IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, KOOME & SICHALE, JJ.A)

CRIMINAL APPEAL NO. 49 OF 2016

BETWEEN

RICHARD MITALO MUKOTO ………...……. APPELLANT

AND

REPUBLIC ……………….........…...............RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (Mwongo & Achode, JJ.) dated 15th December, 2013

in

H.C. CRA. No. 112 of 2008.)

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JUDGMENT OF THE COURT

[1] This is a second appeal from the judgment of the High Court in Nairobi in HC CR. Appeal No 112 of 2008. That being so, this Court is enjoined by dint of the provisions of **Section 361** of the Criminal Procedure Code to consider only matters of law. In doing so, this Court will not interfere with concurrent findings of fact arrived at by the courts below unless it is shown demonstrably, that the same were based on no evidence (See **Karingo v Republic** [1982] KLR 219 and also **Okeno v Republic** [1972] EA 32). The test to be applied is whether the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered, or that looking at the evidence, they were plainly wrong.

[2] We will recapitulate the brief background information so as to put this judgement in perspective and in order for us to isolate the points of law that fall for determination. On 22nd December, 2006, Reino Bernard, a resident of Karen area within Nairobi who testified as (PW1) and was the complainant before the learned trial magistrate, left his home for the airport, where he was to collect some guests from Italy. He returned to his Karen home at about, 11.30 p.m. He was with his wife, son and guests in his car and upon arrival at his gate, it was opened for them by Richard Mitake Mukoto (appellant) who had been PWI's watchman of over 10 and within 50 metres from the gate, there was a group of about six men.

[3] Three of the assailants were armed with guns, the assailants ordered the complainant and his guests to get out of the car, tied them and made them to lie down. Shortly thereafter, the complainant's daughter,

who was accompanied by a friend, drove into the compound and were met with similar fate; she was let in the gate by the appellant. The assailants ordered them out of their car and made them to lie down.

[4] Thereafter, the assailants took all the victims into the complainant's house; where they were subjected to an ordeal that lasted over 4 hours. The complainant was ordered to open the house, disarm the alarm and reveal the whereabouts of his safe. The appellant opened the safe for the robbers who were armed with guns; they went through the contents and found a berretta pistol, with 50 rounds of ammunition, an assortment of jewellery, one camera, one Nokia phone and one fossil watch, which they took. In addition to the above, they also took some suits, Kshs.10,000/=, one Nokia phone N-70, shoes, Kshs.300,000/=, USD 200, 1200 Euros, 800 pounds Sterling, and an assortment of personal effects all cumulatively valued at Kshs.2.1 million. The robbers also brought the complainant's wife from downstairs where she had been made to lie down and demanded from her to be shown where they kept other money and weapons, but the wife confirmed everything was in the safe. The robbers took the car keys where they emptied their loot and drove off, leaving all the victims tied. After sometime, the victims were able to untie themselves; the complainant went outside to look for the appellant at the guard house, but he found the appellant had also taken off.

[5] The complainant reported the matter to the police. The only items that were recovered was the motor vehicle which was subsequently recovered in Kagema, and the firearm which the complainant was able to identify at Muthangari police station. The appellant, who was the guard on duty when the robbery took place, and had disappeared after the robbery, was apprehended by police several months later at his rural village in Western Kenya. According to the complainant, in the entire period since the appellant's disappearance. After the robbery, his phone remained switched off.

[6] By a strange coincidence, the police apprehended one Patrick Angwenya Shimekha following a robbery which took place at Kileleshwa whereat the complainant's firearm, the baretta pistol which was stolen during the aforesaid robbery was recovered. Convinced that the two crimes were perpetrated by the same gang and that the appellant was party thereto, the police preferred charges against the two, who were charged before the Chief Magistrate's court at Nairobi with four counts of robbery with violence contrary to **section 296(2)** of the Penal Code. The particulars of the charges were as follows:-

