IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: GICHERU, OMOLO & PALL JJ.A)

CRIMINAL APPEAL NO. 91 OF 1996

BETWEEN JUMANNE HABIB.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa (Lady Justice Ang'awa & Justice Waki) dated 7th June,1996

in

H.C.CR. A. NO. 317 OF 1995)

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JUDGMENT OF THE COURT

Before the Resident Magistrate Mombasa the present appellant along with four other suspects was jointly charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code.

The particulars of the charge state that on 15th January, 1993 at Kibokoni in Mombasa District within the Coast Province they jointly being armed with dangerous weapons namely; two pistols, robbed Mulhat Mohamed of 14 bangles, 3 sets of golden necklaces and some other ornaments and property mentioned therein of the total value of Shs.361,000/=, and at or immediately before or immediately after such robbery threatened to use personal violence against the said Mulhat MohamAe d.brief history of the matter is that Mulhat Mohamed (P.W.1) had gone to her grandmother's house. At the material time she was alone in the house with the appellant and a maid, Dinah Mbarak (P.W.2). P.W.1 sent the appellant to buy charcoal. The appellant returned at about 10.20 a.m. and brought charcoal. He had taken about 20 minutes to return.When he returned, he left entrance door of the house open which is normally kept locked. P.W.1 noticed it and went to lock the door. As she was doing that a man with a gun appeared from behind the store and at gun point robbed P.W.1 of the jewellery she was wearing. Three other persons joined him. They tied P.W.1 and P.W.2 and brought them into the lounge. They also tied the appellant but he was tied not as tightly as P.W.1 and P.W.2 were. The robbers ransacked the house. When the robbers thereafter left, the appellant warned P.W.1 and P.W.2 not to scream as the robbers could just return and kill them all. There is evidence that the appellant expressed a desire soon after the robbery that he wanted to leave his employment and go home. He had been only recently employed by the owner of the house. There is further evidence that the appellant went and pointed out one of the robbers who was arrested along with the appellant. The other three suspects were arrested subsequently and all five of them were charged together.

The trial magistrate acquitted two accused persons out of five of them for lack of sufficient evidence and the appellant was convicted along with the other two of the offence. The learned magistrate held that "the appellant was part of the group that planned the robbery."

Three of them including this appellant separately appealed to the High Court against their conviction and mandatory sentence of death. Their appeals were consolidated. On 7th June, 1996 Mary Ang'awa and Waki JJ. quashed the conviction and set aside sentence of the other two accused persons, but confirmed the conviction and sentence of the appellant.

The appellant has now appealed to this Court. Under S.361(1) of the C.P.C. a party to an appeal from a subordinate court may, ... appeal to the Court of Appeal against the decision of the High Court in its appellate jurisdiction on a matter of law only.

The only matter of law raised by the appellant b y his home made memorandum of appeal is that the judges of the superior court failed to give proper consideration to the evidence on record and unreasonably rejected his defence.

When the appeal came for hearing before us Mr Ingutya informed us that he had been assigned a pauper brief by the Honourable the Chief Justice to argue the appeal on behalf of the appellant. He said that his office received the brief on 9th January, 1997 in his absence from the office and he saw it only on 13th January, 1997. But he said he did not have enough time to prepare himself for the appeal. He applied for adjournment. In view of the fact that if the appeal was taken out it would come back for hearing in July 1997 and as we considered that Mr Ingutya had enough time to prepare for the appeal, it not being a complicated appeal we declined to take the appeal out of the list but allowed Mr Ingutya half an hour to make necessary preparation to argue the appeal. When the Court re-assembled after an hour, Mr Ingutya failed to appear.

We proceeded with the appeal. After we had heard it for about half an hour, Mr Ingutya walked in. When asked he said that he was in the library looking up authorities for this appeal. He, however apologised for this lapse. We accepted his apology but we would put on record that Mr Ingutya acted very irresponsibly. He failed to justify his brief. He failed to discharge his duty to his client and treated this court with disrespect. We send out a warning that in future we will not countenance this kind of behaviour from any member of the bar.

