



**IN THE COURT OF APPEAL**

**AT NAKURU**

**( Coram: Madan, Potter JJA & Chesoni Ag JA )**

**CRIMINAL APPEAL NO. 33 OF 1983**

**BETWEEN**

**1. JAMES MWANGI**

**2. JOHN GABRIEL GITAU KAMAU.....APPELLANTS**

**AND**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellants, James Mwangi and John Gabriel Gitau Kamau, were the fourth and first appellants respectively in the High Court. They were convicted by a senior resident magistrate with three others, namely, Joseph Nganga Kalumba, Anthony Mwangi Nduma and Edward Kabui Kariuki of robbery with violence contrary to section 296(2) of the Penal Code (cap 63) and sentenced to twenty years' imprisonment with eighteen strokes each. Their appeals were dismissed in the High Court by Bennett J. Joseph, Anthony and Edward do not appear to have appealed to this court. We allowed the appeals of James and Gabriel and reserved our reasons which we now give.

On November 4, 1970 in the morning between 9.30 and 10.00, a gang of armed robbers entered the Naivasha Agency Branch of the Barclays Bank DCO and after ordering the bank staff and customers to lie down, they stole Kshs 164,499.10, the property of the bank. They were said in evidence to have also stolen a cheque book, a current account debit slip and a paper bearing on it the name of Joseph K Nganga, but these latter items were not charged nor were their values given. The case depended entirely upon circumstantial evidence as none of the five men was identified by anyone at the scene. John Wachanga (PW 4) who worked at an Esso Petrol Service Station 100 yards away from the bank told the court that he saw a white Cortina car near the bank which later was driven towards Nairobi. He saw some people inside it but he did not say whether he could recognize the passengers. This witness, upon receiving information of a theft, went towards the bank but as he approached the bank, a man standing near the Cortina car pointed a pistol at him and he (the witness) ran back to his place of work.

An inspector of police, Lawrence Bungala (PW 6), visited the scene of the robbery and then went to the petrol station. He asked John to drive him towards Nairobi and John did so in his car. After they had gone for eighty yards, according to John, but seven hundred to eight hundred yards, according to Inspector Lawrence, they spotted a white Cortina car ahead of them. They followed that car till the Kijabe escarpment where the car turned towards Kijabe Mission and after going for three miles the Cortina car turned into the bush and was abandoned by its occupants some 250 yards from the road. Inspector Lawrence said that the car bore registration mark number KJE 201. The Inspector accompanied for a

while by John followed some foot-prints from the scene where the Cortina car was abandoned, but John gave up the journey and returned to Naivasha leaving Inspector Lawrence to himself. The foot-print led Inspector Lawrence to Kirunga village in the Upland area. He went to Uplands Police Station where he reported the robbery and returned to this abandoned Cortina car.

A witness, Sophie Wambui w/o Tera (PW 9), said that two men ran into her house and when they entered she went outside where her child was. She took the child and went to the back of the house. One of the two men who later was said to have been James went out of the house, jumped over the fence and ran away, but he was chased by a police dog which caught him. The dog held him until Chief Inspector Stanley Ndirangu (PW 10) separated the dog from him. Chief Inspector Ndirangu said that when he searched the appellant James he had a lot of money in all his pockets, all of which the Chief Inspector took, but did not immediately count it. When the money was subsequently counted by the Chief Inspector and Inspector Mutunga it was found to be Kshs 18,117.95. There was no evidence that the counting was in James' presence. When cross examined by James, Chief Inspector Ndirangu said that he did not see James run into the house of Sophie, but he saw the dog handler release the dog and he saw the dog catch James. The learned judge said this of James:

“On being searched Kshs 18,117.95 was found in his possession. There is a plain inference that the money found on the fourth appellant and the money found on PW 9's bed was never positively identified as money stolen from the bank. However, that may be, the fact that the fourth appellant was found with so large a sum of money on his person a few hours after the robbery within walking distance of the place where the thieves had abandoned the car and in the company of one of the thieves (namely second accused), leads to a strong presumption that the money found in his possession was part of the proceeds of the theft. In his unsworn statement, the appellant made no attempt to explain his possession of this very large sum of money and in my judgment he was properly convicted.”

With respect the learned judge's reasoning is unacceptable. The appellant was not found with the large sum of money near the scene of the robbery. The fact that James was near the place where the car was abandoned was of no evidential value for there was no proof that the appellant was one of the passengers in the car. There was nothing wrong in the appellant having in his possession Kshs 18,000 and he did not have to explain how he came to be in possession of that sum of money, especially as the prosecution had not established that the money was part of the sum stolen from the bank. It was wrong to shift the burden of proving innocent possession of the alleged money onto James. Joseph Wambugu (PW 11) said that Stanley Ndirangu and the dog handler followed the appellant yet the dog handler never testified.