> ***COUNT 1: ROBBERY WITH VIOLENCE C/SEC 292(2) OF THE PENAL CODE:***
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> ***'(1) RICHARD MITAKO MUKOTO (2) PATRICK ANGWEYA SHIMEKHA:*** *On the 22nd day of December, 2006 at Karen Tree Lane of Langata within Nairobi Area Province, jointly with others before court and while armed with dangerous weapons namely pistols robbed BENZO BERNARDI one baretta pistol S/No. 089899 with 50 rounds of ammunition, cash Kshs.300,000/-, US $2000, 12000 Euros, 800 pounds, cameras, suits and other clothings (sic) all valued at Kshs.2 million and at or immediately the time (sic) of such robbery, threatened to use physical violence to the said RENZO BERNARDI.*
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> ***COUNT II: ROBBERY WITH VIOLENCE C/SEC 292(2) OF THE PENAL CODE:***
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> ***'(1) RICHARD MITAKO MUKOTO (2) PATRICK ANGWEYA SHIMEKHA:*** *On the 22nd day of December, 2006 at Karen Tree Lane of Langata within Nairobi Area Province, jointly with others before court and while armed with dangerous weapons namely pistols robbed PERONI FERNANDO cash 2550 euros, 3 pairs of shoes and assortment of personal belongings all valued at Kshs.1.5 million and at or immediately the time (sic) of such robbery, threatened to use physical violence to the said PERONI FERNANDO.*
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> ***COUNT III: ROBBERY WITH VIOLENCE C/SEC 292(2) OF THE***
>
> ***PENAL CODE:***
>
> ***'(1) RICHARD MITAKO MUKOTO (2) PATRICK ANGWEYA SHIMEKHA:*** *On the 22nd day of December, 2006 at Karen Tree Lane of Langata within Nairobi Area Province, jointly*

with others before court and while armed with dangerous weapons namely pistols robbed MARTINA BERNADI of an assortment of jewellery, one camera, one Nokia Mobile phone all valued at Kshs.150,000/- and at or immediately the time (sic) of such robbery, threatened to use physical violence to the said MARTINA BERNADI.

COUNT IV: ROBBERY WITH VIOLENCE C/SEC 292(2) OF THE PENAL CODE:

'(1) RICHARD MITAKO MUKOTO (2) PATRICK ANGWEYA SHIMEKHA: *On the 22nd day of December, 2006 at Karen Tree Lane of Langata within Nairobi Area Province, jointly with others before court and while armed with dangerous weapons namely pistols robbed RUSSO SLAVATORE cash Kshs.10,000/-, one Nokia N-70 and one fossil watch all valued at Kshs.100,000/- and at or immediately the time (sic) of such robbery, threatened to use physical violence to the said RUSSO SLAVATORE.*

[7] The appellant and his co- accused denied the charges; the trial began in earnest and at the close of the prosecution's case, the learned trial magistrate (**Muketi, S**.) found that the two had with a case to answer and put them on their defence. They each elected to give unsworn statements of defence without calling any witnesses. At the close of the trial, the 2nd accused person was acquitted. In his defence, the appellant narrated how on the material day, he reported at work at Karen where he was working with another guard for the complainant. When the complainant left the house at about 9.30 p.m., it started raining, he decided to take shelter by the garage, suddenly he heard a noise as if something had fallen but as he went to check, he was confronted by three people who ordered him to sit down, tied him and took possession of the gate keys, his watch and phone as well as his uniform. When the complainant drove back, it was the robbers who opened the gate for them while clad in the appellant's uniform. After the robbers terrorised the complaint for about 4 hours, they left in his car and as they were leaving, the appellant was bundled in the car and made to lie on his stomach. When the vehicle stopped in Uthiru area, the appellant said he was threatened by the robbers and warned of dire consequences should he name them. The appellant said he decided to travel to his rural home until the 13th May, 2007 when he was arrested and charged with the aforesaid offences which he denied. The learned trial magistrate rendered a judgment in which the appellant was convicted on all counts and sentenced to suffer death, his co – accused was nonetheless acquitted.

[8] The appellant preferred an appeal before the High Court both on conviction and sentence but the High Court (**Mwongo and Achode, JJ**.) upheld the judgment of the trial court, hence this appeal.

