REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, AGANYANYA & NYAMU, JJ.A.)

CRIMINAL APPEAL NO. 534 OF 2010

BETWEEN

EUNICE MUSENYA NDUI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a conviction, and sentence of the High Court of Kenya at Machakos (Lenaola & Warsame, JJ.)

in

H.C.CR.A.NO.72 OF 2006)
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JUDGMENT OF THE COURT

On 30th November 2005 the appellant's life changed drastically perhaps because of the choice of her friends. No doubt the saying that one is known by the company one keeps is a saying the appellant might not forget for the rest of her life. A person she alleged to have been her boyfriend and who was perhaps unknown to her, at the material time armed, asked for her company and this is what led to her arrest. The appellant ***Eunice Musenya Ndui*** was charged and convicted for attempted robbery with violence contrary to ***section 297(2)*** of the Penal Code by the ***Principal Magistrate's Court*** at ***Kitui***. The particulars of the charge were that on 30th November, 2005 at 7.00 p.m. at ***Nzeu Bridge Changwithya East Location***, ***Kitui District*** of the ***Eastern Province*** jointly with others not before court while armed with dangerous or offensive weapons namely pistols attempted to rob ***Japhet Kimanzi (PW1)*** of his motor vehicle registration KAK 312Q valued at Kshs.300,000/- and at or immediately before or immediately after the time of such attempted robbery threatened to use actual violence to the said Japhet Kimanzi.

After a full trial the appellant was found guilty of the offence charged and sentenced to suffer death, but the sentence has since been commutted to life imprisonment by his Excellency the President.

The facts as presented by the prosecution are that Japhet Kimanzi (PW1) a part time taxi operator based in Kitui and owner of taxi registration number ***KAK 312Q*** was at the taxi stage of the town when he was approached by a lady (the appellant) and a man who wanted to travel to ***Chuluni*** area. PW1 gladly struck

a bargain with the two people at a fare of Kshs.300,00. At the time the taxi was being hired the appellant was carrying a heavy carton. In abundant caution a sense many taxi men appear to have acquired for their own protection at night, PW1 asked ***Lee Morgan (PW3)*** to accompany him. The appellant's alleged boyfriend occupied the front passenger seat and PW3 and the appellant took the back seat. As the four approached the final destination namely Chuluni, the alleged boyfriend directed PW1 to change direction and go to ***Changwithya Secondary School*** which school was in the opposite direction to the initial destination. When the four reached Nzeu River the alleged boyfriend whom the appellant subsequently named "Musyoka" in her defence, directed PW1 to stop the taxi and as he gave the direction he placed a pistol on the taxi driver's head. As directed, PW1 stopped the taxi in the middle of the road near Nzeu river and to his surprise, two men appeared from the nearby bush and immediately attempted to open the car but their effort did not bear fruit because in the nick of time, a GK motor vehicle appeared from the opposite direction. Mr Musyoka and his accomplices escaped but the appellant who could not get out of the taxi and could not escape was arrested at the scene in possession of the heavy carton which upon being inspected was found to contain paper bags, soil and charcoal particles and as would shortly become apparent, the evidence presented by the prosecution seemed to point to the fact that the carton was used as a bait to convince PW1 the taxi man that the couple, that is, the appellant and the boyfriend were serious and genuine travellers to Chuluni. The driver of the GK vehicle ***P.C. Joshua Mwema*** testified that at the material time and while on their way from ***Mutomo,*** they found a white motor vehicle (i.e. the taxi) at Nzeu River and when the occupants of the car saw them, they fired at them and thereafter ran away following a shoot-out with the gangsters. Perhaps shocked, the appellant did not leave her seat.

The appellant was represented by learned counsel, **Mr E.O. Obok** who submitted that the appellant was not involved in a common plan or design to commit any crime; that the appellant found herself in the company of a criminal and that in itself is not a crime in law; that there was no evidence tendered that there was a shoot-out at the scene since no cartridges were recovered; that the appellant when arrested had no weapon and was calm, and did not make any attempt to escape from the police who confronted the gangsters, and, finally that all in all the prosecution did not prove the crime beyond reasonable doubt.