The prosecution never established the circumstances from which the conclusion of guilt could be drawn and in the absence of establishing such facts there could not be a hypothesis of guilt of the appellant. The learned senior state counsel, like us, was unable to support the conviction and sentence of the appellant.

As for Gabriel it was said that he led Supt of Police Anthony Johnson Musyoki (PW 21) and a team of police officers to the forest on Kijabe Hills where three miles from the road of Kijabe Mission there was a place from where the police recovered some money in the old EA currency. This appellant also took police to a house in the uplands area. This must have been the house of Philip Kariuki (PW 7) for Supt Anthony said that at the house they found Inspector Mutunga, and, Philip said:

“The next day the first accused returned to my house with the police. Inspector Mutunga was with me at the time.”

Gabriel had been to Philip's house on November 4, 1970 the day of the robbery at about 2 pm when he asked Philip to sell to him a lorry that was standing outside Philip's home. Gabriel had been seen by Philip going to the lavatory at the home twice and when the police searched the lavatory a lot of money was found there. A total of Kshs 3,263 was recovered from Philip's home which did not belong to Philip. Gabriel made an unsworn statement and denied knowing anything about the money found in Philip's home. He, however, was silent about leading the police party to Kijabe Hills and to the home of Philip. There was not direct evidence that the money found in the lavatory and in the heap of dung at Philip's home was put there by Gabriel. There was evidence that the lavatory was near a common path to and

from the house of Philip. Richo, Philip's wife, had admitted that four other persons came to the home when Gabriel was there and one of them had gone alone to the *shamba*. To go to the *shamba* one had to pass by the lavatory. Gabriel was suspected to have put the money in the lavatory because he went there twice, but the man who went there once could have done the same. Gabriel said that he had eaten bad meat. There was no evidence connecting that money in the lavatory with Gabriel and with the money stolen from the bank. The fact that it was a large sum did not matter. The Kshs 290 found at Kijabe Hills was all of old East African currency and there was no evidence that it was part of the money stolen from the bank. Indeed it was not charged. The cheque book, pay-in-slip and other articles found at the scene where this appellant was alleged to have led Supt Anthony and his team were not charged and so had no evidential value. After reviewing the evidence against Gabriel in the lower court the learned judge said:

“The first appellant, in his unsworn statement to the court, explained the circumstances of his arrest and denied knowing anything about the money found in PW 7's home, but did not deny leading the police party to the place in the forest where more money and articles which I have mentioned were discovered. In my judgment, the circumstantial evidence led to an irresistible conclusion which was only consistent with the guilt of the appellant and utterly inconsistent with his innocence.”

In a case depended on circumstantial evidence in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt (*Sarkar on Evidence* - 10th Edition p 31). It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other coexisting circumstances which would weaken or destroy the inference - *Teper v The Queen* [1952] AC 480 at page 489. Here the evidence of hiding the money in the lavatory pointed to another man besides Gabriel, which destroyed any inference. The trip to Kijabe Hills was of no consequence to the case. Gabriel explained that he was a dealer in scrap metal and spare parts and he went to Philip's home when he saw an old lorry outside which he wanted to buy for spare parts. His visit to Philip's home was explained away. As to the Kshs 920, which Supt Anthony said was Kshs 987.50, handed to Sgt Mbugua (PW 23) by Philip's wife the money was found in a heap of dung and there was no evidence that it was put there by Gabriel or that he ever went near the heap. There was evidence that Sgt Mbugua and Philip's wife first went into the house and it was when they came out that Sgt Mbugua handed to Supt Anthony the Kshs 987.50. Sgt Mbugua himself was not sure which accused went with him to Uplands to Philip's home. He first said it was James (fourth accused). Then he changed and said it was Gabriel and changed further and said it was the second accused (Joseph Nganga Kirumba). Richo Wanjiru wife of Philip (PW 8) said she found Kshs 920 in the dung of sheep in her house. That was the money she gave to Sgt. Mbugua. There was no explanation where the extra Kshs 67.50 came from. Such circumstantial evidence could not be said to be reliable. It was not of a conclusive nature or tendency and should not have been acted on.

As we were satisfied that there was no evidence on which the conviction and sentence of either appellant could be sustained we allowed the appeals, quashed their convictions and set aside the sentence.

**Dated and Delivered at Nakuru this 23rd day of March 1983.**

**C.B.MADAN**

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**JUDGE OF APPEAL**

**K.D.POTTER**

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**JUDGE OF APPEAL**

**Z.R.CHESONI**

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**AG.JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**