[9] Whereas no memorandum of appeal appears to have been filed by the appellant, his counsel did file a supplementary memorandum of appeal which impugned the High Court's decision on grounds that the learned judges erred; in failing to consider and in particular to examine the circumstances under which identification by a single eye witness was made; for upholding a conviction where all the ingredients for a charge of robbery with violence had not been satisfied; for failing to subject the entire evidence to fresh examination; had the two judges of the High Court done a re-evaluation, they would have noticed there were apparent contradictions, for failing to consider the appellant's defence; failing to notice the items reported as stolen were different from items listed in the charge sheet, and lastly, for failing to notice that though charged on four counts; the appellant was the only one who was convicted on one count with no mention of the fate of the other counts.

[10] At the hearing of the instant appeal, **Mr. Wangira Okoba** learned counsel for the appellant, submitted that on the material date, a robbery occurred at the appellant's work place, as a result of which the complainant was violently robbed of his properties. However the appellant who was guarding the complaint's property was also a victim of robbery because he was tied up and stripped of his uniform. He proceeded to state that there was no evidence before the trial court, proving that the appellant had committed this offence or that he was part of the gang that robbed the complainant. In addition, counsel for the appellant pointed out that the complainant in his testimony admitted that he never saw the appellant during the attack. That given that the offence occurred on a rainy night, visibility was poor and no evidence was led as to what type of gate the complainant had. Counsel urged us to find the concurrent findings of the two courts below were erroneous as no interrogation of the circumstances of the

appellant's identification was ever done.

[11] Counsel for the appellant went on to state that while Robert Mabea who testified as PW 4 described the compound and contended that the appellant took part in the robbery, there was no evidence led to support that assertion; whereas to the contrary, the appellant was steadfast in his defence that he too was a victim, as the robbers stripped him of his uniform and kidnapped him. The fact that the appellant took off to his rural village thereafter does not in counsel's opinion connote guilt on the appellant's part. On that note, counsel urged that the appeal be allowed and the conviction and sentence be set aside.

[12] Opposing the appeal, Senior Assistant Director of Public Prosecutions (SADPP), **Mr. Wanyonyi,** contended that the ingredients to sustain a safe conviction of robbery with violence were proved. That according to the complainant, the appellant had opened the gate and thereafter the complainant, his family and guests were all accosted by a gang of thugs who ordered them to open the house and terrorised them for about 4 hours. That the compound was well lit and that the appellant was in the compound throughout and though he had been issued with a remote activated portable alarm, he never made a distress call. As a consequence, the only inference to be drawn was that the appellant organized the attack as he thereafter disappeared and could not be located for the next 6 months. In addition to the appellant's disappearance from his last known abode and place of work, he also switched off his phone. This, coupled with the fact that he was on duty and is the one who opened the gate for the complainant and his daughter while knowing there were robbers in the compound squarely put him in the centre of the crime as one of the perpetrators of the offences he was charged and convicted with.

[13] Counsel for the respondent further submitted that if at all the appellant was a victim; he should have reported the matter to the police. That when it is considered that he made no distress call and that to the contrary, the thugs enjoyed an uninterrupted opportunity to rob the complainant's family for over four hours, while the appellant did nothing to prevent or scare them away, the only logical conclusion that could be drawn was that of the appellant's guilt. Submitting on the alleged inconsistency in evidence, counsel said that the same (if any) is hardly prejudicial to the appellant. He thus urged for the dismissal of the appeal.

[14] In a brief rejoinder, counsel for the appellant reiterated his earlier submissions, adding that the appellant's phone was also stolen during the robbery, hence the appellant could not be in touch. That in any event, his apprehension of danger cannot be construed as connoting guilt on his part as the thugs had threatened him with dire consequences if he so much as spoke of the matter.

[15] The aforesaid summary brings out the three salient issues of law that fall for our determination which we discern as germane. That is, whether the appellant was positively identified as one of the perpetrators or organizers of the robbery based on the sole evidence of the complainant; whether the High Court judges failed in their duty to re-evaluate the evidence in particular the appellants' defence which his counsel alleged was cogent and, lastly, failure to find that the lost items as per complainant's testimony were at variance with those outlined in the charge sheet.