Now coming back to the appeal, Mr Gacivih has argued that the evidence pointing to the guilt of the appellant was overwhelming.

He has submitted that the appellant had pre-arranged with the robbers about the time when they were going to strike and that is why he requested P.W.5, the neighbour's house servant, to remind him when it was 10 a.m. But there is evidence of P.W.1 that he did not ask for permission to go out so as to bring the robbers to the house. It was on the other hand P.W.1 who sent him to bring charcoal. He took only 20 minutes to come back with charcoal. There is no evidence that the appellant was in contact with the robbers in those 20 minutes. His collaboration with the robbers is negatively by the fact that he could not have anticipated that P.W.1 was going to send him at 10 a.m. to buy charcoal.

Mr Gacivih further argued that the appellant left the door open to allow the robbers in. Nobody however saw how the robbers came in before they struck. P.W.1 asked him why he had left the door open. She however did not say what was the appellant's reply. Mr Gacivih conceded that although the door was normally locked one could through sheer forgetfulness leave it open. It was a reasonable possibility, he had to concede.

Another matter which pointed to the guilt of the appellant according to Gacivih was that he advised P.W.1 and P.W.2 as the robbers had just left that they should not raise an alarm lest the robbers should come back and kill all of them. The appellant had seen that the robbers were armed with firearms. It was a real possibility that if they were disturbed by an alarm, they would come back and shoot P.W.1, P.W.2 and the appellant. It would be far-fetched to say that the appellant was a participant in the robbery and

that is why he threatened P.W.1 and P.W.2 that they would be killed if they raised an alarm.

Then there is evidence that after the robbery the appellant said that he would leave the employment and go home. Mr Gacivih said that he the appellant wanted to disappear for fear of being arrested due to his involvement in the robbery. But on the other hand we know that the appellant is a youth of about 18 years. He had seen robbers armed with firearms committing the robbery in the broad day light. It is possible that he wanted to leave his job for fear of his life.

Mr Gacivih also submitted that the judgment of the superior court should not be interfered with because in the recent past there have been many robberies in the country with connivance of the house servants. We cannot take judicial notice of the allegation. Nor can we draw inference of guilt from it against the appellant.

Finally Mr Gacivih said that the fact appellant knew and pointed out a suspect who was involved in the robbery shows that he himself was involved in it. It is indeed a farfetched reasoning.

There is absolutely no evidence that the appellant participated in the actual robbery. He had been tied albeit not very tightly. Mr Gacivih has submitted that the appellant aided and abetted the act of robbery. Both judges of the superior court at page 7 of their typed judgment held: "It is not certain that there has been established evidence that appellant No.2 (the present appellant) did aid or abet the said robbers in the commission of this offence." They should have then acquitted the appellant giving him benefit of doubt.

Instead against the weight of evidence and notwithstanding the doubt which they had expressed about the appellant's involvement, they went ahead and said:

> "We find that the circumstances surrounding his involvement is (are) sufficient to uphold a conviction for aiding and abetting a commission of an offence under section 20 P.C.".

It is a strange case where the four suspects who were alleged to be the main perpetrators of the crime of robbery have been acquitted and this appellant who had no direct involvement in the robbery has been convicted on mere suspicion of aiding and abetting them.

We do not say that the appellant could not have been convicted on circumstantial evidence. But then that evidence should have been so strong as to lead the Court to an irresistible conclusion that the appellant did aid and abet in the commission of the offence. On the evidence before us it is dangerous to come to that conclusion. In any event it is not a reasonable conclusion. In Attorney General v. David Marakaru [1960] E.A 484 Sir Ronald Sinclair C.J. held that "a decision is erroneous in law if it is not one to which no court could reasonably come".

We therefore allow the appeal, quash the conviction and set aside the sentence and order that the appellant be set at liberty forthwith unless otherwise lawfully held.

It is ordered.

Dated and delivered at Mombasa this 23rd day of January, 1997.

J.E. GICHERU

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JUDGE OF APPEAL

R.S.C. OMOLO

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JUDGE OF APPEAL

G. S. PALL

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR