



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**Criminal Appeal 159 & 160 of 2007**

**PAUL KIBARA WAITHAKA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**AND**

**CRIMINAL APPEAL NO. 160 OF 2007**

**DANIEL MURIITHI PAUL.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(CONSOLIDATED)***

**J U D G M E N T**

PAUL KIBARA WAITHAKA and DANIEL MURIITHI PAUL are the Appellants in this appeal. They had been charged before the Senior Principal Magistrate Embu along with 4 other accused persons. The other 4 were acquitted and these 2 were convicted on one count of preparation to commit a felony. They were found guilty and convicted and each sentenced to 5 years imprisonment. They each appealed against the conviction and sentence separately. The 2 appeals were consolidated and heard together. They were also released on bail pending appeal. This Judgment is therefore in respect of both appeals. They were represented by Morris Njage Advocate. They raised several grounds of appeal but Mr. Njage only argued one ground to wit that the conviction was against the weight of the evidence.

Learned counsel for the state conceded the appeal saying that the charge against them was not proved.

As far as the 1<sup>st</sup> appellant was concerned, he said that he was only arrested because he was found in the bar with other people.

On the 2<sup>nd</sup> appellant, he said that he was arrested while standing near the motor vehicle which was

alleged to have been stolen. He was not found with the motor vehicle keys or with any weapons.

I have read through the evidence adduced before the trial court. The witnesses were police officers who had laid an ambush after receiving information that there was a gang inside a bar which was suspected to be planning to rob the Kenya Commercial Bank Wang'uru. Since I am satisfied that this Appeal has been properly conceded, I need not repeat the entire evidence that was adduced before the trial court. I have nonetheless read through the entire evidence but will only highlight the relevant evidence that makes the concession by the state justified.

The 1<sup>st</sup> Appellant is listed as the 4<sup>th</sup> Accused in the charge sheet while the 2<sup>nd</sup> Appellant was the 5<sup>th</sup> Accused person. Accused 5 i.e the 2<sup>nd</sup> Appellant is said to have been arrested by PW3 P.C Wagura. He told the court that he arrested him after he saw him jump from the top of the building. He did not arrest him with any dangerous weapon. He stated clearly on cross-examination that he did not recover anything from him even after searching him. The conviction on the charge of preparation to commit a felony was not therefore sustainable.

On the 1<sup>st</sup> Appellant who was 4<sup>th</sup> Accused in the trial court, he was said to have been found inside the bar. PW2 nonetheless said that he could not remember where he was seated. He said that 2<sup>nd</sup> Appellant was also searched but nothing was recovered from him

PW4 – P.C Charles Mwarulo told the court that he found 4<sup>th</sup> accused (1<sup>st</sup> Appellant) seated in the bar taking a soft drink. He was ordered to surrender which he did. He was not found with any weapons. I wish to point out however that all these witnesses were confused when it came to identification of the accused persons as they sat in the dock and as they appeared in the charge sheet. Accused 3 was said to be Accused 5 in dock etc. It is not clear why the learned trial magistrate could not rectify the sitting arrangement to match with the arrangement of the names as they appeared in the charge sheet. That said, it is clear that neither the 1<sup>st</sup> appellant nor the 2<sup>nd</sup> Appellant herein was arrested with any of the recovered pistols or any other dangerous weapon with which they intended to commit a felony.

I agree with both learned counsel in this appeal that the conviction against the 2 appellants was against the weight of the evidence adduced. The same was unsafe and it cannot therefore stand. Accordingly, I allow this appeal, quash the conviction and set aside the sentence imposed on both appellants. I order that they both be set at liberty unless they are otherwise lawfully held.

**W. KARANJA**

**JUDGE**

Delivered, signed and dated at Embu this 10th day of Nov 2009.

**In presence of both Appellants and Mr. Omwega for state.**



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