



REPUBLIC OF KENYA



**KENYA LAW**  
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**Biketi v Republic (Criminal Appeal 95 of 2021)  
[2023] KECA 670 (KLR) (9 June 2023) (Judgment)**

Neutral citation: [2023] KECA 670 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CRIMINAL APPEAL 95 OF 2021  
AK MURGOR, S OLE KANTAI & PM GACHOKA, JJA  
JUNE 9, 2023**

**BETWEEN**

**SHADRACK BARASA BIKETI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgment of the High Court of Kenya at  
Nairobi (Kimaru, J.) dated 14th June 2018 in HC. CR. A. No. 74 of 2015)*

**JUDGMENT**

1. The appellant, Shadrack Barasa Biketi was charged before the Chief Magistrates Court, Kibera with the offence of robbery with violence contrary to section 296 (2) of the *Penal Code*. Particulars of the charge were that on July 17, 2013, jointly with others not before the court, at Appleton Resort, while armed with pistols, they robbed Margaret Wawira Njiru of 12 Sony television sets, 1 Sony music system, assorted whiskeys, Sony Ericsson mobile phone, a silver ring, assorted kitchen utensils, one bale of maize flour and Kshs 7000 in cash; the total value being Kshs 1.2 million. They were said to have threatened to use violence against the said victim. The appellant faced an alternative charge of neglect to prevent the commission of a felony contrary to section 392 of the *Penal Code*. Particulars on the alternative charge were that, on the same day at the same place, he failed to stop the commission of the robbery, which he should have done in his duty as a night guard.
2. The prosecution called 8 witnesses while the appellant in defence gave a sworn statement and called 2 witnesses. On April 13, 2015, the trial court convicted the appellant on the main charge of robbery with violence and sentenced him to death. He filed an appeal to the High Court of Kenya at Nairobi which was dismissed by Kimaru, J (as he then was) on June 14, 2018.



3. The appellant has now proffered this second appeal. Our mandate in such an appeal is limited by Section 361(1)(a) of the *Criminal Procedure Code* to consider only issues of law as was stated in *John Kariuki Gikonyo v Republic* [2019] eKLR;

(15) This being a second appeal as we have already stated, our jurisdiction is limited to matters of law only. In *David Njoroge v Republic*, [2011] eKLR, this court stated that under section 361 of the *Criminal Procedure Code*:

“Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (See also *Chemagong v Republic* (1984) KLR 213.”

4. We shall briefly set out the facts of the matter to establish whether the two courts below carried out their mandate as required in law.

5. The prosecution witnesses led evidence that on July 16, 2013, a robbery took place at Appleton Resort, within Nairobi, whereby a group of men robbed the Resort while armed with pistols. PW1 was Margaret Wawira, (Wawira) the hotel receptionist who was woken up by armed men at around 2 a.m. was made to take them round the Resort opening different rooms, the kitchen, the bar and the manager’s office. The thieves stole mobile phones, several television sets, foodstuff, electronics and alcohol, before tying her up with a guest in one of the rooms. PW1 recalled seeing two security guards who were bound and lying on the floor in the reception, none of whom was the appellant.

6. PW2 was Rosemary Humbug, (Humbug) the manager at the Resort. She had been on duty during the day but left at 10 p.m., leaving the night shift staff. She would get a call in the middle of the night informing her that the Resort had been robbed and that receptionist was being looked for. She would later receive a call from a taxi driver who said that he had driven into the Resort and found the gate wide open when he went to pick up a client and he had ended up untying a guard named Sylvester. Humbug went to the premises at 8 a.m. and found that Wawira, the receptionist, had been located but people were looking for a guard named Shadrack (the appellant) who was said to be missing. She said that the guards on duty that night were Sylvester, Wycliffe, Shadrack (the appellant) and Patrick though only 3 guards were meant to be on night duty. One guard was meant to be a reliever of another guard who would go off, but the appellant was a reliever and not a regular guard. She confirmed the items listed as stolen. On September 11, 2013 she was called to identify items that had been recovered and she managed to identify spoons and forks branded “AR”. These were initials representative of Appleton Resort, her place of work that had been attacked and robbed. She said the hotel guards were supplied by Allan Brown security firm.

7. Wycliffe testified as PW3 and confirmed that he was a security guard for Allan Brown security firm and he worked with the appellant briefly as the appellant was a reliever. Wycliffe stated that on the material day, July 16, 2013 he reported on duty at 5.30 p.m. and left at 6.50 p.m. as he was to be off duty that night. He left Sylvester, Shadrack and Patrick on duty. He learned the next day that a robbery had taken place at his place of work and various items had been stolen. When he reported to work he established that a robbery had indeed taken place. He found his colleagues at work but did not find the appellant who was missing.

