



**IN THE COURT OF APPEAL OF KENYA**  
**AT NAKURU**  
**Criminal Appeal 285 of 2008**

**BETWEEN**

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

**AND**

**REPUBLIC .....RESPONDENT**

*(An appeal from a judgment of the High Court of Kenya at Nakuru (Maraga & Mugo, JJ.) dated 17<sup>th</sup>  
December, 2008  
in*

**H.C.CR.A. NO. 100 OF 2004)**

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**JUDGMENT OF THE COURT**

The appellant herein, **LAWRENCE NKONGE MWIANDI**, was arraigned before the Chief Magistrate's Court Nakuru, on 23<sup>rd</sup> April, 2003 where he was charged with robbery with violence contrary to **section 296 (2)** of the Penal Code. The particulars of the offence were that on the 10<sup>th</sup> day of November, 2002 at Kenya Seed Company Limited in Nakuru District of the Rift Valley Province, jointly with others not before court, while armed with dangerous weapons namely electric wires they robbed **Julius Kipchumba Cheronno** of one mobile phone make Erickson valued at Kshs. 12,900/=, one spectacles case valued at Kshs.500/= and cash money Kshs.149,102/= all the total value of **Kshs.167,502/=** and at or immediately before or immediately after the time of such robbery used actual violence to the said Julius Kipchumba Cheronno.

The appellant denied the charge but after a full trial before the Senior Resident Magistrate at Nakuru (Mrs. S. Muketi), he was convicted and sentenced to death. He appealed to the High Court but his appeal was dismissed and hence this second and final appeal to this Court.

The facts as accepted by the two courts below were fairly simple and straightforward. The appellant was, at the material time, a guard employed by Securicor Guards (Kenya) Limited and assigned to guard Kenya Seed Company Ltd premises at Nakuru. On Sunday 10<sup>th</sup> November, 2002 at about 11.00 a.m. **Julius Kipchumba Cheronno** (PW1) the Kenya Seed Company Limited Product Promotion Manager went to the company offices to pick the company car and advertisements which he needed to take to Njoro Golf Club where there was a tournament sponsored by Kenya Seed Company Ltd. At the gate to the premises he gave the gate keys to the appellant who was guarding it to open the gate for him which the appellant did and

Cherono went in. When he was in his office he smelt something burning and got out to check what it was. As he entered the reception area, three people emerged from the safe room, tied his hands, beat him up and blind folded him with a gunnysack. These people proceeded to rob him of a mobile phone and a pair of spectacles. At about 2.00 p.m. when those people had left he managed to walk to the adjoining premises of Milling Corporation where a guard untied him. He then called the Securicor Guards (Kenya) Ltd. offices and as a result the Nakuru District Manager **Benard Macharia Ngugi** (PW2) proceeded to the Kenya Seed Company Ltd premises where he was joined by police officers. At the offices the safe had been broken into and money stolen therefrom. The appellant's uniform was found in the office but the appellant was nowhere to be seen. He was, however, arrested about five months later at Eldama Ravine town and thereafter charged with the offence.

In his defence the appellant stated that after he opened for Mr. Cherono (PW1) he was attacked by people who removed his uniform and then drove him to a place where he was abandoned. He was then employed for 3 ½ months and from what he was paid he was able to pay Shs.5,900/= to the person who had rescued him. He was on his way to report the incident at their offices at Eldama Ravine when he was arrested.

In dismissing the appellant's appeal the learned Judges of the superior court (Maraga & Mugo, JJ.) in their judgment delivered on 17<sup>th</sup> December, 2008 stated *inter alia*:

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

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

When this appeal came up for hearing before us on 31<sup>st</sup> March, 2010 Mr. G. Ogola appeared for the appellant while Mr. G.L. Mugambi appeared for the State. In his submission Mr. Ogola relied on two principles of law - that the judges of the superior court erred in finding that there was enough circumstantial evidence and that the case against the appellant had been proved beyond any reasonable doubt. To elaborate these points Mr. Ogola drew our attention to the fact that when the complainant was attacked he saw three people and that the appellant was not among those three people. He went on to submit that the disappearance of the appellant could be explained by the treatment cards produced by the appellant in his defence. It was Mr. Ogola's contention that there were other co-existing circumstances to weaken the inference of guilt. Mr. Ogola finally submitted that as the appellant had given a reasonable explanation the benefit of doubt ought to be resolved in his favour.

In supporting both conviction and sentence Mr. Mugambi submitted that after the commission of the offence the appellant

disappeared only to be arrested after five months without any reasonable explanation. Mr. Mugambi further submitted that the judges of the superior court properly directed themselves and reached a proper decision in dismissing the appellant's appeal to the superior court.

The appellant's conviction was based on the fact that when the robbery took place on 10<sup>th</sup> November, 2002 he was guarding the premises and he is the one who even opened the gate for the complainant, but thereafter the appellant was nowhere to be seen until 10<sup>th</sup> April, 2003 when he was arrested in Eldama Ravine town. Hence, the appellant was arrested after a period of five months. It is to be noted that when the police officers arrived at the scene of the robbery the appellant's uniform was found on the premises. The appellant's explanation was that he, too, was a victim of crime in that he was abducted by unknown people who abandoned him in some forest.

In his submissions Mr. Ogola faulted the learned judges of the superior court in the manner they handled the issue of circumstantial evidence. He contended that there were other co-existing circumstances which weakened the inference of guilt. But the learned judges of the superior court were alive to the principles governing circumstantial evidence. We have already reproduced a portion of what the judges said in their judgment. In that same judgment the learned judges expressed themselves thus: -

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

***However, “..... In order to justify an inference of guilty, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.” - Republic vs. Kipkering arap Koske & Another (1949) 16 EACA 15.***

***This test was applied by the Court of Appeal for East Africa in the Uganda case of Simoni Musoke v. R. [1958] EA 715, and recently by the Kenyan Court of Appeal in the case of Parvin Singh Dhaly v. Republic, Criminal Appeal No. 10 of 1997 in which it stated: -***

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

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

This is a case in which the appellant opened the gate for the complainant and a short moment later the complainant was violently robbed, blind folded and abandoned at the scene. The appellant who was guarding the premises disappeared leaving his uniform behind. He was not seen or heard of until five months later when he was arrested in Eldama Ravine away from Nakuru town where the robbery had taken place. His explanation was that he, too, had been abducted by the robbers. But it is to be noted that the appellant did not report to his alleged rescuers or the nearest police station of his abduction. The appellant's claim that he had medical documents to show that he had been treated at some hospital turned out to be untrue since the

documents produced by the appellant to prove his claim were, upon our perusal, fake documents. This in effect meant that the appellant was not telling the truth and hence his defence was properly rejected.

Having carefully considered what has been urged before us we are satisfied that circumstantial evidence in this case irresistibly points to the appellant as one of the robbers who attacked the complainant and robbed him on the material day. There were no other co-existing circumstances which would weaken or destroy the inference of guilt. Accordingly the appellant's appeal is rejected and we order it to be and is hereby dismissed.

*Dated and delivered at NAKURU this 28<sup>th</sup> day of May, 2010.*

**R.S.C. OMOLO**

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

**E.O. O'KUBASU**

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

**D.K.S. AGANYANYA**

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

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

**DEPUTY REGISTRAR**