REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CRIMINAL APPEAL NO. E02 OF 2021

BAKARI MSALAM BAKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of the Principal Magistrate Court at Lamu by Hon T. A SITATI delivered on 3rd November 2020 in Criminal Case No. 57 of 2019)

CORAM: Hon. Justice Reuben Nyakundi

Mwaure & Mwaure Waihiga Advocates for the Appellant

Mr. J. Mwangi for the state

JUDGMENT

The Appellant, **Bakari Msalam Baka** was convicted and sentenced on 3rd November, 2020 in Lamu Principal Magistrate's Case No. 57 of 2019 for 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 10th April 2019 at Mbwajumwali village in Lamu East sub county within Lamu county was found armed with a dangerous weapon namely a panga in circumstances that indicated that he was so armed with intent to commit a felony of robbery.

The Accused was first presented to court on 12th April 2019. The charge was read out to him and explained in Swahili which he understood whereupon and he plead not guilty.

The matter was set down for trial where the prosecution presented three witnesses to advance its case.

PW1 PC. Mohamed Ibrahim S/NO.117025 of Kizingitini Police Station testified that on 10th April 2019 at 10p.m he was together with OCS **C. I. Shadrack Mumo** and **P.C Njoroge** on night patrol around Mbwajumwali village. They received a tip off that there were some young men moving around Mbwajumwali village terrorizing villages with pangas.

While on patrol, they bumped into the accused person who while walking in their direction became uneasy on them. This arose the suspicion of the officers. when OCS Mumo searched him, he retrieved a panga concealed in the left side of his trousers. The officers asked him why he was armed but the accused person did not give them a reason. They seized the panga which was produced in court as PMFI-1 together with an inventory produced as PMFI-2.

On cross examination by the accused, **PW1** stated that the accused did not give a reason for being armed at night. He further contended that they (the police) had received security complaints that some young men were moving around armed with pangas robbing villagers. He denied that the Chief had named the accused to the officers and stated that the reason they were on patrol was for general law and order as per their usual schedule. **PW1** further denied that the accused had asked to be taken to the Chief so that the Chief confirm he was from the area. According to his testimony, it was late at night therefore it was not plausible that the accused was from working at his grandfather's shamba with a panga at night.

On re-examination, **PW1** stated that the procedure for arrest did not require for the officers to take the accused to the chief.

PW 2 S/NO.113974 PC. Zakayo Njoroge testified that he was with **PW1** and **C.I. Shadrack Mumo** on the material night of 10th April

2019 conducting patrols. He echoed the testimony of **PW1.** He added that the accused was arrested and charged because he had a weapon and was moving around at a very late hour without a satisfactory reason. He further stated that the accused was previously unknown to him.

On cross-examination, **PW2** stated that the accused was not carrying a bag of coconuts that night but was armed with a panga and nothing else. That the accused had told the officers that his home was in Mbwajumwali.

When he was re-examined, **PW2** affirmed that the accused was found on the road armed with a panga and had no coconuts with him.

PW 3 S/NO.114203 PC. Alvin Odongo testified as the successor Investigating Officer in the place of **PC. Mangi Zaidi** who had been transferred to the Nyeri Police Station. According to this witness, prior to his transfer **PC. Zaidi** had already recorded the Witness Statements and compiled the Police file. He had secured the exhibits – a Panga and an Inventory of the recovered items – which he handed over to **PC. Odongo**.

PC Odongo produced the Panga in Court as P.EX. 1 and the Inventory dated 10th April 2019 as P.Ex.2. He added that due to his visible nervousness and uneasiness when he bumped into the Police on the material night, the Officers immediately became suspicious and nabbed him after retrieving the Panga from his trousers.

When cross-examined, **PC. Odongo** confirmed that no bag of Coconuts was recovered from the Suspect at the time of arrest.

The testimony of **PC. Odongo** marked the close of the case by the prosecution. The Court found that a prima facie case had been established and the accused was put to his defence where he opted to give an unsworn statement and call no witnesses.

Bakari Msalam Baka denied the charges. He told the Court that he was found on the road going to look for food. He told the Court that if his father had not become bedridden with a terminal illness, he would not have stated that he was out looking for food.

In a judgment rendered on 3rd November 2020, the learned trial magistrate found the accused guilty as charged and convicted him accordingly. Treating the accused as a first offender, the trial magistrate sentenced the accused to the minimum sentence of 7 years for the offence.

