Korir & another v Republic (Criminal Appeal E020 of 2021)
[2023] KEHC 193 (KLR) (25 January 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL E020 OF 2021

HK CHEMITEI, J

JANUARY 25, 2023

BETWEEN

JUSTICE KORIR ..... 1ST APPELLANT

CHARLES CHERUIYOT KOSGEI ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgement of Hon. R. Yator (SRM) dated 19th July 2021 in Molo Criminal Case No.1979 of 2017)

JUDGMENT

1. The appellants were charged with the offence of Preparation to commit a felony contrary to Section 308(1) of the *Penal Code*. The particulars of the offence were that on the October 3, 2017 at Kapkembu village in Kuresoi south sub county of Nakuru county jointly with others not before court was found armed with offensive weapons namely Maasai sword, panga, bolted head rungus and wooden spear made of bamboo tree in the circumstances that indicate that you were armed with intent to commit a felony namely grievous harm.

2. The second count was Assault causing actual bodily harm contrary to Section 251 of the *Penal Code*. The particulars were that on the October 3, 2017 at Kapkembu village in Kuresoi south sub county of Nakuru county jointly assaulted Joseph Kibet Barno thereby occasioning him actual bodily harm.

3. The third count was Assault causing actual bodily harm contrary to Section 251 of the *Penal Code*. The particulars were that on the October 3, 2017 at Kapkembu village in Kuresoi south sub county of Nakuru county jointly assaulted Stanley Kemoi Kipkoech thereby occasioning him actual bodily harm.

4. The 4th count which affected the 1st appellant alone was also Assault causing actual bodily harm contrary to Section 251 of the *Penal Code*. The particulars are that on the October 3, 2017 at Kapkembu village in Kuresoi south sub county of Nakuru county jointly assaulted Peter Rotich thereby occasioning him actual bodily harm.

5. The appellants were convicted after a full trial and each sentence to seven years imprisonment in respect to the 1st count, first appellant sentence to 12 months imprisonment in regard to the 2nd count; both appellants sentence to 12 months imprisonment in regard to the third count and 1st appellant sentence to 12 months imprisonment in regard to the 4th count. All the sentences were to run concurrently.

6. Both were unhappy with the conviction and sentence and have filed joined appeal. The amended petition of appeal has 10 grounds. When the matter came up for directions the court directed the same to be heard by way of written submissions which the parties have complied.

7. The appellants have condensed the grounds of appeal into two major ones namely; whether the salient grounds of the offence of preparation to commit a felony were proved beyond any shadow of doubt and whether the ingredients of the offence of assault causing actual bodily harm were as well proved.

8. For purposes of time this court shall not reproduce the submissions by the parties as well as the authorities cited save to state that the issues raised in both are directly the same, that is whether the respondent proved its case against the appellants beyond any shadow of doubt.

9. The facts and evidence presented is worth reiterating here albeit in summary form. There was a meeting to inaugurate a tea factory at land parcel number Nakuru /Tinet Sotik Settlement Scheme/3189. The same was a public land issued by the government. It appears that some of the members of the public were opposed to it while others were in favour.

10. On the October 3, 2017, the exercise of breaking ground was to be undertaken and it appears many people came to witness. The appellants from the evidence tendered by the respondent were opposed to the same and they were armed and when the exercise began they incited some members of the public. A fracas ensued and the area chief was called who sent some police officers to quell the situation.

11. By the time the situation was calmed, the complainants had been injured and were rushed to the hospital. Meanwhile the appellants were arrested by members of the public and handed over to the police. Those injured were taken to Olenguruoni hospital for treatment.

12. They were later issued with P3 forms and charges preferred against the appellants. The prosecution called a total of 7 witnesses to establish their case. The appellants each gave sworn evidence in their defence and the 2nd appellant called his witness as well.

13. The court as indicated above found for the respondent and sentence the appellants as earlier stated.

14. The two issues as rightly submitted by the parties is whether the ingredients of the two offences were proved by the respondent.

