REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 18 OF 2014

JOSEPH NGUNGURU WANJOHI……..APPELLANT

VERSUS

REPUBLIC …….……..…….RESPONDENT.

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera Cr. Case No. 1301 of 2013 delivered by Hon. Ochenja, Ag CM on 30th January, 2014)

JUDGMENT

Background

Joseph Ngunguru Wanjohi, the Appellant herein was charged alongside another with the offence of conspiracy to commit a felony contrary to Section 393 of the Penal Code. The particulars of the charge were that on 2nd April 2013 at Galileo Investment Limited along Waiyaki Way, Parklands within Nairobi County, jointly with others not before the court conspired together to commit a felony, namely; rob from Galileo Investment Limited Kshs. 1,894,850/= and 4000USD from its safe, from an Mpesa cash box Kshs. 180,000, float cash Kshs. 30,000/= and a Dell computer monitor all valued at Kshs. 2,800,000/= .

They were arraigned in court and at the conclusion of their trial were found guilty of the offence charged and each sentenced to 3 years imprisonment. The Appellant was dissatisfied with the verdict and has lodged the present appeal challenging his conviction and sentence. In a Memorandum of Appeal filed on 10th February, 2014, he was dissatisfied that he was convicted on ground of insufficient circumstantial evidence, that the search that was conducted in his house was illegal, that the learned trial magistrate failed to give regard to the contradictions and inconsistencies in the prosecution's evidence and that the evidence imposed was harsh and excessive in the circumstances.

Submissions.

The Appellant filed written submissions on 19th October, 2016 through the firm of J. Makumi & Company Advocates. Four issues were raised. Firstly, that the charge was duplex in that the Appellant was charged with the offence of conspiracy to commit a felony and the felony itself which was the robbery was completed. The argument was that once the offence is completed, an accused cannot be charged with a conspiracy to commit an offence. The ruling in the case of **Joseph Ngunguru Wanjohi vs Republic [2014] eKLR** was cited in this respect. Secondly, that the accused's constitutional right to privacy was infringed on because the search that was conducted in his house prior to the recovery of the money was done without a search warrant. Thirdly, that the learned trial magistrate erred in convicting

him based on circumstantial evidence that was not sufficient. The case of **R vs Nyoro Mwenga [2014] EKLR** was cited. Finally, that the prosecution did not prove the case beyond a reasonable doubt.

The Respondent through learned State Counsel, Ms. Atina filed its submissions on 6th December, 2016. Her view was that the charge was not duplex, that the circumstantial evidence on record was sufficient to warrant a conviction, that the Appellant's constitutional right was not infringed on for want of a search warrant during the search in his house and that the prosecution discharged its burden in proving its case beyond a reasonable doubt.

Evidence.

The prosecution's case was that the Appellant and his co-accused conspired with others to gain access to Galileo Lounge to commit a robbery. They assisted the robbers by being absent from work or facilitating the robbery in question which led to the theft of the property itemized in the charge sheet.

PW1, Richard Ngatia was the proprietor of Galileo Investment Limited. He testified that the Appellant who was the accountant was charged with the duty of collecting money, accounting for it and banking. He recalled that on 2nd April, 2013 at around 0800hrs he was driving to his office when he received a call from one of his employees who informed him that their establishment had been raided by armed robbers. The witness called the police who rushed to the scene. He called one of his employees who informed him that the police had rescued the employees who were locked into a room but that the robbers had escaped with a safe that contained their weekly collection, a computer monitor and a small box containing money. He was informed that their consulting accountant, Cleopha, was to report at work late at 0800hrs as the Appellant had lost the office keys and needed time to get keys from the cashier. The Appellant on the other hand reported to work at 0700 hours which was suspicious. He also found that the 1st accused, a security officer, did not report to work on the day in question. He confirmed that some money was recovered in the Appellant's house.

