



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL APPEAL NO. 597 OF 1981**

**DIMAS NJERU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Appeal from the Chief Magistrate's Court, at Nairobi)**

**JUDGMENT**

The Kenya Commercial Bank Ltd at Moi Avenue was, on February 27, 1981 invaded by a gang of about five armed robbers who staged a robbery of Kshs 9,116,153.80 from Samuel Kigotho Gachau. The time the robbery took place was estimated to have been between 5.30 pm and 6.30 pm and it occurred at the strong-room. One of the members of the gang was shot dead at the scene by the police. The appellant, Cleophas Njeru s/o Dismas Njeru was at the time the Bank's security officer and his office was adjacent to the strong-room area. The appellant kept the keys to the strong-room where the money was kept. The appellant did the same job as Jonah Ndei Kamuri (PW 5) and these were security duties. In the office from where they operated were two televisions, an alarm system and security doors. As a security officer, the appellant was, among other things, to observe unusual movements to and from the strong-room and Jonah said that he was able to do so from his office through the glass wall of the security office. This witness said:

“I am also able to watch any movements leading to Chief Cashier's office. From my office I am able to see the lifts which lead to the strong room.”

On February 27, 1981, Jonah left duty at 5.30 pm and, according to Jonah, the appellant was supposed to have left duty at the same time, but Jonah said that when he checked off he left the appellant in the security office. It was never disputed that the appellant was on duty at the security office when the robbery took place. He was charged with and convicted of procuring others to commit an offence of robbery, contrary to section 20(3) as read with section 296(1) of the Penal Code and sentenced to 5 years' imprisonment plus 12 strokes. He has appealed against both conviction and sentence.

Section 20(3) of the Penal Code provides as follows:

“20 (3) Any person who procures another to do or omit to do any act of such nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with doing the act or making the omission.”

The first ground of appeal raised by the appellant is that the charge was defective both in form and content because no evidence was given of the nature of procurement nor the criminal intent necessary to sustain the charge. We have been unable to see in what way the charge was defective in form. As to the content, the particulars of the offence did allege that the appellant procured about five persons not before the court to commit the offence of robbery. This ground was not that clear, but perhaps what the appellant meant about content of the charge is that it did not state how he procured the five robbers. We do not think that it was necessary to specify the means of procurement. It was enough for the charge to allege only procurement without stating the method of the procurement which was a matter of evidence.

Musyoki Musyimi (PW 3) and George Kenneth Okumu (PW 4) were key prosecution witnesses. They both said that sometime between January and February, 1981, but presumably before the robbery, they each saw the appellant with two other persons go into and come out from the strongroom. George asked the appellant where the two persons were coming from and the appellant is said to have said that they had come from the strong-room to repair a clock. There was evidence including the appellant's that there was no clock in the strong-room. Furthermore when there was need to repair the alarm system – this was done by the firm known as Technical Engineer Services, who did not deal in the repair of clocks. Amos Muturi (PW 8) of the Technical Engineer Services who was incharge of the security system said in cross-examination that his firm had never been asked to go and repair anything in the strong-room.

In the second ground of appeal, the appellant has stated that Musyoki's and George's evidence was not for belief as they neither raised the alarm nor informed the authority when they saw the appellant with two strangers at the Bank. Both Musyoki and George said that George did ask the appellant who the two strangers were and was told that they were watch repairers. The two men were with the appellant who was one of the bank's security officers. The two guards, Musyoki and George, must have believed the appellant, which if they did, they could not have raised the alarm or reported the matter to the authority.

With Jonah's evidence on record that from his office, where the appellant worked and was on the material day, he could monitor whatever was going on at the lifts which led to the strong-room, the third ground of the appellant's appeal is untruthful. As to the fourth ground, the chief cashier and the cash officer and George could not have used the radio system in the strong room to alert the appellant because they were immediately attacked by the robbers who blindfolded them. They were captives and had no time to do anything.

The evidence of George Okumu was that one of the robbers who attacked him on the day of the robbery was one of the two men he had seen the appellant with at the Bank between January and February 1981. George was taken to the City Mortuary and he identified a dead body of the member of the gang who was shot dead at the scene and whom he said was with the appellant before the day of the robbery. George said that he entered the city Mortuary alone as the police stayed out. George said:

“I remember the face of this robber who died because I had seen him twice before the robbery.”

The learned senior resident magistrate who heard and saw George believed him and on our own assessment of the written word we find that George spoke the truth that he saw the appellant with two persons coming from the strong-room before the robbery and one of the two persons was the man who was shot dead at the scene of the robbery on February 27, 1981. Once the court had believed that George had seen the dead robber twice and he recognized him, identification of the dead body of the dead robber was of mere confirmatory value so that even if it is excluded it would be of no consequence to the prosecution case. It was in the evidence of George that on the February 27, 1981 the appellant went to the strong-room at 6.00 pm before the robbery and came out after 3-4 minutes complaining that the chief cashier was delaying him of course by not taking the money to the strong-room. The witness said:

“That day about 6.00 pm accused came and I opened for him to go to the alarm room in the strong-room. He came after about 3-4 minutes. He came back alone. He knocked on the door....and he leaned on the Chief Cashier's office and looked and said where is chief cashier he is making us late we want to go home. He then went back to his security office. After a few minutes Gachau came back and took money into boxes and went down through the lift.”