8. Patrick Okumu (PW4), confirmed that he reported for duty at 6 p.m. on July 16, 2013 in the company of Wycliffe, Sylvester and Shadrack. Shadrack, the appellant, was told that the numbers required were achieved and he should go home, as he was a reliever, but he refused to go home. The supervisor decided



to relieve Wycliffe and the appellant was assigned duties. Okumu told the court that Shadrack (the appellant) was placed at the gate, while he (Okumu) and Sylvester remained near a store in the middle of the compound. Okumu was patrolling at around 2 a.m. when he saw someone in work uniform. The man greeted him but he did not find the man to be familiar. The man then pulled out a pistol, directing him to lie down and then searched him and robbed him of his phone, wallet and a watch. The man tied up Okumu then took him to a store, where he found his colleague Sylvester tied up and lying down, and he was made to also lie down. Soon the receptionist, Wawira, was also brought to the store but she was taken away again after the thugs said she knew where everything was. Okumu and Sylvester were left in the store and they could hear movement around them and also heard a vehicle come into the compound and items were being loaded into it. At around 4 a.m. a car came and hooted at the premises and Okumu crawled out of the store, meeting the taxi driver who would untie him and Sylvester. They thereafter went round the premises and found Wawira tied up with a guest. Their colleague Shadrack Barasa (the appellant) never returned or called their workplace. Okumu would later identify his boots recovered from the appellant's house, boots which had been removed from his feet during the robbery.

9. Kennedy Omoyi was PW5. He is a supervisor with Allan Brown security and he confirmed to the court that on the material day, he deployed Sylvester, Patrick and Wycliffe for night shift duty but in the morning, he met Patrick and Sylvester. On the material day, he had directed the appellant to return home and he would be redeployed elsewhere but he later learned that the appellant and Wycliffe made their personal agreements and Wycliffe had gone home. His attempts to reach the appellant thereafter were not fruitful. Omoyi would later conduct private investigations and Sylvester would assist him track and follow the appellant to a house in Kangemi, where he was arrested. They found cutlery from the hotel, security uniform and work boots belonging to Wycliffe, in the appellant's house.
10. PC Stephen Oketch (PW6), the Investigating Officer said that he was on duty when they received information at around 4 a.m. of a robbery at Appleton Resort Hotel in Westlands. They went to the hotel around 30 minutes later and found the gate wide open and there was a taxi inside the compound. They went round untying the guards and looking for Wawira, who they found locked in a room with a guest. They thereafter took an inventory of the stolen items and recorded statements. He reported that the appellant was arrested 2 months later with the assistance of AP officers from Kangemi police station.
11. Sylvester Ouma (PW7), a key witness, confirmed that he worked as a watchman for Allan Brown security company and was posted to Appleton Resort on the day of the robbery. He reported that there were four watchmen that evening and he told the appellant, a reliever, to go home as there was sufficient staff for the night shift. The appellant refused to leave and another guard said he would leave instead. Ouma told the appellant to patrol and let Patrick man the gate but the appellant declined and Ouma let the appellant man the gate while Patrick took over patrol duties. Ouma saw the hotel lights go off and he went to investigate the main switch near the gate, only to be met by a man who ordered him to lie down and another man appeared with a gun. He lay down and was tied up and taken to a store where he found Patrick tied up. Wawira was later brought to the store and taken away again to show the robbers the keys. A man remained guarding them and sometime later they heard a vehicle drive in and items being loaded into the vehicle. The vehicle would drive away and come back. The third vehicle they heard was the taxi which was to pick up a guest, and the driver came in calling out and they shouted to him to come and untie them. The taxi man untied them and they looked around and found Wawira tied in a room with a guest but they did not find the appellant. Ouma lost his work uniform and his phone during the robbery. They informed their supervisor of what had happened. Ouma noted theft of televisions, alcohol and foodstuff from the kitchen. Ouma would later assist in the arrest of the appellant when he spotted him and followed him to a house and stayed there until police