Miss Nyamosi, Principal State Counsel who appeared for the State in supporting the conviction, submitted that there was evidence that the appellant knew that her colleagues were robbers as is reflected in the evidence of PW1, PW3 and the appellant's own defence; that her conduct was not consistent with innocence in that she was involved in hiring the taxi, carried the heavy carton containing assorted items which included sand and particles of charcoal as part of the plan, and further that the only reason why she did not escape was because the car doors were locked or that she was too scared to leave the car after the shootout; that even in the face of a shoot-out she failed to scream or stop the gunman who was her companion and finally that there was sufficient evidence as confined by the two courts below to support the fact that the appellant's role was part of a common intention to commit the crime. The appellant's grounds of appeal are:

1. That I was sentenced to suffer death by SPMs Court Kitui on 8th June, 2006 before E.K. Makori (SRM) for the offence of attempted robbery with violence contrary to section 297(2)P.C. in Criminal Case No. 1429(A)05 and later the sentence was commuted to life imprisonment by His Excellency the President.

2. That my first appeal was dismissed by High Court Machakos on 23rd June, 2010 before Justice Isaac Lenaola and Justice M. Warsame in Criminal Appeal No.72/06.

3. That the learned Judges erred in law by believing the evidence of PW1 and PW2 without any supportive testimony from the scene of crime, since I did not have any weapon with me although I was in the vehicle nor did the driver testify that I participated in any way apart from being in the vehicle.

4. That the honourable Judge overlooked the fact that I did not try to escape when the police ambushed us and this is because I was not aware of my boyfriend's plan.

5. That my boyfriend had requested me to help him with the cartoon and I did not know what was

contained inside, I only realized it was rubbish that was inside when the police opened it.

6. That the charge of attempted robbery with violence is too harsh since I was not armed and I did not even attempt to harm the driver apart from being in the company of my boyfriend whom I learnt later was armed and exchanged fire with the police and I was so confused when they ordered the driver of the taxi to change route since I was not aware of their plan.

7. That the sentence imposed on me is too harsh considering that I was not armed and I did no harm anyone.

8. That I am a first offender.

9. **That I plead with the learned Judges to review my case and set me free.**

In upholding the conviction the High Court (Lenaola and Warsame, JJ.) made inter-alia the following observations:
"That the appellant knew all the facts of the intended crime and is deemed to have assisted the person who escaped after the failed attempt to rob PW1 ……. It is clear that the appellant together with her colleague planned and designed with common intention and knowledge to commit a robbery. The act or omissions resulting from the initial intention constitutes the commission of an offence as charged and convicted. In our view the appellant had guilty knowledge, at the time she boarded the taxi together with her colleague.
…….. It is also the evidence of PW3 that it was the appellant who was carrying the heavy box when they came to the taxi bay. …….. We therefore think that the evidence against the appellant is cogent and credible. We also think that the prosecution proved its case beyond reasonable doubt."

We are acutely aware that what is before us is a second and final appeal and for this reason our mandate is ordinarily limited to matters of law. In addition, in undertaking our duty we should bear in mind the important guidelines concerning our role as set out in the case of ***CHEMAGONG v REPUBLIC*** *[1984] KLR 611:*

"It is also an established principle of law that a Court of Appeal will not normally interfere with a finding of fact by the trial court whether in a civil or criminal case unless it is based on no evidence, or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did."

For reasons which will become apparent later in this judgment, we are of the respectful view that the evidence in support of the conviction falls within the three exceptions outlined in the ***Chemagong*** case above, hence the need for us to intervene. The first question we must at the outset pause is, what evidence supports the above findings and/or observations of the High Court? According to the High Court the incriminating evidence includes the fact that the appellant carried the carton full of rubbish at the point the taxi was hired and that she was also in the company of her companion the gunman, and the fact that after the shoot-out she remained in the car allegedly because she was too scared to escape. The second question we must raise is what was the appellant's explanation with regard to the two pieces of evidence, namely, the carrying of the carton and her failure to get out of the taxi at the point of arrest? The other question to pose is whether the two courts below took into account the appellants defence?

The appellant's defence was:-

"On 30th September, 2005 I woke up earlier in the morning and went to my place of work. That I was leaving place of work at 4.00 p.m. After I left my place of work, I did proceed to where I was living. Around 5.00 p.m. I did go to the stage to repair my shoes. I did go (sic) to shoe repair. I did not seal (sic). It is then at the stage (sic) I met a man whom I had known for a while. He did tell me he was to leave for Kalawa Secondary School to see his brother who is a teacher there. That he had a box when I met him. I was never aware what was in the box. That he did ask I do escort him to Kalawa. I did say

I couldn't go; he did insist. It is then he said he was to hire a taxi we were not to foot. We did proceed near Nzeu River. We did see other people standing across blocking the vehicle. They were quite many. Its then the driver was stopped; GK vehicle did come. The people an (sic) away together with the fellow I was with. He is called Musyoka from Mwingi. He says that he stays in Nairobi. When the people ran way, I could not run so I was arrested. I was surprised what (sic) transpired that is why I did not get out of the vehicle." ……