15. In their submission the appellants while relying on the definition as found by the Court of Appeal in *Manuel Legasiani & 3 Others v Republic* (2000) eKLR submitted that there was no evidence that the appellants were found to be preparing to commit a felony. They submitted that the weapons found by the police did not necessarily belong to them as there were many people who were armed. That those weapons were recovered after the fracas and did not belong to the appellants.

16. The appellants went on to state that none of the witnesses, specifically PW1,2 and 4 who saw some armed persons were able to zero in on the appellants. That PW1 apparently fell unconscious after he was injured and it was puzzling for him to state that he saw the persons that injured him.

17. They went on to submit that the civilians who disarmed and arrested the appellants were not called to testify and thus the failure to call these crucial witnesses dealt a blow to the respondent's case.

18. In their defences, the appellants clearly established where and what action they took during the fracas and thus they could not be accused of the offence of being armed and ready to cause a felony.

19. On the second ground of assault the appellants relied on the case of *Ndaa v. Republic* (1984) eKLR which summarises what must be proved. These are assaulting the complainant or the victim and causing actual bodily harm.

20. The appellants acknowledged that indeed the complainants sustained bodily injuries but they denied that they caused the same. They wondered for instance how PW1 was able to identify those who injured him while he was unconscious and did not know for how long.

21. They submitted that PW2 must have shielded himself using his walking stick from other attackers who were not the appellants as there were many who were armed. That PW4, a key witness was also unable to tell who attacked the complainants. The same goes with PW6 the arresting officer.

22. The appellants argued that the identification of the assailants was wanting and relied on the famous case of *R v Turnbull* (1976) 3 ALL ER 551 among others.

23. The sum total of the appellant's case was that the charges against them were not proved and the appeal ought to be allowed.

24. The learned state counsel while on the two issues opposed the appeal. Mr Kihara submitted that the first ground was fully established by the respondent as they were found with the panga and the sword which were dangerous weapons as per the evidence of the witnesses namely PW1, 2 and 6. That they were arrested while running away from the scene upon seeing the law enforcement officers. He submitted that there was no point for the appellants running away when they saw the police officers if at all they were innocent.

25. On the second limb, the state submitted that the complainants were able to establish that they were injured by the appellants as they clearly identified them. They each were able to pinpoint how and who injured them.

26. The respondent submitted that the appeal could not therefore stand as they were able to show the injuries occasioned upon the complainants, the weapons used and the same was by the appellants. He prayed that the appeal be dismissed.

Analysis and determination

27. The duty of the court is to re-evaluate the evidence afresh and come with its own independent conclusion as was stated in the case of *Okeno v Rep* 1972 EA 32.

28. The twin issues deciphered herein are whether the respondent established its case against the appellants in respect to the two counts.

29. On the first count Section 308(1) of the *Penal code* provides as hereunder;

> "Any person found armed with any dangerous or offensive weapon in circumstances that indicate that he was so armed with intent to commit any felony is guilty of a felony and is liable to imprisonment of not less than seven years and not more than fifteen years."

30. In proving its case the respondent must establish the felonious intent or action by a suspect which he was preparing to undertake. There must be a nexus between the items which are deemed dangerous and the action intended.

31. Ordinarily a panga, sword or rungu are in and of themselves not dangerous. Occasionally people carry them for various reasons and in particular for preventive as opposed to offensive purposes. Some communities have been known to carry them as part of their daily paraphernalia without any offence to their neighbours.

32. As defined above the said weapons to be termed dangerous must be utilised by the carriers and specifically against their neighbours. As a result of the said usage the suspect would be deemed to have committed the offence.

33. In the present case there is no doubt that there was a public function in the area where there was a ground breaking for the tea factory. A fracas ensued and the complainants were attacked and injured. They did confirm the injuries before the trial court as well as the production of the p3 forms. The alleged weapons used were produced as pieces of evidence save for the bamboo spear and bolted head rungu.