- officers arrived. Upon entering the house, the appellant said he did not know Ouma. Ouma confirmed that his work uniform and boots were found in the appellant's house as well as cutlery branded with the hotel's initials.
12. APC Daniel Odhiambo (PW8) was an undercover police officer who assisted in the arrest of the appellant and confirmed that uniform and boots of Allan Brown security as well as spoons branded "AR" (Appleton Resort) were found in the appellant's house. They handed him over to Kangemi police station and called Kileleshwa police station which took over the case.
  13. That was the case made out by the prosecution and the trial court found that a case had been made out for the appellant to answer.
  14. The appellant gave a sworn statement in his defence. He said that he never committed the offence and was not working as a watchman but rather was working on construction sites and painting houses. He said that he never did anything wrong and learned of the offence in court. In cross-examination, he said that he bought boots to use while painting and that he did not know anything about Allan Brown security uniform.
  15. He called his wife, Concepta Nabwoba, as a witness and she testified that her husband used to paint houses and she did not know what offence he was charged with but asked that he be forgiven so that he could take care of their children. She said that he had left their home a few days prior to the robbery and she did not know what may have been found in the house at Kangemi.
  16. The appellant also called his brother, Moses Biket, as a witness. He testified that the appellant did masonry work and painted houses and had never worked as a watchman. In cross-examination, he said that his brother never told him about being found with spoons and forks.
  17. As we have stated, the appellant was convicted and sentenced to death and his appeal was dismissed by the High Court.
  18. The appellant prepared a homemade Memorandum of Appeal in which he raises 6 grounds of appeal. He contends that the High Court failed to re-evaluate the trial court record, that the court shifted the burden of proof to him, that the magistrate acted on suspicious exhibits, in violation of Article 50 (4) of the *Constitution*, that the trial court should have found the investigations were poorly done and that his defence was dismissed without plausible reason.
  19. In our view the only matters of law arising are whether the High Court discharged its legal mandate to re-consider the entire evidence and reach its own conclusion and whether the trial court shifted the burden of proof.
  20. The appellant filed written submissions dated September 26, 2022 through Edward C Asitiba & Associates Advocates in support of the supplementary grounds of appeal. His submissions only touch on the issue of the sentence that was imposed and the appellant implores that we should exercise discretion in sentencing. The appellant asks us to set aside the maximum mandatory sentence and release him from prison. Alternatively, the appellant asks us to remit the matter for re-sentencing and for the appellant to be released on time served.
  21. The respondent filed submissions dated February 13, 2023. They oppose the appeal and state that though there was no direct evidence placing the appellant with the robbers, there was sufficient circumstantial evidence pointing to the guilt of the appellant. They submit that the appellant was manning the gate, that he thereafter vanished from the scene and that he was also found with items stolen from the resort. They urge the court to dismiss the appeal in its entirety.
  22. We have carefully considered the record of appeal and the submissions by the parties.



23. The record of appeal reflects that the High Court Judge rehashed the evidence in detail and considered it as against the elements of the offence of robbery with violence. These are as per section 296(2) of the Penal Code, which states;

296. Punishment of robbery

(2) 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, or 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, he shall be sentenced to death.”

24. The High Court in its judgment rightly reminded itself of its mandate on first appeal and re-evaluated the evidence. We take note that the evidence against the appellant was purely circumstantial. The court stated on reliance of circumstantial evidence in the case of Ibrahim Chacha Mwita v Republic [2004] eKLR;

It is trite that 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 hypothesis than the guilt; see Simoni Musoke v R [1958] EA 715 where the following extract from Teper v R [1952] AC 480, 489, was quoted ([1958] EA at page 719):

“It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co- existing circumstances which would weaken or destroy the inference.””

25. In reaching his judgment, the Judge posed several questions such as who opened the gates for the robbers, why the appellant was spared when others were incapacitated and bound, why didn’t the appellant go to the assistance of his colleagues during the robbery and why didn’t he pick calls after the robbery. The Judge also asked why the appellant, despite his defence, was found in possession of the security uniform issued by Allan Brown security company if he had never been a security guard for the firm. The learned Judge reached the conclusion that the disappearance of the appellant from the scene was because he was part of the gang that undertook the robbery. We agree with the Judge’s conclusion and we find that the circumstantial evidence was sufficient to support the conviction of the trial court, which was rightly upheld by the High Court.

27. The appellant’s appeal is on sentence. We note that he was convicted and sentenced to death. As we have seen that was the sentence specified for an offence of robbery with violence under section 296 (2) of the Penal Code. The Supreme Court of Kenya in Francis Kariokor Muruatetu & another v Republic (2017) eKLR was asked whether it was constitutional for Parliament to impose mandatory sentence leaving the trial court with no option regardless of the circumstances of the case. It returned the answer that it was unconstitutional for Parliament to do so. That court later issued directions in Francis Muruatetu & another v Republic (2021) eKLR to the effect that their earlier finding only related to murder charges; not other charges.

28. The offence here was not a murder charge and the court was entitled to impose the death penalty which was the prescribed penalty.

29. There is no merit in this appeal and we dismiss it in its entirety.

**DATED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF JUNE, 2023.**

**A.K. MURGOR**



.....  
**JUDGE OF APPEAL**  
**S. OLE KANTAI**

.....  
**JUDGE OF APPEAL**  
**M. GACHOKA**

.....  
**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**