On the basis of the contents of the defence as outlined above, we think it is abundantly clear that both courts below did not consider the appellant's defence and whether her defence was capable of displacing the prosecution evidence (if any) concerning the existence of a common intention or capable of introducing a reasonable doubt in the case. In particular, and with profound respect, although the High Court did refer to the defence when it embarked on what it considered to be evaluation of the evidence tendered, the court was completely silent on the effect of the defence on the prosecution case. Thus, the findings of the High Court as ***italiced*** above were not based on any evidence. The appellant had no burden to discharge and a plausible explanation of her circumstances should have been sufficient in law. To illustrate the point, we are unable to find the basis for the following findings by the High Court:-

"It is clear that the appellant together with her colleagues planned and designed with common intention and knowledge to commit a robbery. The acts or omissions resulting from the initial intention constitute the commission of an offence as charged and convicted. In our view the appellant had guilty knowledge at the time she boarded the taxi together with her colleagues."

It is clear from the record that the heavy carton was brought to the bus stage by the appellant's colleague, the gunman and that the appellant in her defence clearly states that she did not know what its contents were and it is also clear to us that the plan to commit the crime in question must have been conceived earlier before the involvement of the appellant at the bus stage. It is also clear to us that the fact that she was not able to escape and was eventually found in a calm mode inside the vehicle is not necessarily consistent with her guilt taking into account that her explanation is that she was in a state of shock. With respect, we are therefore of the view that the High Court's findings were clearly against the weight of the evidence before the court and in total disregard of the appellant's defence. In our view, in real life, innocent people have been known to demonstrate incredible calmness even in the face of hostile circumstances and consequently her sitting in the car was not consistent with guilt. In our view the two sets of evidence relied on as incriminating the appellant are not necessarily inconsistent with her innocence. The defence does in our view contain plausible explanation of the appellant's initial involvement with the gunman in view of her explanation that he was her boyfriend. There is absolutely no evidence on record that she was instrumental in the planning or design of the crime prior to her meeting with the gunman at the bus stage yet common sense suggests that the intention to commit the robbery must have been conceived by the gunman and others prior to the gunman's, meeting with the appellant at the bus stage. We think there was no evidence of the appellant having been party to common intention of the conspirators. It is therefore our view that had both courts properly evaluated the evidence and also fully considered the defence it is possible that they could have reached a different conclusion. Again with respect, the two pieces of evidence relied on namely carton and the appellant's calmness in the car, do not in our view constitute cogent evidence of a common intention as suggested by the High Court. Perhaps we should also add that in the face of the appellant's defence, the guilt of the appellant could not in the circumstances be said to have been beyond reasonable doubt. Indeed, all in all, we think that in the circumstances, there was no proof of a common intention. The appellant had testified that the gunman was her boyfriend although they had known each other only for a short period before the incident. To presume that her presence in the car is consistent with her involvement in the design and planning of the offence, is in our view, shifting the burden of proof to the appellant which in law was not supposed to be on her. For instance there is no evidence that she knew in advance the details of the plan to commit the robbery or that she knew that her companion, the gunman was armed prior to her meeting him at the taxi bay. On this aspect the High Court delivered itself thus:

"The law is that, a crime of conspiracy requires an agreement between two or more persons to commit an unlawful act with the intention of carrying it out. It is the intention to carry out a crime that constitutes the necessary mens rea for the offence."

In the circumstances of this matter and again with respect, although the above finding is correct as regards conspiracies generally it is all the same a clear misapprehension of the law as regards the application of the principle of common intention. In the recent decision of this Court in the case of ***FRANCISCA NGINA KAGIRI v REPUBLIC***C.A. 264 of 2007 (Nyeri) ***unreported,*** this Court had occasion to adopt the definition of common intention as stated by the predecessor to the Court, the East Africa Court of Appeal in the case of ***Wanjiro d/o Wamerio v Republic*** 22 EACA 521:-

"Common intention generally implies a premeditated plan, but this does not rule out the possibility of a common intention developing in the course of events though it might not have been proven to start with."

