robbery with violence contrary to **Section 296 (2)** of the **Penal Code** and an alternative charge of failing to prevent the commission of a felony contrary to **Section 392** of the **Penal Code**.

a. The particulars in count 1 were that on the 13<sup>th</sup> day of May, 2005 at 4<sup>th</sup> Parklands Avenue within Nairobi Area Province, jointly with others not before court, being armed with dangerous weapons namely AK47 Rifles and pistols, robbed **Jyotindra Kanji Shah** of his motor vehicle registration No. KAG 660 S make Mitsubishi Lancer, cash Kshs. 66,000/=, gold jewelleryes and Sony DVD Player all valued at Kshs. 672,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said **Jyotindra Kanji Shah**.

b. In count II, the particulars were that on the 13<sup>th</sup> day of May, 2005 at 4<sup>th</sup> 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 Shah** of his mobile phones make Nokia 2100 and Samsung 400, 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 robbery threatened to use actual violence to the said **Manoji Kumar Shah**.

c. In count III, the particulars were that on the 13<sup>th</sup> day of May, 2005 at 4<sup>th</sup> 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 robbery threatened to use actual violence to the said **Rashaben Jyotindra Shah**.

d. In count IV, the particulars were that on the 13<sup>th</sup> day of May, 2005 at 4<sup>th</sup> 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 earrings all valued at Kshs. 80,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said **Snigdha Jayatilal Shah**.

e. The particulars of the alternative charge were that on the 13<sup>th</sup> day of May, 2005 at 4<sup>th</sup> Parklands Avenue within Nairobi Area Province, being a guard employed by **Mr. Jyotindra Kanji Shah** at his residence and knowing that an offence of robbery with violence was taking place whereby the following items; motor vehicle registration no. KAG 660S make Mitsubishi Lancer, cash Kshs. 66,000/=, gold jewelleryes and a DVD Player all valued at Kshs. 672,000/=, the property of **Mr. Jyotindra Kanji Shah**, failed to use all reasonable means to prevent the commission of the said felony.

2. The Appellant pleaded not guilty to all the counts. After a full trial, he was convicted of all the four counts of robbery with violence. He was sentenced to suffer death on count 1 and sentences in the rest of the counts suspended. Aggrieved by both his conviction and sentence, he preferred the instant appeal to this court.

3. The Appellant raised six (6) grounds of appeal in his Petition of Appeal filed on 4<sup>th</sup> November, 2009. He was aggrieved that the trial court failed to find that the prosecution did not prove its case beyond all reasonable doubts, that his conviction was based on hearsay evidence, that no expert was called to prove that the signature on the master roll book was actually made by him, that the prosecution's evidence was marred by contradictions and that his alibi defence was never counteracted by the prosecution.

### **Summary of Evidence**

4. This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced by the witnesses before the trial court and arrive at its own independent conclusion. In doing so, this court is required to take into account that it neither saw nor heard the witnesses and give due regard for that. (See **Okeno v Republic (1972) EA 32**). I thus summarize the prosecution case as below.

5. The Complainant in count I, **PW1, Jyotindra Kanji Shah** and **PW4, Manoj Kumar Shah**, the complainant in count II were brothers. **PW2, Rashaben Jyotindra Shah** and **PW3, Shigdha Jayantalal Shah**, complainants in counts III and IV were their wives respectively. They all lived together with their children in the same residence at 4<sup>th</sup> Parklands Avenue, Nairobi. The Appellant was a night security guard who had been employed by Eurosec Security Company, contracted by PW1, to guard their residence on temporary basis since their usual security guard was on leave. He had worked for them for about five nights.