[16] On identification of the appellant, there is no dispute that he was employed to guard the complaint's premises and he was the guard on duty at the material time. It is also evident the appellant was well known to the complainant having worked for him for well over 10 years. Further, the appellant was the watchman on duty on the material date, and he did nothing to avert the robbery despite having been left outside with a remote controlled alarm device while the robbers were in the house terrorising the complainant. Moreover, after the robbery, he took off in company of the robbers. It is clear to us from the evidence, that the conviction of the appellant was not only based on his identification as the one who opened the gate for the robbers and later let in the complainant without warning them of the dangers ahead, but on the overwhelming circumstantial evidence stacked against him, mainly revolving around his conduct during and after the robbery. These are the facts that the High Court termed as inculpatory facts arising from the circumstantial evidence. The contentious issue, however, is whether the appellant too was a victim of robbery which will of necessity lead us to another issue of whether the disappearance of the appellant after the robbery was innocent or a flight from the scene due to guilty consciousness.

[17] The learned judges duly took into consideration the case of **Muchene v Republic [2002] 2 KLR Page 367** while analysing the issue of circumstantial evidence that led them to the following conclusion taken from a pertinent paragraph of their judgment;-

> *"The learned trial magistrate did consider the appellant's defence in which he said that he too was a victim of the robbery, and found that was untenable. In the circumstances of this case we humbly agree with her findings.*
>
> ***None of the inculpatory facts taken on their own would suffice to found a conviction. Taken cumulatively however, they lead irresistibly to the inference that the appellant acted in concert with the gang of robbers that raided his employer's house on the night in question, and are incapable of explanation on any other reasonable hypothesis other than that of guilt"***

[18] It is necessary also to point out that the evidence that the appellant disappeared from his place of work is hardly refuted. Disappearing from the place of work, switching off all communication with the complainant who was violently robbed in the presence of the appellant is the circumstantial evidence which was pieced together and led the two courts below, to conclude that the appellant deliberately fled from his place of work torun away from the police because he knew he aided or was part of the robbers in the commission of the offence. These were inculpatory facts. By definition, inculpatory facts are evidence that shows, or tends to show a person's involvement in an act, or evidence that can establish guilt (see. **Black's Law Dictionary, 9th Edn**). To be relied on, the inculpatory facts must be inconsistent with the innocence of the appellant (see. **Sawe v. Republic (2003) KLR 365**). The principles that guide the court when dealing with circumstantial evidence are well known as settled in the **Sawe v R** (Supra).

> ***"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.***
>
> ***Circumstantial evidence can be the basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.***
>
> ***The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused"***

[19] The facts must be incapable of any other explanation or hypothesis than that of the appellant's guilt. As such, there should be no other co- existing circumstances weakening the chain of facts relied on. In the instant appeal, there was undisputed evidence on record that the appellant was on duty on the material time, where he had in his possession a remote controlled alarm device, which was supposed to be on his person at all times while on duty. A day prior to the material date, he had moved out of his house where he ordinarily used to reside within Kawangware area. On the material day, he was left outside the house as the robbers besieged the complainant's family and robbed them of valuables, a transaction that lasted over four hours; yet at no point was a distress call raised by the appellant even to attract the neighbours, but what was more telling about the appellant's involvement was the fact that after the robbery , he took off in the company of the robbers and never reported the matter to the police or made any contact with the complainant, his mobile phone remained turned off, he was arrested six months, later from his rural home in western Kenya.

[20] The two courts below carefully analysed the appellant's defence that upon being released by the robbers he was warned against reporting the matter and out of fear he relocated to his rural home. The appellant further contended that while an alarm device had been duly issued to him by the complainant, it was with the appellant's colleague (a fellow watchman), who had failed to hand it over when they changed shifts. Also that the robbers had sneaked into the compound as the appellant sheltered himself from the rain and upon the complainant's arrival; they are the ones that opened the gate for him. Lastly, that he too was a victim, as he was kidnapped by the thugs immediately thereafter.

[21] In dealing with those issues raised by the appellant in his defence, both courts below found this defence untenable. We think the judges fastidiously analysed each of those issues and we are in agreement the evidence by the prosecution witnesses that it was the appellant and not the thugs, who opened the gate for the complainant and his guests was cogent and was not at all challenged even during cross examination by appellant who was duly represented by counsel. It is evident that the complainant had known the appellant for over 10 years, therefore he would have noticed something was amiss if the gate was opened for him by a stranger. Moreover, this issue of identification of the guard who opened the gate seems to have been taken up in this second appeal; it was not raised in the two courts below.