Based on the above definition there is no evidence to suggest that the appellant had any role in a premeditated plan. On the contrary her defence does reveal a plausible surprise at the turn of events when she was arrested. Both the carrying of the carton and being calm in the car after the event were on their own not offences without proof of a common intention. It is for the same reasons that we consider that the evidence fell far short of the required threshold namely proof beyond reasonable doubt because there was insufficient evidence in our view to justify the existence of a common intention. ***Section 21*** of the Penal Code on common intention states:-

"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

If there was any common intention between the appellant and the gunman boyfriend, it was to travel to Chuluni and the appellant did not appear to have any knowledge of the pre-arranged plan which in the case was to steal the taxi. The pre-arranged plan as per the evidence was between the gunman boyfriend and the other conspirators who were laying in wait at the Nzeu river. By laying ambush the conspirators became part of the gang. In this regard we consider the Singapore case of ***Vihay s/o Kahevasan and others v Public Prosecutor*** ***[2010] 4 SSLR 1119*** extremely persuasive and to the point. In this case the Supreme Court held that the doctrine of common intention included consideration of four ingredients namely:

(i) The criminal act

(ii) The common intention

(iii) Whether the criminal act was done in furtherance of the common intention; and

(iv) ***Whether there was the requisite participation of the accused in the criminal act.***

Although ***section 21*** of the Kenyan Penal Code has five ingredients of common intention and the Singaporean Penal Code has four the law as regards the equivalent ingredients is the same.

In our view the two acts relied on by the prosecution cannot possibly on their own be said to have been the probable consequence of the perpetration of the robbery. Going by the above holding, it is clear to us since the criminal act was the intended robbery and there is no proof that the appellant had any prior knowledge, there were missing links in the appellant's involvement in the actual criminal act and that she was part of a common intention and in addition we think the level of the appellant's participation in the criminal act was an important factor which the courts below should not have ignored. The appellant's participation was in our view insufficient and insignificant to an extent that it was in our view not capable of sufficiently linking her to the predetermined plan of the conspirators who had conceived the idea. All in all, we think the appellant's participation fell far below the required threshold test of proof beyond reasonable doubt.

In our view the principle of common intention is based on a presumption, which should not be too readily applied as has happened in the matter before us. Thus if there is evidence or circumstances which may

displace the presumption this must be taken into account and it was clearly not taken into account by the two courts below. As held by this Court in the case of ***Ngina*** (supra) where the appellant, ***Ngina***, in a murder case involving her husband and where she did not pull the trigger the doctrine of common intention sucked her in as having been part of the conspirators who killed her husband. While we recognize that in most cases due to the presumption, being in the company of the gang is good enough, but in our view the presumption can in certain circumstances be displaced by contrary evidence. In the ***Ngina*** case there was evidence in support of a common intention that she was actively involved in the design and perpetration of the crime. In the current case in our view as stated above the evidence of carrying the heavy carton and being found in the car that was intended to be robbed is grossly insufficient to support a presumption of common intention. In addition, the level of the appellant's participation is minimal when viewed from the standpoint of her defence and the prosecution's burden of proof beyond reasonable doubt. It is with the above in view, that we endorse the holding of Cousey, J.A. in the Western African Court of Appeal case of ***Adekule v The State SC 66/1989*** where he held as follows in interpreting the Nigeria ***section 8*** of the Penal Code on common intention and which is in ***pari materia*** with the Kenyan ***section 21*** of the Penal Code:

"Common intention may be inferred from circumstances disclosed in the evidence and need not be by express agreement but a presumption of a common intention should not be too readily applied. That proof of common intention is a condition precedent to conviction in this type of case is appreciated when it is remembered that if a combination of this kind is proved, a fatal blow, though given by one of the party is deemed in the eye of the law to have been given by all those present and aiding. The person actually delivering the blow is no more than the hand by which the others all strike."

A reading of ***section 21*** of the Penal Code reveals the following identifiable ingredients which in turn trigger the presumption:-

1) There must be two or more persons

2) They must form a common intention

3) The common intention must be towards prosecuting an unlawful purpose in conjunction with one another.

4) An offence must be committed in the process.

5) The offence must be of such a nature that its commission was a probable consequence of the prosecution of such purpose.

From the analysis of the evidence on record it should be fairly apparent that ingredients 2, 3 and 5 above are conspicuously missing in the circumstances of the appeal before us.

We think the conviction was based on a misapprehension of the law and on the failure by the two courts below to give the appellant's defence its rightful place. In the result, we hereby set aside the conviction and quash the sentence imposed on the appellant. The appellant to be immediately released unless otherwise lawfully held.

It is so ordered.

Dated and delivered at Nairobi this 14th day of October, 2011.

E.M. GITHINJI
.....
JUDGE OF APPEAL

D.K.S. AGANYANYA
.....

JUDGE OF APPEAL

J.G. NYAMU
.....
JUDGE OF APPEAL
I certify that this is a true copy of the original.

DEPUTY REGISTRAR