Gachau (PW 11 ) said:

“.....we pushed boxes (boxes of money – in brackets ours) to lift. This was about 5.30 pm. We got into lift with Mutta and a messenger. We pushed them with the lift reached strong room area and as we found about five men in the strong room area they were armed with *pangas* and a pistol. Immediately they ordered us to lie down. We lay down and they tied us.”

David Mutta (PW 9) said:

“I know the accused Cleophas Njeru, he is a security officer at the bank. I know his office. We met these 5 people in front of the lifts which face the strong room. Accused could have seen what was happening in the security corridor not downstairs.”

In ground 8 of the petition the appellant has suggested that George and Musyoka must have been accomplices because they guarded the only entrance that the robbers could have used to gain entry to the strong room. George clearly stated that the robbers knocked at the door he was guarding and immediately he opened he was attacked, blindfolded and his mouth sealed. He cannot be said to have been a *particeps criminis* and we do not find Musyoka to have been one either, as he was not at the scene immediately.

The appellant has questioned why the police officer who conducted the identification of the dead body was not called as a witness for the prosecution.

We do not consider what took place at the City Mortuary when George identified the body of the deceased robber to have been any practice near an identification parade. We have however already said that George had seen the deceased robber twice and he said that he recalled the robber's physical appearance. That evidence, if believed by the court as it was, was sufficient to establish the robber's identity without the identification of his dead body. It might have been desirable to call the police officer who went to the mortuary with George when the latter identified the body, but we do consider it to have been necessary to call the police officer as a prosecution witness and the omission did not, in our opinion, occasion a miscarriage of justice. In any event in identifying the body of a deceased person it is doubtful whether all the Judges' Rules relating to identification parades have to be observed.

Procuring is a fact which can be inferred from circumstantial or oral evidence, and, it may be proved by other than oral evidence. For example it may be proved by the evidence of surrounding circumstances and/or the accused's conduct before, during or after the alleged commission of the offence.

In order to convict a person of procuring under section 20(3) of the Penal code the prosecution must prove (a) that the accused was connected with steps of the transaction which are criminal and (b) that he had a criminal intention. The requirements of what is to be proved are the same as for abettment and for this limited assistance may be derived from *The Law of Crimes* by Rautaula and O Thakore, 19th Edition (1956) paragraph 232- 233.

The appellant offered a defence in which he stated that although he was in his security office monitoring movements on the television he did not observe any suspicious movements. He admitted that at one stage earlier, he saw George Okumu in the corridor leading to the strong-room. All in all he denied procuring other persons to commit the robbery. He however, admitted that he was in the security room and was in a better position to know any movements in the security corridor and strong-room. The learned senior resident magistrate considered the appellant's defence and arrived at the proper conclusion that his denials were not for believing, a conclusion we too have reached.

On February 10, 1981, that is about slightly over two weeks before the robbery occurred, guard Erasto Akhayere David Abuchari had seen a Peugeot 504 car parked opposite the gate and when he looked at it and the driver noticed the car was driven away slowly. One person stood near the wall of the bank. As the vehicle was driven off, Erasto saw a handbag under a window and he picked it up, but the appellant knocked on the window and indicated that the bag was his. It was a red bag which was later identified by the witness as one of the bags used in the robbery in which part of the money robbed had been kept. The

appellant was seen by George going into and coming out from the strong-room with two men one of whom later was a member of the gang of robbers that invaded the bank on February 27, 1981. Before the robbery took place the appellant visited the strong room and when he came out after 3-4 minutes he started complaining about delay in taking the money to the strong room. Though he was in the security office from which he could see what was going on at the area by the strong room, he did nothing and alleged that he saw nothing strange when in fact George was attacked in that area. From this circumstantial evidence, we are satisfied that there was an irresistible inference to be drawn that the appellant was connected with the said robbery and he had a criminal intention. He procured others to commit the offence of robbery. His guilt was manifest and in the result he was properly convicted.

The appellant has stated that the sentence of 5 years' imprisonment with 12 strokes which he was awarded was harsh and excessive in all the circumstances of the case. The robbery was planned over a period and not only cunningly but skillfully carefully. It was a deliberate intentional plan to rob the bank of a substantial sum of money and the appellant used his position to arrange for the commission of the crime. We are, in the light of all this, unable to say that the sentence awarded was harsh or excessive. The learned senior resident magistrate acted on no wrong principles in exercising her discretion of sentencing. For these reasons we have no ground to and we shall not interfere with the sentence.

The learned state counsel supported both the conviction and sentence. There is no merit in the appeal which we dismiss. Order accordingly.

**Dated and Delivered at Nairobi this 18th day of March 1982.**

**Z.R.CHESONI**

**A.M.COCKAR**

**JUDGE**

**JUDGE**