REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL NO. 163 OF 2003
(AS CONSOLIDATED WITH
APPEALS NO. 164 AND 165 OF 2003)
(From original conviction and sentence of the Chief Magistrate's Court at Nakuru in Criminal Case No. 706 of 2002 –S. Muketi)

BENSON KANGETHE NJENGA……...……..1ST APPELLANT

PETERSON MUNENE MUGO……...…….2ND APPELLANT

PETER KIUME KAERU……..…….3RD APPELLANT

VERSUS

REPUBLIC……...…….RESPONDENT

JUDGMENT

The Appellants, Benson Kangethe Njenga, Peterson Munene Mugo and Peter Kiume Kaeru were charged with the offence of robbery with violence contrary to **Section 296(2) of the Penal Code**. They were further charged with the offence of conspiracy to commit a felony contrary to **Section 393 of the Penal Code**. The particulars of the offence were that on the 30th of March 2002 at 4.00 p.m. at Thigo Bar within Njoro Town, Nakuru District conspired together to commit a felony namely to rob Joseph Mwangi Kanyogo of his money. The Appellants pleaded not guilty to both counts. After a full trial the Appellants were acquitted on the first count of robbery with violence. They were however convicted of the second count of conspiracy to commit a felony. Each of the Appellants was sentenced to serve four years imprisonment. The Appellants were aggrieved by their conviction and sentence and have appealed to this court against the said convictions and sentences.

At the hearing of the Appeal, the separate appeals filed by the Appellants were consolidated and heard as one. The Appellants, in their Petitions of Appeal put forward more or less similar grounds of appeal. They were aggrieved by the decision of the trial magistrate in convicting them based on allegedly flimsy, scanty and insufficient evidence of the prosecution witnesses; that the trial magistrate erred in selectively considering the evidence which was adduced to arrive at a pre-determined conclusion convicting the Appellants. The Appellants were further aggrieved that they were convicted based on a charge that was invalid. The Appellant faulted the trial magistrate for arriving at the decision convicting them against the weight of the evidence which was adduced in court and finally the Appellants were aggrieved that they had been sentenced to serve a custodial sentence that was manifestly excessive in the circumstances. At the hearing of the appeal, the Appellants, with the leave of the court presented written

submissions in support of their appeal. They urged the court to allow their Appeal. On the other hand, Mr Gumo the Assistant Deputy Public Prosecutor supported the conviction and the sentences imposed upon the Appellants by the trial magistrate. He submitted that this court ought to dismiss the appeals filed by the Appellants. I will consider the arguments made by the Appellants and the LearnedAssistant Deputy Public Prosecutor after briefly setting out the facts of the case.

PW 2, Joseph Mwangi Kanyongo, at the material time ran a business known as Biashara Masters Saw Mills Limited. The business was situated at Njoro Township. On the 31st of May 1999 his business premises was broken into and several items including the sum of Kshs 270,000/= stolen. His security guards were injured in the course of the robbery. No recoveries were made nor was anyone arrested in connection with the said robbery. On the 15th of March 2002 whilst PW 7, Daniel Waithanje Mwangi, the son of PW 2 was at the saw mill, a lady (PW 5) came to the saw mill. She indicated that she wanted to purchase timber. She asked to be given quotations of various timber products. She then went away without making any purchase. On the 26th of March 2002, the lady, identifying herself as Miriam Wanjiru, rung PW 7 and told him that he wanted to meet with him with some information which concerned a robbery which had been planned to be committed at the saw mill. PW 7 informed PW 2. PW 2 invited PW 5 to go to the saw mill. PW 5 narrated to them the conspiracy that was being hatched by one of the employees of the saw mill with two others to rob the saw mill.

PW 2 decided to inform the Police. PW 5 co-operated with the Police and a tape recorder was concealed in her body and a meeting arranged between the Appellants and the people whom they assumed to be robbers whom they would hire to rob the saw mill. When PW 5 met with the Appellants, she indicated that she was in a position to secure for them people who would be hired to rob the premises of PW 2. A meeting was arranged between the supposed robbers and the Appellants. PW 8 Police Constable Bernard Irungu posed as a robber and met with the Appellants at a public venue at Njoro. The conversation between the Appellants and PW 5 in company of PW 8 was recorded. During the said conversation which was in Kikuyu and Kiswahili, the Appellants talked about their intention to rob the premises owned by PW 2. The conversation from the tape was later transcribed and the transcription admitted in evidence by the court. The essence of the conversation held between the Appellants and PW 5 was that a plan was to be hatched whereby the premises of PW 2 was to be robbed. According to PW 5, the 2nd Appellant, Peterson Munene Mugo even proposed to burn down the saw mill after the robbery and "eliminate" PW 2. When the Appellants agreed to meet again with PW 8 and PW 5 with a view of finalising the planned robbery at Ngata complex, PW 8 arranged for the arrest of the Appellants. The Appellants were arrested and charged with the offence of conspiracy to commit a felony for which they were convicted.

When the Appellants were put on their defence, the 1st Appellant, Benson Kagethe, apart from narrating the circumstances of his arrest did not say anything in connection with the evidence which was adduced against him by the prosecution. The 2nd Appellant, Peterson Munene testified that he was charged with the offence because of the grudge that he had with PW 2 as his employee because he did not want him to join a union. He denied involvement in the conspiracy to rob the premises of PW 2. PW 3 Peter Kiome Kairu *(alias Mwangi*), apart from narrating the circumstances of his arrest, did not give any evidence that could controvert the evidence adduced by the prosecution.

