REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 34 of 2005

BENARD MACHIBO KIBET ……..……...……APPELLANT

VERSUS

REPUBLIC……..…….……RESPONDENT

(From the original conviction and sentence in criminal case No.34 of 2005 of the Chief Magistrate's court at Nairobi – Ms. W. Juma SPM)

JUDGMENT

BENARD MACHIBO KIBETT, the appellant, was charged before the subordinate court together with three others with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence were that on 5th February 2003 at Consolidated Bank of Kenya

Harambee Avenue Nairobi within Nairobi Area, jointly with others not before the court while armed with dangerous weapons namely pistols robbed RAEL MWENDIA NJUE MUCHIRI of cash Kshs. 36 million and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said RAEL MWENDIA NJUE MUCHIRI. The amount of money in the charge was later amended to read Kshs. 36,705,000/=, US$ Dollars 72,665, UK Sterling Pounds 4385, and 10,005 Euros all valued at Kshs.43,740,712/05. After a full hearing, all the other three accused persons in the subordinate court were acquitted. The appellant (who was the 2nd accused) was however convicted o f the offence and sentenced suffer death as provided for by law. Being aggrieved by the decision of the trial magistrate, the appellant has appealed to this court. His amended grounds of appeal are that –

1. The learned trial magistrate erred in law and facts to make a guilt inference on the basis of alleged aiding and facilitating the robbers entry into Bank premises without either considering the evidence of event of attack which were swift, sudden and beyond his control while he unarmed; or appreciating the evidence about his duties which absolved him from the alleged complicity.

2. The magistrate erred in failing to address section 72(3) (b) of the Constitution which was violated in the case.

3. The magistrate erred in upholding the charges as proved whereas there was no explanation about his long stay (in custody) and the informer did not testify and was not cross examined.

4. The evidence of his defence escaped adequate consideration by the trial court.

5. The charge sheet was defective.

6. The magistrate erred in convicting him when section 77(2) (b) (f) of the Constitution was not complied with.

The appellant also filed written submissions in support of his grounds of appeal.

Mr. Makura, the learned State Counsel, opposed the appeal and supported both conviction and sentence. It was counsel's contention that the appellant was a guard at Consolidated Bank Harambee Avenue when the robbery occurred and he was the mastermind of the robbery. Counsel contended that appellant then absconded from duty leading to his dismissal, arrest and charge. Counsel contended that the evidence of PW1, PW2, and PW3 proved that the appellant was a principal offender in the commission of the offence, in terms of section 20 of the Penal Code (Cap.63).

Counsel argued that there was no evidence that the appellant was detained for a long period contrary to section 72 of the Constitution. Counsel also argued that it was not true that the language used in court, at any point, was not indicated in contravention of section 77 of the Constitution. Lastly, counsel submitted that defence of the appellant was considered, and that the charge sheet was not defective as alleged by the appellant.

In response, the appellant submitted that he was the first person who was forced by the robbers to lie down, and could not prevent the robbers from entering as they had a gun. He also submitted that STANLEY NGURE who was said to have given information about his (appellant's) involvement in the robbery did not testify.

This being a first appeal, we have to remind ourselves that we are duty bound to re-evaluate the evidence afresh and come to our own conclusions and inferences – see **OKENO –vs- REPUBLIC [1972] EA 32.**

The brief facts are as follows. The appellant was a watchman at Consolidated Banks Ltd. Harambee Avenue Branch. On 5/2/2007 in the morning, he relieved his colleague the night watchman. Therefore workers of the bank started arriving. At 7.30 a.m., PW1 RAEL MWENDIA NJUE, who had the key to the main door arrived and opened the main door and entered. The appellant also entered the main door. He continued allowing other workers to come in, while he was himself behind the door. At one point, he allowed two female workers to come in, but these were closely followed by people who had guns who entered the bank, took his uniform, threatened all the workers and forced them to lie down. The appellant was also forced to lie down. The intruders took control of the main door.

The intruders then looked for PW1, whom they appeared to know by name and asked for her. She hid in a toilet but they forced the toilet door open and demanded that she opens the safe PW1 could not open the safe as he keys which open the safe are held separately by two people. When (PW3) ISABEL WAMBUI WAINAIANA WAMBUI, who held the other key to the safe arrived, the intruders also appear to have known her by name as they called her by name. They let her into the bank and forced both PW1 and PW3 to open the safe. The intruders took the money in local Kenya currency and other foreign denominations. They them left with the money.