6. On 13<sup>th</sup> May 2005 at around 7.00 pm, they all left their residence using the family van, a Toyota Matatu KAG 040H, to go and take a bath at their sister's house along Waiyaki Way since they had no running water. They left the Appellant guarding the gate. When they returned at around 11.00 pm, the Appellant opened the gate for them. PW1 proceeded to open the door to the house and got in with PW4 and their children. Suddenly, PW1 heard PW2 and PW3 who had remained outside screaming. Four men dressed in police uniform walked into the house and introduced themselves as police officers who had come to investigate whether there were drugs in their compound. Two of them had AK 47 rifles, a third one had a pistol and the fourth one had a rungu. One of the men with AK 47 said they were robbers and demanded that they surrender all valuables.

7. The robbers ordered them to sit down and proceeded to ransack the house while threatening them with the weapons and showing them bullets. They robbed them of jewellery, wrist watches, mobile phones, electronic goods and cash. After the robbery, the robbers locked them in the toilet with a belt and left with the family car, a Mitsubishi Lancer registration number KAG 660 S. About ten minutes later, PW1 pulled the belt and managed to open the door. They came out and found the door as well as the gate wide open. The Appellant was also nowhere to be found. Their compound was fenced with impenetrable Kei Apple fence and wire and the only entrance was at the gate. The security light inside the compound was also on.

8. PW1 contacted their neighbour who in turn called the police. **PW6, PC, Ronald Anyoka** who was on crime stand by at Parklands Police Station that night visited the scene together with the duty officer. The following morning, PW1 and PW4 reported the incident at Parklands Police Station and also made a report to the Appellant's employer, Eurosec Security Firm.

9. **PW5, David Wambane Siravi**, the managing director of Eurosec Security Firm confirmed that the Appellant was the guard on duty at PW1's residence on the night of the robbery. He set out to assist in investigating the whereabouts of the Appellants since he had his job application letter as well as a copy of his Identity Card and passport size photo. The OCS Parklands Police Station gave him a letter to take to Malakisi Police Station where the Appellant hailed from, which station assisted in tracing the Appellant's home. They met his parents who promised to contact him in case they saw him but never did.

10. More than two years later in November 2007, PW5 received information that the Appellant had been seen at his rural home. On 20<sup>th</sup> November, 2007, PW5, PW6 and one PC Rono went to Malakisi where they were assisted by police officers from Malakisi Police Station and the area chief to arrest the Appellant. PW6 and his colleague brought him to Parklands Police Station where he was charged accordingly. PW5 showed the court the Security Firm's muster roll for 13<sup>th</sup> May, 2005 showing that the Appellant was the guard on duty at PW1's residence at the material time. The said muster roll as well the Appellant's passport size photograph and job application letter were produced in evidence by PW6 who was the investigating officer.

11. The Appellant gave a sworn testimony in defence. He stated that at the material time, he was already working as a security guard for Panacle Security Company in Eldoret. Prior to that, he had worked with Eurosec Security Company based in Nairobi but left on 6<sup>th</sup> February, 2005 due to poor pay which was only Kshs. 3,300/= whereas Panacle offered him Kshs. 7,000/=. On 21<sup>st</sup> November, 2007 at about 10.00 am, while at his place of work in Eldoret, a colleague informed him that he had visitors in the office. He went to the office and his boss asked him to accompany the two male visitors to Nairobi.

12. They brought him to Parklands Police Station where a police officer informed him that he had been arrested so that he could assist them with investigations concerning a robbery which had taken place at PW1's residence. On 30<sup>th</sup> November, 2007, he was taken to court and charged with offences he knew nothing about.

### **Analysis and determination**

13. This appeal was heard via skype video link in which both parties made oral submissions. The Appellant appeared in person whilst the Respondent was represented by the learned State Counsel, Ms. Nyauncho. Upon carefully reevaluating the evidence on record and considering the parties' respective submissions, I find that the only issue for determination is whether the prosecution proved its case against the Appellant beyond a reasonable doubt.