PW2, Benard Kilonzo Muthama was a care taker at Galileo Lounge. He recalled that on 2nd April, 2013 he reported to work at around 0730hrs and found the Appellant's car which he took to mean that the Appellant was in his office. He testified that he was carrying out his normal duties when suddenly a pistol was pointed at him. He was led towards the Appellant's office. There he met the security guard and another employee, one Njoroge and they were forced to sit down. He was robbed of the cash in his pocket. He testified that other employees were brought to the location where they were all held for thirty minutes. He testified that the robbers took money from the Appellant's office to a car. After a few minutes police officers arrived and broke the door. They left for Parklands Police Station where they recorded their statements.

PW3, Ann Wamboi Kimani was a cashier at Galileo lounge. She worked in the night shift. She recalled that on 1st April, 2013 she left the office at around 1000hrs and she carried the office keys with her. She testified that during this period they had lost one of the accounts' office keys. She testified that she talked to the Appellant later in the day and informed him that she had the keys. She testified that the Appellant came for the key and informed her that he wanted to carry out a reconciliation of cash before the auditor arrived. She testified that on 2nd April, 2013 at around 0900hrs the Appellant called her and informed her they had been robbed. She testified that she had left Kshs. 2,600,000/= and that the Appellant used to operate a float of Kshs. 200,000/=.

PW4, Elias Njoroge Wangui, and **PW5, Rahab Nyavivia Kamau**, were both a cleaner and house keeper at Galileo Lounge. They corroborated the evidence of PW2. **PW6, Cleopha Munene** was a consultant in financial solutions and worked with the Appellant more particularly in doing banking every Monday morning. His testimony was that he was informed of the robbery on 2nd April, 2013 by PW1 who warned him not to open the safe upon arrival in the office because there had been a robbery. His testimony was that the safe could only be opened by a combination number only known to himself and the Appellant.

PW7, Henson N. Mwambeo was a security guard at the Galileo Lounge. He testified that on the material date at 0830 hours, two men who turned out to be robbers arrived at the gate and informed him that they had been sent to collect a cheque from the Appellant. He allowed them into the premises. Five minutes later, one of them returned to where he was, pointed a gun at him and demanded that he opens the gate or he would kill him. He did not open the gate and the man snatched the keys from him and opened the gate which allowed three robbers to get in. He was handcuffed together with PW4. Thereafter the robbery was executed.

PW8, CPL Josephat Chebon of Flying Squad Nairobi commenced the investigations before handing them over to PW10. His main testimony was that he confirmed between 1st February and 21st April, 2013, the Appellant had not withdrawn any money from his Equity and Cooperative Bank Accounts. **PW9, No. 73465 PC Martin Ndirangu** from Parklands Police Station was one of the officers who visited the scene after the robbery. He did also confirm that on 19th April, 2013 Kshs. 50,000/= and 100 USD was recovered from the Appellant's house. **PW10 CIP David Cheruiyot** was one of the investigating officers. His evidence was that the Appellant was charged because had the knowledge of the daily collections and that the day before the robbery he had informed one of his colleagues that he would be getting late to work on the following day. He also confirmed about the money recovered from the Appellant's house. **PW11, CPL Benjamin Cheruiyot** was one of the arresting officers. He also participated in conducting the search in the Appellant's house.

The **Appellant** testified as **DW2**. He recalled that on 2nd April, 2013 he was working at Galileo Lounge as a chief accountant. He recalled that on 30th March, 2013 he left work at around 1900hrs and while in town he received a call from PW3 who informed him that she could not find her keys and she needed his. He assisted her with the keys. He testified that he usually arrived at work at 0800hrs but on Mondays he arrived earlier. He testified that on 1st April, 2013 at around 1400hrs he gave a call to PW3 asking if she had left his keys with the security guard or he could collect them from her. After PW3 failed to respond, he informed PW6 that he would report to work late as he did not have the keys to the office. Later, PW3 asked him to pick up the keys from her.

