



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

APPELLATE SIDE

CRIMINAL APPEAL NO. 217 OF 1998

(From original conviction and sentence in Criminal Case
No. 13607 of 1996 of the Senior Principal Magistrate's
Court at Kibera: {(J. Ondieki (Mrs))}

JOEL BII NGANDA.....APPELLANT

-Versus-

REPUBLIC.....RESPONDENT

(Consolidated with)

CRIMINAL APPEAL NO. 339 OF 1998

(From original conviction and sentence in Criminal Case
No. 13607 of 1997 of the Senior Principal Magistrate's
Court at Kibera: {(J. Ondieki (Mrs))}

BENSON MUIRURI MBUGUA.....APPELLANT

-Versus-

REPUBLIC.....RESPONDENT

JUDGEMENT

The two appeals are consolidated. Both appellants were convicted of the offence of preparation to commit a felony contrary to section 308 (2) of the Penal Code and sentenced to 24 months imprisonment with one stroke of the cane. These are appeals from the said convictions and sentence.

When these appeals came up for hearing the first appellant told the court that he was satisfied with the conviction but asked for a reduction of the sentence. The second appellant Benson Muiruri Mbugua argued his appeal. He submitted that he was only a taxi driver who was hired for a fee and never knew that his customers were thieves until he was arrested by the police after a chase.

There is no doubt that the second appellant was the driver of the motor vehicle that drove the thieves to the house of the complainant. He left and allegedly came back, first after 2 minutes and secondly after 30 minutes. When he came back for the third time he encountered the police and PW3 stopped him in vain. Instead he sped off calling for a chase after which he stopped when his car was shot at. At the scene there were several securicor motor vehicles with sirens on but he did not stop. His conduct for the Republic was

evidence of his guilt.

The second appellant does not deny acting the way he did. He explained the reasons in his defence. He admitted he sped off but that was after hearing a gun shot and did not know at whom it was aimed.

I have made an independent evaluation of the evidence. If it were true that the second appellant was in league with the gang, I find it difficult to understand why he would have decided to go away and revisit the scene later. In my judgement he gave a plausible explanation of his conduct that night. His conviction, with respect was unsafe and the benefit of doubt should have been accorded to him. His appeal must therefore be allowed.

In respect of the first appellant Joel Bii Ngania, he was behind the whole plan. The said plan would have succeeded had it not been for the honesty of PW1 who revealed the intended robbery. The offence was serious and the sentence was well merited.

And so in the end, the appeal by Joel Bii Ngania is dismissed while that of Benson Muiruri Mbugua is allowed, conviction quashed and sentence set aside.

The said Benson Muiruri Mbugua shall be set free forthwith unless otherwise lawfully held. Orders accordingly.

Delivered and dated this 23rd day of March, 1999.

A. Mbogholi Msagha

JUDGE