This is a first appeal. As the first Appellate court in criminal cases, this court is mandated to look at the evidence adduced before the trial magistrate afresh, re-examine and re-evaluate it and reach its own independent determination whether or not

to uphold the conviction of the Appellants. In reaching its determination, this court has to put in mind the fact that it did not have an opportunity of seeing the witnesses as they testified and therefore it is not expected to make any finding as to the demeanour of the witnesses. The court also has to put into consideration the grounds of appeal put forward by the Appellants in reaching its decision (See O**keno – versus- Republic [1972] E.A. 32 Njoroge –versus- Republic [1987]K.L.R. 19**). In the instant Appeal, the Appellants were convicted of the offence of conspiracy to commit a felony. According to Section 393 of the Penal Code, any person who conspires with another to commit any felony, or to do any act in any part of the world which if done in Kenya would be a felony, and which is an offence under the laws in

force in the place where it is proposed to be done is guilty of a felony. **The Oxford Advanced Learners Dictionary 6th Edition 2000 (oxford university press**) defines *"conspiracy*" as:

"a secret plan by a group of people to do something harmful or illegal."

According to **Archibold, Criminal pleading, evidence and practice, 2003 (Sweet & Maxwell 2003)** adopting the definition as contained in the **Criminal Law Act 1977** of England (at page 2689, para 33-2) "**Criminal Conspiracy"** was defined as a situation where a person agrees with another person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions either will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement or would do so but for the existence of facts which render the commission of the offence or any of the offences impossible. The essential ingredient to thus prove the offence of conspiracy to commit a felony in that two or more people agree to put into effect a scheme whose ultimate aim would be the commission of a criminal offence. It will not matter that the criminal offence proposed to be done may be impossible to be undertaken. Proof of the existence of a conspiracy is generally a *"matter of inference, deduced from certain criminal acts of the parties accused, done in the pursuance of an apparent criminal purpose common between them"***R –vs- Brisac (1803) 4 East 164 at p. 71 (as quoted at** page 2692 Archibold para 33 – 11 (supra).

In the present appeal, the 2nd Appellant Peterson Munene, an employer of PW 2, the owner of Biashara Masters Saw Mill hatched a plan with the 1st Appellant Benson Kagethe and the 3rd Appellant Peter Kiome to rob the premises of PW 2. The plan involved the premises of PW 2 being broken into and items stolen. The Appellants were interested in stealing cash and the power-saws that were kept in the said premises. The Appellants met with PW 5 and ask her if she knew of persons who would be hired to undertake the robbery. PW 5 indicated that she could avail such persons. The Appellants wanted people who were in possession of firearms. This was due to the information that the 2nd Appellant had given to the PW 8 that PW 2 had a licence to own a gun and indeed owned one. PW 5 informed PW 2 the owner of the sawmill. A report was made to the Police. PW 8 was detailed to pose as a person who could be in a position to undertake the robbery. PW 8, a Police Officer met with the Appellants. Prior to this meeting, the 2nd Appellant arranged with PW 5 to visit the saw mill so that he could show her the layout of where the items proposed to be stolen were kept. PW 5 testified that she visited the premises of PW 2 as arranged by the 2nd Appellant and was indeed shown by the 2nd Appellant the store where the power-saws were kept and the strong room where the money was kept. In the meeting held between the Appellants and PW 8, a Police Officer who posed as a robber, a recording of the conversation that took place was made. The transcribed conversation was admitted in evidence. The Appellants were arrested when they agreed to meet with PW 5 and PW 8 the last time to finalise the plans for the robbery.

I have re-evaluated the evidence adduced by the prosecution and the evidence offered by the Appellants in their defence. I have also carefully considered the written and oral submissions made by the Appellants and the response to it by the State. I hold that the Prosecution established its case against the Appellants beyond any reasonable doubt. The prosecution proved that the Appellants met and agreed to undertake a course of action whose ultimate result would have been the commission of a felony, namely a robbery. The prosecution proved that the Appellants had conspired to commit a felony which felony was prevented when PW 5 whom the Appellants had approached to undertake procure the persons who were to undertake the robbery informed PW 2, the owner of the sawmill and later the Police. It is the finding of this court that theevidence adduced by PW 5 and PW 8 was cogent, consistent and without any shadow of a doubt connected the Appellants with the conspiracy to commit a felony. The evidence of PW 5 and PW 8 was corroborated by the evidence of PW 2 and PW 7 who testified on how PW 5 informed them of the plan that had been hatched to rob their premises. All the ingredients to prove the offence of conspiracy to commit a felony were thus proved. I do not find any merit in the appeals filed by the Appellants. Their Appeals against conviction is thus dismissed.

As regards sentence, this court has noted that the Appellants upon being arrested on the 31st of March 2002, were charged with the offence which they were convicted and the offence of robbery with violence contrary to **Section 296(2) of the Penal Code**. The second offence is not bailable. The Appellants have thus been in custody since the 31st of March 2002 when they were arrested. They were

convicted on the 4th of April 2003 and sentenced to each serve four years imprisonment. As at today's date the Appellants have been in custody for a period slightly less than three years. I have noted that the Appellants were first offenders. I have also noted that the offence which the Appellants intended to commit was nipped in the bud due to the public spirited nature of PW 5 who should be commended for her bold decision, not only to report the incident to the police, but to testify against the Appellants in this case. Taking in totality the circumstances of this case, I do find that the period which the Appellants have served is sufficient punishment for them. They have learnt their lesson. In the premises therefore, I set aside the sentences imposed by the trial magistrate upon the Appellants and substitute it with the sentence of this court commuting the sentences imposed to the period already served. The Appellants are thus set at liberty unless otherwise lawfully held.

DATED at NAKURU this 14th day of January, 2005.

L. KIMARU

JUDGE