He recalled that on 2nd April, 2013 he arrived to the office at 0730hrs and went straight to the office to carry out petty cash summaries. He testified that at about 0800 to 0830 hrs two men who were armed with pistols accosted him demanding to know where the safe was. The robbers took his valuables and made him sit in a corner. One of the thugs left while the other stood guard. He was thereafter taken to where other staff members were bundled. The robbers carried away the safe. After about 5 minutes the area was quiet and he made a call to his wife who called a Mr. Mahinda who in turn called the police who arrived after 10 minutes and rescued them. They were taken to Parklands Police Station where they recorded statements.

He recalled that he was arrested on 19th April, 2013 together with his co- accused and a colleague, one Mahinda. Amongst the arresting officers were PW10. They escorted him to his house where Ksh. 50,000/ and USD 100 were recovered. He explained that the money belonged to his wife's 'shylock' business.

DW3, Cecilia Muthoni was the wife of DW2 who corroborated the latter's evidence that the money recovered from their house was from a shylock business she and DW2 ran in the name and style of Pillars Soft Loan Dealers. She produced receipt books as evidence of the business. In cross examination she testified that she kept the money in the house to meet urgent demands from clients.

Determination.

After analysizing the evidence on record and the respective submissions, I have arrived at the issues for determination to be;

1. Whether the charge was duplex.

2. Whether the charge was proved beyond a reasonable doubt.

On whether the charge was duplex, the Appellant submitted that the same applied because once the offence the Appellant was alleged to have conspired to commit was complete, then he ought to have been charged with the committed offence and not one of conspiracy. A ruling by Hon. Mbogholi J. in **H.C Misc. Cr. Appl. No. 52 of 2014, Joseph Ngunguru Wanjohi vs Republic [2014] EKLR** was cited. In the ruling, the judge delivered himself as follows:

> **"My first observation relates to the framing of the charge. Whereas the applicant(Appellant) is charged with the of conspiracy to commit a felony, it would appear, the alleged felony was complete in that the particulars of the charge alluded to the offence of robbery…..Where an offence is complete, it no longer remains a conspiracy unless the two are charged separately. The charge therefore may be faulted for duplicity."**

It is then important to attempt to define what duplicity is. The same concerns the count as opposed to the charge. A charge is said to be bad for duplicity when it contains more than one offence in a single count. Therefore, the test in determining if a charge is duplex is not the evidence but the draftsmanship of the charge itself. It is defined in Archbold Criminal Pleading, Evidence and Practice, 2010 at page 9 as:

> **"The indictment must be double; that is to say, no one count of indictment should charge the defendant with having committed two or more separate offences… The question of whether a count breaches the general rule against duplicity is a question relating to the form of the count, not the underlying evidence… thus, if the particulars set out in the count allege only one offence, the fact that the evidence at trial may reveal more than one offenc3 does not make the count bad for duplicity."**

In the present case, the Appellant was charged with a single offence which is that of conspiracy to commit an offence. The particulars of the offence are clearly spelt out and they constitute a single transaction comprising the offence. Therefore, whether or not the robbery was committed is a matter of evidence. More so, with respect to the Appellant, all that the prosecution needed prove was whether the Appellant in cohort with others conspired to commit the offence of robbery. Therefore, the fact that the offence was completed does not offend the rule of duplicity.

I now delve into the issue of whether the charged was proved beyond a reasonable doubt. Clearly, the Appellant was convicted based on circumstantial evidence. In order for the court to convict on circumstantial evidence, it must be established that the inculpatory facts of the case are such that they are inconsistent with the innocence of the accused. See the case of **Sawe vs Republic [2003] KLR 364** in which it was held that:

> **i. In order to justify a conviction 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 hypotheses than of guilt.**
>
> **ii. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.**
>
> **iii. The burden of proving facts which justify the drawing of the 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.**
>
> **iv. Suspicion however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt"**

The same was held in **The Queen v. Baden-Clay [2016] HCA 35 thus**:

> **"..."in considering a circumstantial case, all the circumstances established by the evidence are to be considered and weighed in deciding whether there is an inference consistent with innocence reasonably open on the evidence"(emphasis added). The trial is not to be looked at**

in a piece meal fashion, at a trial or on appeal.

