



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**APPELLATE SIDE**

**CRIMINAL APPEAL NO.104 OF 2002**

**MUNGUYUKO KAZURI.....1ST APPELLANT**

**(Original Accused No.1)**

**V E R S U S**

**REPUBLIC.....RESPONDENT**

**CONSOLIDATED WITH**

**CRIMINAL APPEAL NO.103 OF 2002**

**YUSUF ISAAC BULE.....2ND APPELLANT**

**(Original Accused No.3)**

**V E R S U S**

**REPUBLIC.....RESPONDENT**

**A N D**

**CRIMINAL APPEAL NO. 107 2002**

**MUNGUYUKO KAZURI.....APPELLANT**

**V E R S U S**

**REPUBLIC.....ACCUSED**

**(From Original Conviction and Sentence in Criminal Case No.1595 of 1999 of the Senior Resident Magistrate's Court at Mombasa –H. Njiru, Esq., - S.R.M.)**

**JUDGMENT OF COURT**

The first appellant was charged with the offence of Stealing by a Person Employed in the Public Service contrary to Section 280 of the Penal Code. He was also jointly charged with the 2nd Appellant Yusuf Isaac Bule and another, Evans Orina

Omenge with Preparation to Commit a Felony contrary Section 308(3)(b) of the Penal Code. The said Evans Orina Omenge who has not appealed also was charged with a 3rd count of Possession of Firearm contrary to Section 4(1)(a) of the Firearms Act, Cap.114 of Laws of Kenya and 4th count of Unlawful Possession of ammunition contrary to Section 4(2)(a) of the Firearm Act. The 1st appellant was acquitted of the 2nd count but convicted of the 1st count of Stealing by a Person Employed in the Public Service. The 2nd appellant and the 3rd accused at the lower court were convicted of the 2nd count while the 2nd accused was convicted of the 3rd and 4th counts. As I have indicated the 1st accused and 3rd accused appealed and they are here as 1st and 2nd appellants. The appellants were represented by Mr. Magolo. After he concluded his submissions, the State Counsel, Miss Mwaniki conceded the 1st appellant's appeal. The appeal which is now before me for determination therefore is by the 2nd appellant in respect to the conviction on the charge Preparation to Commit a Felony of Robbery with Violence contrary to Section 308(3)(b).

I have considered the arguments put forward by Mr. Magolo and Miss Mwaniki. The evidence against the 2nd appellant came from PW.2, Pc. Roba Bashuna, and PW.3, Pc. Joel Langat. The effect of their evidence is that they got information from an informer on 20.4.99 at about 3 p.m. or 4 p.m. that a robbery was going to take place at Salambo Night Club along Moi Avenue, Mombasa. They were both in town. By about 5.30 p.m. to 6 p.m., the two with others not called as witnesses, went to Salambo Night Club to waylay the suspects. At the said time they saw the 2nd accused and the 2nd appellant who fitted the description they had got from the informer. They promptly arrested them. It is in conflict whether they took them to Urban Police Station or the Dog Section since the two witnesses differ. They stated that on arrest, they conducted a search and recovered the relevant pistol – Ceska No. F 1781 under the underwear of the 2nd accused. Who recovered the gun from the 2nd accused (lower court). Again the two witnesses conflicted, Pc. Roba Bashuna saying that it was Sgt. Kanda while Pc. Joel Langat saying that it was Pc. Roba Bashuna himself who recovered the gun from 2nd accused. Both admit that there were many members of the public at Salambo Night Club when they arrested the suspects but no member of the public was called as witness. The two Police witnesses had not at all indicated anywhere on the Police ordinary records that they had gotten information about the intended robbery nor did they ask the informer how he himself got the information. Even in their personally recorded statements they did not record that they would go to Salambo Night Club for such an important or serious mission. PW.2 stated that the 2nd appellant was arrested with 2nd accused because they were together but both confirmed on searching the 2nd appellant that they found no weapon with him, although he had been described by the informer as a Somali.

The 2nd appellant in his defence, stated that he was a watch hawk and was known very well to PW.1 Pc. Bashuna with whom there was a vendetta over an assault case which had been dismissed against the appellant. He further stated that Pc. Bashuna had called him to meet the witness at the G.P.O. where the appellant went and there he was arrested by PW.2 and PW.3.

The evidence on the record barely supports the charge against the 2nd appellant. All there is is that he was arrested outside Salambo Night Club. He had no weapon. There is no reliable evidence that he was indeed in company of the 2nd accused whom he denied knowing at all and never saw until the time they were charged together. The evidence of PW.2 and PW.3 is itself unreliable. How can their evidence be relied upon when they conflict as to who even recovered the gun from the 2nd accused outside the Salambo Night Club. They never indicated on the records that they had a serious assignment at 6.30 p.m. that day. They never even got any reliable information from their informer. It is my view, and I so hold, that the prosecution evidence was not reliable and was not credible enough to be relied upon to convict. Furthermore, section 308(3)(b) states that a suspect can be found guilty of the offence of preparation to commit a felony only if he is found in any building whatever by night with the intent to commit the felony therein. It was not argued that the appellant was in a building at night as 6 p.m. to 6.30 p.m. cannot be called, night. The appellant and his colleague, if he was in company at all, were arrested not inside Salambo Night Club but outside before entry. I therefore have no hesitation in holding that the trial Magistrate erred in failing to examine and establishing the ingredients of the offence charged, apart from the fact that the necessary evidence was almost non-existent.

This appeal by the 1st and 2nd appellants must accordingly be allowed. The convictions against both is hereby quashed and the sentences set aside.

The 1st and 2nd appellants are hereby set at liberty forthwith unless lawfully detained in prison. It is so ordered.

I cannot help but express my surprise at the shoddy investigation done by the Police in this case. Had proper investigations been carried out, there is no doubt that Chief Inspector John Muthusi would have been made more answerable than he was. I however, say no more.

Dated and delivered at Mombasa this 23rd day of July, 2002.

**D. A. ONYANCHA**

**JUDGE**