After the incident, appellant appears to have been initially arrested and then released. The bank two employees (PW1 and PW2) who opened the safes were also initially treated as suspects and their residences were searched, but they were not charged in court, as nothing connecting them to the offence was found in their houses. The appellant was later arrested and charged on information from a person or persons who did not testify inc court.

When he was put on his defence, the appellant gave sworn defence. He stated that while on duty he was threatened by robbers who were armed. He was ordered to lie down which he did and was not able to see or identify any of the robbers. After the robbery incident he rang his bosses and the police. He was arrested and kept in custody for 12 days before he was released and he resumed work. However, on 9/7/2003, he was arrested at his place of work at ICDC Uchumi House and placed in the cells up to 27/7/2003 when he was charged.

Faced with this evidence, the learned trial magistrate found that the prosecution had proved its case against the appellant beyond any reasonable doubt. In the judgment, the learned trial magistrate stated thus with respect to the appellant –

"**The second accused was also mentioned by the suspect and just like other accused that evidence is not important on its own. The second accused explained how he let in those robbers but not with clarity. He claims to have first let in two ladies, then later three robbers. How much later is not clear. He could have assisted the police with investigation to the extent that the said ladies would have been interrogated on. Whether or not they saw anybody come in after them.**

No such ladies came to testify, most probably because things did not happen the way the second accused would want the court believe. The second accused person knows how he let in those robbers. If the robbers had come disguised as employees or come pointing a gun at him and ordering him to open the door for them it would make sense but from the explanation of the accused no such information can be gathered. Two most probable conclusion one can come to is that the second accused person opened the door for those a suspects, knowing well what those arrangement was".

With profound due respect to the learned trial magistrate, the above observation were misdirections. Firstly, the magistrate shifted the burden of proof to the appellant, which should never happen in a criminal case. The burden is always on the prosecution to prove the guilt of an accused person beyond any reasonable doubt. Therefore, in our view, the learned magistrate erred in shifting the burden of proof to the appellant. It is clear from the evidence that the appellant opened the door for several employees of Consolidated Bank Ltd. It should have been for those witnesses to have given the time between when they came in and when they were confronted by the robbers, not the appellant.

Secondly, the learned magistrate went into drawing conclusions from conjecture and suspicion which was also a misdirection. A criminal case is not proved on conjecture or suspicions. The appellant could not safely be convicted merely because "it is probable that he opened the door for those suspects, knowing well what the arrangement was". There must be evidence to support that conclusion. As was held by Kwach, Lakha, and O'kubasu JJA in **SAWE –vs- REPUBLIC [2003] KLR 364 –**

"**7. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt"**

That is not all. The appellant was arrested by PC CHARLES MUTHAA (PW7). The said witness testified that the appellant was in police custody before, and he was released. He was later arrested because of information that was given by STANLEY NGURE MWANGI. That STANLEY NGURE MWANIGN was not called to testify in evidence. That information could not be a basis for connecting the appellant with the offence. Firstly, the information that the appellant is the one who gave STANLEY NGURE MWANGI the job (to rob the bank) is hearsay and is not admissible. Secondly, that STANLEY NGURE MWANGI is such a crucial witness that the failure to call him leads us to make an adverse inference that his evidence, if tendered in court would be adverse to the prosecution case – see BUKENYA & ANOTHER –vs- UGANDA [1972] E A 547.

Having evaluated all evidence on record, we come to the conclusion that the conviction of the appellant is not safe and cannot be sustained. We do not find it necessary to address the other grounds of appeal.

Consequently, we allow the appeal, quash the conviction and set aside the sentence of the subordinate court. We order that the appellant be set at liberty forthwith, unless he is otherwise lawfully held.

Dated and delivered at Nairobi this 1st day of November 2007.

…….**……**

J.B. OJWANG

JUDGE

…….……..

G.A. DULU

JUDGE

In the presence of –

Appellant in person

Mr. Makura for State

Tabitha and Eric - court clerks