…

For an inference to be reasonable, it "must rely upon something more than mere conjecture. The bare possibility of innocence should not prevent a [court] from finding the prisoner guilty, if the inference of guilt is the inference open to a reasonable man upon a consideration of all facts in evidence"(emphasis added)."

In the instant case, the Appellant was convicted because some money was recovered in his house. He however gave a plausible account of how he had the money which the prosecution did not rebut. Indeed, DW3 produced before the court a book in which she showed how she transacted with her clients whom she used to lend money. Furthermore, the burden of prove being on the prosecution, the prosecution was charged to demonstrate that the money recovered was part of what was stolen. Unfortunately, this burden was not discharged.

The other element was that the Appellant had informed PW6 that he would be going to the office late because he did not have keys to the office. The keys were in possession of PW3. He had tried getting the keys from PW3 so that he could report to the office early but in vain. That is when he told PW6 that he would arrive in the office late. But after PW3 contacted him, he collected the keys and was able to go to the office early as he had planned. That is how the prosecution deduced he was likely to have been involved in the robbery. In shuttering the prosecution's case, it is factual that the robbery occurred between 0800 and 0830 hrs. By this time, most workers had arrived at work. If the court were to believe that the Appellant had conspired with the robbers and that that is why he had arrived at work early, then the robbery ought to have taken place at about the time he was alone in the office. This was not the case as the robbery was executed when other employees were at work and like them, the Appellant was also a victim.

In crystalizing all the circumstances of the robbery, I am unable to deduce that the Appellant conspired with the robbers to commit the offence. Nothing gives the inference in exclusion of all other circumstances that he was guilty. The circumstantial evidence was therefore too weak to warrant a conviction.

Although I have found that sufficient evidence was not adduced by the prosecution to warrant the conviction, it is also important that I mention about the search that was conducted in the Appellant's house. His view was that the police officers who searched his house did not have a search warrant and the entry to his house was therefore unconstitutional. **Section 57 of the National Police Service Act (i) (a)** provides as follows:

(1) <u>Subject to the Constitution</u>, if a police officer has reasonable cause to

believe—

(a) that anything necessary to the investigation of an alleged offence is

in any premises and that the delay caused by obtaining a warrant to enter and search those premises would be likely to imperil the success

of the investigation; or

...

the police officer may demand that the person residing in or in charge of such premises allow him free entry thereto and afford him all reasonable facilities for a search of the premises, and if, after notification of his authority and purpose, entry cannot without unreasonable delay be so obtained, the officer may enter such premises without warrant and conduct the

search, and may, if necessary in order to effect entry, break open any outer or inner door or window or other part of such premises.(emphasis added).

In the instant case, the search was conducted on the date of the arrest. This of course was not immediately after the robbery. Due diligence demanded that the search officers ought to have obtained a search warrant before going into the house of the Appellant. I say so because the above provision places a disclaimer that the search must be in accordance with the Constitution. Be that as it may, it is clear that the Appellant did not suffer any prejudice merely because a search warrant was not obtained. He was not harassed by the officers conducting the search, neither was anything that was not necessary carried away from his house. Moreover, both himself and his wife signed the inventory in confirmation of the actual property taken away by the police.

In the end, I find that the prosecution did not adduce sufficient evidence to warrant the conviction of the Appellant. The appeal is allowed. I quash the conviction, set aside the sentence and order that the Appellant be and is hereby forthwith set free unless otherwise lawfully held. Cash bail paid on release pending appeal shall be refunded to the Appellant. It is so ordered.

Dated and Delivered at Nairobi this 28th February, 2017.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. Appellant present in person

2. Miss Kimiri for the Respondent.