34. Did the appellants carry the said weapons or were they in possession of the rest of the crowd which caused the fracas? It is noted that the incident occurred during daytime and that the parties were from the same locality meaning that the issue of identification was not very difficult.

35. PW1 in his evidence appeared general as he described the people who attacked them as being armed with pangas, knife and used sharpened bamboo at them. He sustained injuries on the face, back and the right arm. He went on to state that he saw the two who were part of those who attacked them.

36. When cross examined by the 2nd appellant he said that he threw the bamboo on his forehead.

37. PW2 on the other hand said that he defended himself using his walking stick. He identified the pangas in court.

38. PW3 testified that he identified the second appellant who hit him with a bolt nut and a knife. PW4 on the other hand witnessed the appellants armed with the said weapons and saw the 1st appellant assault PW2.

39. Taking the totality of the evidence as presented by the witnesses there is no doubt in my mind that the appellants carried the weapons mentioned by them. The same weapons were used to injure the complainants. Although the appellants argue that there many other people, it is them who were apprehended by the members of the public.

40. Was there any malice on the part of the complainants so as to target the appellants alone.? There seemed not to have been such as the evidence on record clearly shows that the fracas occurred even before the ground breaking took place. Although there were many other people who may have been armed there was nothing to suggest that the complainants had any premeditated grudge against the appellants.

41. Further the apprehension of the appellants took place within the same period and time and area and there is nothing to suggest that they were arrested elsewhere. The presence of the three police officers including PW4 help ameliorate the situation.

42. Further it is possible that the other opposers to the construction of the factory were armed and dispersed when the police arrived, but it is the appellants who were apprehended. It is the appellants who were seen assaulting the complainants. The injuries they sustained were caused by them and not the rest who run away.

43. Looking at their defence, they clearly admitted that they were at the scene seeing proceedings. The 1st appellant went as far as conducting the area Member of the County Assembly (MCA) who apparently he did not call as a witness.

44. The same position obtains for the 2nd appellant. He testified that he called the District Commissioner to intervene but he did not attempt to call him as a witness. His witness Dw3 did not help matters as he only said that the arms recovered did not belong to the appellant but were collected from some house.

45. The narrative that the arms were gotten from the demolished house was not backed by any tangible evidence by the appellants. If they knew the owner of the said house and weapons, then they should have attempted to call him to testify on their behalf. At worst they would have raised it in their defences strongly to persuade the trial court.

46. Taking the totality of the above findings and analysis, I would agree with the findings of the trial court. The dangerous weapons were in possession of the appellants. They used them to assault the complainants.

47. The appellants knew that the meeting was to take place and they armed themselves in readiness to stop the construction of the tea factory. They caused necessary fracas which necessitated the calling of the police to quell the same. Had they been not armed, there would not have been any reason for their arrest by the members of the public and subsequent re arresting by the police. They knew that the weapons they were carrying were dangerous if used and which they indeed used. In essence they were preparing themselves to commit a felonious act which they did.

48. On the second issue of causing actual bodily harm, the court without much hesitation agrees with the trial court. The complainants clearly saw what had happened and the injuries they sustained were corroborated by the clinical officer who produced the P3 form.

49. Although PW2 became unconscious after the attack, he had already seen his attacker as he defended himself by use of the walking stick which was produced as evidence. Pw4 on the other hand saw PW2's assailant.

50. I think the court has said so much to indicate that this appeal is not meritorious. It is of course unfortunate that all that the appellants were intending to stop namely the tea factory was later constructed. There was sufficient evidence through the production of the title deed that the land used was public and there was no claimant to the same and even those who should have opposed were duly compensated.

51. The appeal is otherwise dismissed.

Dated signed and delivered via video link at Nakuru this 25th day of January 2023.

H. K. CHEMITEI

JUDGE