[22] On our part, even if we were to discount the fact that the gate was not opened by the appellant, there is other evidence that connects the appellant with the offence. That is the leisurely pace that the robbery seems to have taken and the fact that the appellant (though left outside) never raised any alarm and given his disappearance following the robbery and also considering that he switched off his mobile phone as well as his failure to report the matter to the police, or to contact the complainant, leaves no other inference other than that the appellant took flight to run away from police due to his guilty consciousness. In our humble view, the evidence presented against the appellant proved a case against him and like the two courts below we find the contention by counsel for the appellant that it was the robbers who opened the gate farfetched and for that reason we find this ground of appeal is without merit

[23] On whether the ingredients of a charge of robbery with violence had been established; the ingredients of what constitutes the offence were well spelt out by this court in the case of **Oluoch v. Republic (1985) KLR** as follows:-

> ***"Robbery with violence is committed in any of the following circumstances;***
>
> ***a) The offender is armed with any dangerous or offensive weapon or instrument or;***
>
> ***b) The offender is in the company of one or more person or persons or;***
>
> ***c) At, or immediately before, or immediately after the time of the robbery, the offender wounds, beats, strikes, or uses other personal violence on any person."*** (Emphasis added)

[24] As aforesaid, the appellant's conviction in this case stemmed from his apparent association with the robbers, as deduced from his conduct prior to, during and after the robbery. The inculpatory facts showed that, not only did he have sufficient time and opportunity to raise an alarm, but as per the evidence of Robert Mabea (PW4 a CID officer), the condition of the perimeter fence showed there was no breach, or inference at all with it, thereby lending credence to the assertion that the robbers were let into the compound. The first appellate court had this to say;

> ***"The appellant would have the court believe that he was forcibly taken away by the robbers and that he did not flee with them out of choice. If indeed he was abducted, his demeanor upon release does not lend itself to his innocence. He did not report the robbery to any police station in Nairobi or Kakamega where he took refuge, until he was smoked out by the investigating officer several months later. It was also noteworthy that his mobile phone was switched off once he left the compound and remained in that state thereafter."***

[25] Given the above, it is clear that the appellant's conviction was based on the association he had with the robbers. Once that was established, the prosecution did not need to prove the other limbs set out in **Oluoch v. Republic** *supra.* On that same note, the contention by the appellant's counsel that the appellant could not stay in touch owing to the theft of his mobile phone by the thugs is also a non starter, as it was never raised at trial. This ground of appeal too fails.

[26] The last ground we have to address, although it too, was not raised before the two courts below was the contention that certain items contained in the charge sheet were at variance with those that the complainant attested to in his evidence as having been stolen. According to the testimony of the complainant, the stolen items included his firearm (a baretta pistol serial no. 089899), 50 rounds of

ammunition, jewellery, USD 2,000, Kshs.300,000/-,1,200 euros and 800 sterling pounds as well as an assortment of personal items and clothes. According to the particulars stated in count 1 of the charge sheet, the items stolen from the complainant were stated as one baretta pistol S/No. 089899 with 50 rounds of ammunition, cash Kshs.300,000/-, US $2000, 12000 Euros, 800 pounds, cameras, suits and other clothings (sic) all valued at Kshs.2 million.

[27] During trial, a recovered berretta pistol serial no. 089899 with barrel no. 039668M was produced in evidence, as well as 10 rounds of ammunition; the firearm examiner did explain that while the pistol was the one identified by the complainant, the barrel thereof had been changed, hence the discrepancy in the type and rounds of ammunition recovered. Granted, not all the items listed in the charge sheet were recovered that notwithstanding, the defence still had to grapple with the recovered, pistol, which matched the one stolen from the complainant. Consequently, even if some of the exhibits produced before court did not form part of the charge sheet, this is a minor discrepancy that did not prejudice the prosecutions' case and it is curable under **Section 382** of the Criminal Procedure Code. This ground of appeal also fails.

[28] Accordingly and for the reasons stated above, we find the conviction of the appellant was safe and so is the sentence. We find no merit in this appeal and dismiss the same. It is so ordered.

Dated and delivered at Nairobi this 30th day of June, 2017.

E. M. GITHINJI

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR