



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO.189 OF 1998

(From Original Conviction and Sentence in Criminal Case No.231 of 1998

of the Chief Magistrate's Court at Mombasa –J.S. Kaburu, SPM)

ISAAC KAMAU IRINGU APPELLANT

- VERSUS -

REPUBLIC RESPONDENT

J U D G M E N T

The Appellant Isaac Kamau Irungu was charged with the offence of Robbery with Violence contrary to Section 296(2) of the Penal Code. It was alleged that on 9-7-96 at Delphis Bank Ltd in Mombasa District of the Coast Province jointly with others not before the court being armed with dangerous weapons namely AK47 and pistols robbed Delphis Bank of cash 10,648.073 and at and or immediately before and immediately after the time of such robbery they threatened to cause actual violence on Shanshitant Chandubhai Patel.

PW.1 Shashikhan Patel was a bank employee and was working there on 9-7-96 when a man armed with a gun ordered them to lie down facing the floor. He had voices ordering and one shouting “Festus come here and open. He did not recognize anyone and they were gone in 15 minutes. Later he learned that KShs.10,648,073/- was stolen. PW.2 narrated how a man carrying a big traveling bag came into the bank at about 3 p.m. took out a gun from the bag and pointed it at her. PW.3 a cashier was also one of the people who complied with the order from the gun man to lie down. He said he could identify the gun man. PW.4 a Delphis Bank driver was at the Delphis bank about 3 p.m. on 9/7/96 when a voice ordered everybody to lie down so was PW.5 who was ordered to lie down. Later PW.5 heard the manager's secretary asking them to lie down. PW.6 a bank officer with KCB testified how on 15-7-96 he opened an account for one Isaac Irungu Kamau A/c No.151-011-004 at Githurai KCB Branch where he Irungu deposited KShs.450,000/-. His photograph appeared on the application form which the bank kept..

Pw.7 IP Edward Muluu Kamojo while investigating the crime investigated the new account in KCB Ruiru. There had been a robbery at Ruiru. He got information about the new account.

PW.7 said that after he got information that some one had opened an account and deposited KShs.450,000/- at KCB Ruiru Branch, he proceeded to the bank and investigated the account whose owner he recognized to be living in Mombasa and was the appellant and was at that time subject of police

investigation.

In his statement under charge and caution which the court admitted after trial with trial. Appellant made admissions and confession of taking part in the robbery. He said that one Sammy Okwale had contacted him in 1996 and recruited him to do a job of stealing some money from the bank. He wanted to get a place where he could hide the robbery get away vehicle. Appellant agreed that he could park his vehicle in his business premises. The man came one day and parked the car and on that robbery day the contact Sammy came to him in the company of Kimilu Kilonzo, Mwangi Kibogoyo, Mwangi Karanja, Patrick Gitau and Kwengwo. The robber came back after 1 hour with money in a sack which they divided among themselves. They locked themselves in appellant's garage and he was given KShs.600,000. They left. He left Mombasa on 12-7-96 for Kiambu and thereafter opened the account in Ruiru with KShs.450,000/- and later after 3 months he was told while he went to withdraw that the account was under investigation. On 6-1-97 when he was arrested he confessed to owing a pistol in Mombasa which was recovered by police after he had told them where the pistol was hidden where PW.9 IP Michael Opiyo recovered it on 15-1-97 being hidden in a kerosene stove Ex.1. PW.11 Cpl. Marwa stated how they arrested the robbers from Mombasa while meeting at Shaurimoyo on advise and prompting from a contact..

In defence the appellant gave sworn statement. First he said that the 450,000/- was a collection from his business for purposes of buying a plot of land and the Ruiru KCB Branch was the nearest. He narrated how he was arrested, at and was taken to Githurai, Shaurimoyo and to Mombasa where he stayed, then he was just told a gun was found at uncle's house. He said he was tortured to sign the statement.

In his judgement the learned Senior Principal Magistrate Mr.Kaburu found that armed robbers robbed Delphis bank as charged. He accepted appellant's confession that he took part in the robbery; that he hid the robbery get away car; that he offered his garage as a hide out and a place where robbers made the distribution, that he had the police to his home in Mombasa where a pistol was recovered. The learned magistrate found him guilty because he participated in the crime and convicted him accordingly and sentenced him to death. In his appeal he says he was not arrested because of Delphis Bank Robbery and that there was nothing connecting him with that robbery. He said that 450,000/- is not evidence against him about theft at the Delphis Bank Robbery and that there was nothing connecting him with that robbery. He challenged the confession and its admissibility. The finding of the gun was irregular and there was no caution administered and more it was not found in the home of appellant but in some other person's house who was not even called as a witness. However, Mr. Gumo, Senior State Counsel supported the conviction and sentence. He said the statement was voluntary. He also said that recovery of the gun was enough proof that appellant was in concert with the robbers.

In our considered view the conviction in this case is based both on circumstantial evidence and on the confession that the magistrate admitted, but at this point of proceedings this being first appeal we are entitled to evaluate the evidence afresh and come to our own conclusions. We can revisit the charge. Appellant was charged that on 9-7-96 at Delphis Bank Ltd in Mombasa he jointly with others not before court being armed with dangerous weapons namely AK47 and pistols robbed Delphis Bank of KShs.10,648,073/- and immediately after or immediately before such robbery they threatened to use actual violence on Shanshitant Chandubai Patel.

On the evidence here we find it proved that there was armed robbery at the Delphis Bank and that it was an offence under S.296(2) of the Penal Code. Secondly we find that there nobody who identified appellant as one of the robbers. We also want to state that taken on their own, the banking of KShs.450,000/- by the appellant and the gun found in Mombasa had no connection with the robbery and the accused, but we must hasten to add that only if these items of evidence are taken individually. On this basis we do not respectfully agree with Mr. Gumo, Senior State Counsel where he says that recovery of the firearm was enough proof that appellant was in concert with the robbers.

There was no connecting independent evidence that the gun found was used in the Delphis robbery nor that the 450,000/= was part of the stolen money. Finding of the gun as a result of appellant's lead is only evidence that the gun was found at a place known to him. S.31 of Evidence Act Cap 80 states:-

“Notwithstanding the provisions of S.26, 28 and 29 when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.” It is not in evidence if robbery using that gun. These pieces of evidence could not be circumstantial enough evidence upon which conviction could be based. The law as we know from Court of Appeal decision in the case of R. v. Kipkering Arap Koske & An. [1949]16 EACA (136) says:- “In order to justify the inference of guilt the exculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilty.”

We believe that there were no circumstances fitting this description to establish appellant’s guilt on this evidence alone. That leaves the confession. Was there admissible confession? Or was there a retracted or repudiated confession? and secondly can a conviction be based on a retracted or repudiated confession?.

Appellant gave a long statement in which he said he aided the robbers with their plan by offering his premises for concealing the vehicle for robbers to get away by offering his garage to conceal them after robbery and sharing in the robbed amount by accepting KShs.600,000/- as his portion.

The learned magistrate accepted this evidence and said that ---

“I rule that the evidence of money, charge and caution statement and possession of the firearm shows that he participated in the robbery.”

If his statement is true then he was guilty by association and because a principal offender under S.20(1) of the Penal Code because he aided and abetted those who actually committed the robbery. In our view the appellant may also have been accessory after the fact and guilty under S.396(1) of the Penal Code..

Appellant now says the confession was not voluntary and therefore Retracts the statement. The learned magistrate held a trial within a trial and consequently admitted the statement. We hold it to be the law that the onus of proving that a confession is voluntary is upon the prosecution. We have carefully followed the recorded procedure of trial within a trial held by the magistrate and we do not find it justifiable to disagree with him on this. We do not see evidence of force used to extract the confession or that it was in any other way involuntary, and we think the prosecution discharge this burden. The learned magistrate accepted this evidence and we think he was entitled to do so. In **Tuwamoi v. Uganda [1967]EA 84** The Court of Appeal per Duffus, Ag. V.P. said:-

“We would summarize the position thus – a trial court should accept any confession which has been retracted or repudiated or both retracted and repudiated with a caution and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually a court will only act on the confession if corroborated in some material particulars by some independent evidence accepted by the court. But corroboration is not necessary in law and the court may act on confession along if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot be but true”.

The learned Senior Principal Magistrate did not expressly state his position as stated by the Court of Appeal but he considered the fact that the appellant bank KShs.450,000/- at once in a KCB bank at Ruiru contrary to his having said that he collected from his other business. He also considered that the appellant led the police to where he hid a gun and a gun was found. We can only suppose that these factors corroborated the appellant’s confession that he aided the robbers and was rewarded with 600,000/- out of which 450,000/- was banked at once by him. If the appellant had obtained the monies piecemeal from other businesses its banking should have reflected that trend. The discovery of the gun also showed consistence on the part of the appellant as to his truthfulness and voluntariness of the confession he made. We feel for these reasons that there was a voluntary confession, and that there was corroboration of it.

On the basis of our discussion above it is our judgement that appellant was properly convicted as a

principal to the robbery committed at the Bank. His appeal is therefore dismissed.

Right of appeal to Court of Appeal in 14 days.

Dated at Mombasa this 14th Day of September, 2000.

A.I. HAYANGA

JUDGE

KASSIM SHAH

COMMISSIONER OF ASSIZE