14. The Appellant submitted that neither PW1 nor PW4 identified him at the police station upon his arrest. He contended that while at the police station, the investigating officer demanded for his ID card which the witnesses used to identify him with since they later claimed that they could identify him. Further, He contended that he had requested PW5 for a salary rise but had declined. He informed him of his intention to quit employment which caused a conflict between them. He thus had to seek employment elsewhere. He reiterated that he managed to get an employer who offered to pay him Kshs. 7,000/=, so he quit employment at PW5's company for greener pastures. He stated that PW5 later castigated his arrest while at his new employment and demanded for Kshs. 500,000/= in order to withdraw the case against him. The Appellant further took issue with the contradictions by the prosecution witnesses regarding the number of days he had worked at the complainant's residence.

15. Ms. Nyauncho opposed the appeal on conviction. She submitted that the trial court invoked the provisions of **Section 20 (1) (b)** of the **Penal Code** to find the Appellant guilty since he aided the robbers in committing the offence. She argued that the prosecution established that he Appellant was working in cahoots with the robbers. She stated that the Appellant's conduct of disappearing and only being arrested two years after the incident raised suspicion on his part. In her view therefore, the Appellant's conviction was proper based on the evidence on record. She thus urged the court not to interfere with it.

16. In rebuttal, the Appellant maintained that he was innocent and submitted that the prosecution did not produce the Occurrence Book (OB) to show that he was working on the material night.

17. From the evidence on record, it is clear that the Appellant was the security guard on duty on the material night of the robbery in the complainants' compound. PW5 produced a muster roll which established the fact that the Appellant had been assigned to do so and actually reported for duty at the complainants' residence that evening. Further, PW1, PW2, PW3 and PW4 gave consistent evidence that it was the Appellant who opened the gate for them when they returned home at around 10.30-11.00 pm. The witnesses testified that while getting into the house, they were suddenly accosted by a gang of four men who appeared from inside the compound.

18. Whereas none of the prosecution witnesses identified the Appellant as one of the robbers, it is clear from the evidence on record that he acted in concert with the robbers. PW1 gave uncontroverted evidence that their compound was fenced with impenetrable Kei Apple fence plus a wire and the only entrance was the gate. The only logical conclusion that can be drawn from the evidence therefore is that it was the Appellant who granted the robbers access into the complainants' residence while they were away.

19. This conclusion is further cemented by the Appellant's conduct prior to, during and after the robbery which was consistent with his being a participant in the robbery. Firstly, he did not warn the complainants of the presence of the robbers when opening the gate for them. Secondly, he did not raise any alarm to alert the neighbours. Thirdly, the Appellant disappeared with the robbers after the robbery incident and did not report back to work or even inform his employer PW5 about the robbery. Fourthly, he disappeared from the scene for over two years until he was tracked and arrested at his rural home in Malakisi. This conduct was inconsistent with that of an innocent person.

20. In the premises, I find that the prosecution established their case against the Appellant to the required standard which is beyond a reasonable doubt. His conviction was therefore safe and is accordingly upheld.

21. As regards the sentence, the Appellant asked for leniency in case his conviction is upheld. He stated that for the period he has been in custody, he has learnt a lot of skills including theological courses and carpentry grade 3 in 2018. Ms. Nyauncho conceded to the appeal on sentence. She submitted that she is not opposed to the reduction of the sentence to a reasonable one in light of the Supreme Court decision in the case of **Francis Kariokor Muruatetu & Another v Republic (2017) eKLR**.

22. I have considered the circumstances of the robbery. I have also considered the seriousness of the offence and particularly the fact that the robbers were armed with dangerous weapons, namely firearms. However, no injuries were inflicted on the complainants. As such, and having regard to the **Muruatetu** (supra) decision, I hold the view that a death sentence is not deserved. I have further taken note that the Appellant has been in custody for a period of twelve years, five months and three weeks since his arrest on 21<sup>st</sup> November, 2007. In the result, I set aside the death sentence and substitute it with fifteen years imprisonment on each of the counts; the same to run concurrently commencing from 21<sup>st</sup> November, 2007. It is so ordered.

**Dated and Delivered at Nairobi This 12<sup>th</sup> Day of May, 2020.**

**G.W.NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. *Appellant in person.*

2. *Mr. Momanyi for the Respondent.*