



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 248 of 2008

APC RASHID SAID .....1<sup>ST</sup> APPELLANT

APC ARNOLD MUDI .....2<sup>ND</sup> APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

*(Appeal from original conviction & sentence in criminal case Number 115 of 2007 in the Senior Principal Magistrate's Court at Garissa - Mr. D.A.ORIMBA (SRM) on 23<sup>rd</sup> April 2008)*

JUDGEMENT

1. The appellants, **APC. Arnold Mudi** and **APC. Rashid Saidi** were tried jointly and convicted for the offence of failing to prevent a felony contrary to **Section 392** of the **Penal Code**. The particulars of the charge were that on the 25<sup>th</sup> January 2007 at NEP Girls Secondary School in Garissa District of North Eastern Province, while on duty at the said school, they failed to use all reasonable means to prevent the commission of a felony, namely robbery with violence, where Amina Khalid Mohammed was robbed of Kshs. 98,000. They were sentenced to a fine of Kshs. 20,000 each and in default to serve 12 months imprisonment.

2. The appellants being dissatisfied with the conviction and sentence filed an appeal in which they advanced five grounds, compressed as hereunder:

a) *That the trial magistrate failed to make a finding that the two key witnesses PW2 and PW3 were accomplices, and instead relied on their contradictory and uncorroborated evidence.*

b) *That the trial magistrate relied on the hearsay evidence of PW1, PW4, PW6 and PW8.*

3. The learned state counsel Miss. Maina responding on behalf of the state opposed the appeal on the ground that there was sufficient evidence on record to support both conviction and sentence.

4. I have carefully analysed and re-evaluated the evidence adduced before the lower court bearing in mind that I neither saw nor heard any of the witnesses testify, and due allowance (**see OKENO vs. REPUBLIC 1972 EA 32**).

5. In the Appellants oral submission the emphasis was that the trial magistrate erred in law and fact in failing to find that the two key witnesses, **PW2** and **PW3** were accomplices. The appellant submitted that these two witnesses were watchmen in the school and together with the Appellants had a duty to

guard the school. **PW2** and **PW3** were arrested together with the appellants and released within two days under unclear circumstances. They then testified against the two appellants whom the court convicted in reliance of their evidence.

6. **Section 392** of the **Penal Code** under which the appellants were tried and convicted provides as follows:

**“Every person who, knowing that a person designs to commit or is committing a felony, fails to use all reasonable means to prevent the commission or completion thereof is guilty of a misdemeanour”**

The issues for determination therefore, are whether the appellants or any of them, knew of the design to commit a felony, or that a felony was in the process of being committed. If this question is determined in the affirmative, I must proceed to examine the evidence to establish whether they or any of them, failed to employ all reasonable means to stop the commission, or completion of the said felony.

7. A summary of the evidence is set out below. **PW2** testified that on 24<sup>th</sup> January 2007, he reported on duty at 6 pm together with **PW3**. They were on duty from 6.00 p.m. to 6.00 a.m. and as was the normal routine, they were to be joined by the appellants. The appellants reported on duty at about 7.00 p.m., patrolled the compound and excused themselves to go to town and come back later. At about 2 a.m. some 20 intruders invaded the school compound and stole items from the house of **PW8** and the school office.

8. **PW2** and **PW3**, on realizing that the intruders were armed, fled fearing for their lives. **PW2** entered the Matron’s house while **PW3** jumped over the fence to the nearby Chief’s Camp and reported the matter. It is he who alerted the Administration Police at the Chief’s Camp of the raid at the school. The appellants who were supposed to be on duty were not in the compound when the intruders struck.

9. The appellants came back after 2.00 a.m. when the intruders had escaped with their loot. The trial magistrate made the following finding when analyzing the conduct of the appellants on the material night.

***“Accused persons being armed officers if were in the compound could have confronted the thugs. This therefore clearly shows that the two were nowhere close to the school. At best this is neglect of duty and being irresponsible on the part of accused persons.”***

10. **PW9**, I.P Abdi Hassan the deputy D.C.I.O Garissa Police Station in corroborating the testimony of **PW2** and **PW3**, testified that on the 25<sup>th</sup> January 2007 he was the deputy D.C.I.O. Garissa. He reported on duty in the morning of 25<sup>th</sup> January 2007 and received a report that thugs had raided the NEP Girls secondary school in the night and made away with property. He visited the school in the company of other officers, and later interrogated the appellants, **PW2** and **PW3** who were guards on duty that night. He recorded their statements and preferred the charge against the appellants. **PW9** formed the opinion that **PW2** and **PW3** should be treated as state witnesses.

11. The trial court found the evidence adduced by **PW2** and **PW3** as consistent and believable. Mr. Masika the learned counsel for the appellants submitted that the trial court should not have believed the evidence of **PW2** and **PW3**'s because they were accomplices in the offence.

**According to BLACK'S LAW DICTIONARY - 7th Edition an accomplice is:-**

***“A person who is in any way concerned with another in the commission of a crime, whether as a principal in the first or second degree or as an accessory.”***

**In WHARTONS CRIMINAL LAW Vol. 38 at page 220 (15<sup>th</sup> Edition 1993):**

***“A person is an accomplice of another in committing a crime if, with intent to promote or facilitate the commission of the crime, he solicits, requests or commands the other person to commit it, or aids the***

*other person in planning or committing it."*

12. It is evident from the above definitions that **PW2** and **PW3** were not within this threshold of who an accomplice is, because there is no evidence of their participation or complexity in the crime. The appellants' main contention on this issue is that since **PW2** and **PW3** were watchmen in the school and together with the appellants had a duty to guard the school, they were accomplices.

13. The evidence of the two watchmen was however fortified by that of **PW1**, the school Matron who gave refuge to **PW3** on the night of the attack. Her testimony was that they found the mobile phone of APC Rashid Said, the 1<sup>st</sup> appellant switched off when they tried to reach him during the attack.

14. **PW5** the then school Deputy Headmaster called a teacher who lived away from the school compound to seek help, and it was that teacher who alerted the Administration Police from the nearby Chief's Camp and they came to the scene. The two appellants were still nowhere to be found.

15. **PW6** confirmed that he had deployed the two appellants on guard duty at the school and that they were not there at the time of attack as they should have been.

16. **PW8** the school Headmistress confirmed that when the robbers broke the door to her house and gained entry to her house, she screamed for help, to no avail. The robbers who brandished crude weapons took money and personal items from her and left with no one to stop them.

17. The two appellants told the trial court in their defence, that on the material night they were deployed on patrol duties around the NEP girls Secondary School. They did check on the school at 8.00 p.m. and confirming that all was calm, they proceeded with their patrol. They however, instructed the guards to contact them in case of any problem requiring their attention.

18. They testified that the school which measures 30 acres is large and they patrolled it upto 1.30 a.m., when one guard called them by phone to alert them over the robbery. The guard said he was calling them within the Matron's house and that when the appellants went to the said house the Matron refused to open for them.

19. The second appellant testified that the deployment, though routine was illegal because it was not sanctioned by the authorized person. The appellants do not, therefore deny that their detail on the night in question included providing security at the NEP Girls Secondary School. Whether or not it was illegal they had orders from their supervisors, with which they appeared to comply, giving the school a false sense of security, only to disappear when the school needed them most.

20. I am satisfied from the evidence on record that indeed on the night of 25<sup>th</sup> January 2007 a robbery did occur at NEP Girls Secondary School, and that during the said robbery the appellants failed to prevent it for the simple reason that they were absent from the school.

21. A construction of **Section 392** of the **Penal Code** however shows that it is not sufficient for the prosecution to prove that ambit of felonious offences, occurred. The more important question is whether any of the two appellants knew that this felony was going to occur, hence at the design stage or witnessed it in progress. It is this **limb** of the offence which provides the **mens rea** even as the third **limb** failure to take reasonable measures to stop the commission of the felony provides the **actus reus**.

22. The evidence on record is in agreement that the appellants showed up at the school at about 8.00 p.m. checked the school and finding everything to be in order they disappeared only to reappear long after the offence had been committed and the robbers had left.

23. To accept the appellants' submissions that **PW2** and **PW3** were accomplices would mean that the two appellants were themselves the principal offenders. There is however no **iota** of evidence that either the two witnesses or the two appellants were aware of the offence during its design or planning stage, or when it was in progress. The testimony of **PW1** was that when one of the guards tried to reach the 1<sup>st</sup>

appellant during the attack his phone was switched off.

**24.** If, therefore, there is no evidence that any of the appellants were aware that a crime was going to be committed or was being committed within their vicinity, it follows that they could not have used all reasonable means to stop an offence whose commission they were unaware of. I must repeat the observation of the learned trial magistrate that:

**“At best this is neglect of duty and being irresponsible on the part of the accused persons”**

for having sneaked away and abandoned their posts. Their actions however do not amount to an offence as defined under **Section 392** of the **Penal Code**.

Reasons wherefore, their respective appeals succeed. The respective convictions are quashed and the resultant sentences set aside. Each appellant is set at liberty forthwith unless otherwise lawfully held.

**SIGNED DATED** and **DELIVERED** in open court this **14<sup>th</sup>** day of **November 2012**.

**L. A. ACHODE**

**JUDGE**