Aggrieved by the conviction and sentence, the accused by a Petition of Appeal dated 4th February 2021 sought to overturn the findings of the trial court on eleven grounds:

> ***1. The Learned trial Magistrate erred in law and fact by convicting and sentencing the Appellant to Seven (7) years imprisonment by relying on a charge sheet whose ingredients and particulars were vague.***
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> ***2. The Learned trial Magistrate erred in law and fact by ignoring and failing to consider the crucial fact that there was neither a report nor complaint made against the appellant in person at any police station.***
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> ***3. The Learned trial Magistrate erred in Law and fact by failing to consider that the appellant was arrested alone at 10.00 pm while the evidence of the 1st, 2nd and 3rd prosecution witnesses who were all police officers confirmed that those who were terrorizing the villagers were a group of young men.***
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> ***4. The learned trial magistrate erred in law and fact by categorizing a panga which is a farming tool as a dangerous weapon despite the appellant confirming that he was coming from the shamba and heading to the sea.***
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> ***5. The learned trial magistrate erred in law and fact by failing to consider that 10:00 pm is not a late hour and that is the hour when fishermen go for fishing and they carry a Panga for their use in the sea.***
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> ***6. The learned trial Magistrate erred in law and fact by convicting and sentencing the Appellant by only analyzing and discrediting the Appellant Defence on the basis of an alibi.***
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> ***7. The Learned trail Magistrate erred in law and fact by creating and importing his own evidence that Mbwajumwali was experiencing attacks by Panga yielding youths and no witness came to court as a victim of the said attacks.***
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> ***8. The learned trial magistrate erred in Law and fact by failing to consider that the appellant had not exposed the panga which could have caused terror to anyone surrounded by the sea.***
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> ***9. The Learned trial Magistrate erred in law and fact by convicting and sentencing the appellant against the weight of the evidence adduced giving a harsh sentence which is manifestly excessive.***
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> ***10. The Learned trial Magistrate erred in law and fact by fatally failing to consider that the appellant has never had any criminal record before.***
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> ***11. The Learned trail Magistrate erred in law and fact by failing to consider a fair trial contrary to the provisions of Article 50 (1) (2) (a) (b) (c) (d) (g) (h) of the Constitution of Kenya, 2010 and convicting and sentencing the appellant on basis of illusion.***

The Court is urged to allow the appeal, quash the conviction and set aside the sentence of the trial court.

Submissions on Appeal

Counsel conducting the appeal on behalf of the Appellant delineated three issues for determination in their submissions dated 8th March 2021. These are the report of the offence, whether the Appellant was preparing to commit a felony and whether a panga is a dangerous weapon.

On the first issue, it is submitted that while all the prosecution witnesses who were all police officers testified that they had received reports of a group of young men terrorizing villagers while armed with pangas, the appellant was arrested alone while walking home and not in a group of young men. Counsel submitted that the information which police officers had received was that a group of young men were terrorizing villagers. Further, it is submitted that not a a single complainant was brought by the prosecution who identified the appellant as one of the young men who were terrorizing villagers in Mbwajumwali. According to Counsel, the police officers fixed the appellant into carrying a cross that he was amongst the young men who were terrorizing villagers.

Regarding whether the appellant was preparing to commit a felony, it is the position of Counsel that while all the prosecution witnesses testified that the Appellant was arrested at 10.00 pm, the learned trial Magistrate imported his own evidence as contained in Page 4 of the Judgement that the appellant was arrested past 10.00pm. Further a query is raised as to how the panga that was concealed in the appellants trouser was a weapon in a preparation to commit a felony. Reliance is placed on **Manuel Legasiani & Others v Republic MSA CA Criminal Appeal No. 59 of 2000 (2000) eKLR** for the definition of ***"preparation"*** as envisaged in Section 308 (1) of the Penal Code.

As for whether a panga a dangerous weapon, it is submitted that the prosecution did not establish anywhere that the Appellant was preparing to commit the felony of robbery. That further the prosecution did not present any OB Number of any complainant who had reported to the police station nor did they bring any witnesses to Court to point out that there were robbery orchestrated in the area. The Court is directed to the decision in **Job Omagwa Omwamu v Republic [2017] eKLR.**

Counsel contends that the appellant was genuine and, in his defence, he informed the trial magistrate that he was a casual worker and he denied the charges as he was on the road going to look for food. He further stated that had his father not been bedridden with terminal illness, he would have come to state that the appellant was out looking for food. That the Appellant was arrested while he had a Panga which he had concealed; a panga is a farming tool and is normally used in the village and many people carry a panga with them while walking at night for their personal security against snakes and other wild animals.

It is further submitted that in **Legasiani & Others v Republic MSA CA Criminal Appeal No. 59 of 2000 [2000] eKLR**, it was noted that the trial magistrate held that the defence evidence was contradictory without giving any reasons for such a holding which was tantamount to shifting the burden of proof to the appellant.

In closing, it was submitted that the prosecution did not show that the Appellant's arrest occurred in circumstances where he was about to commit a felony which is robbery and further the panga which was in possession of the appellant is not a dangerous weapon as such does not fall within the ambit of subsection 1 of Section 308 and therefore a crucial ingredient was not proven.

The Court is urged to allow this appeal and quash the conviction and set aside the sentence.

The Prosecution submitted orally on 7th May 2021 that the Appellant was sentenced to 7 years. That he was found with a panga at 10pm in Faza island where there are security issues. That the crime rate on the island is high and the time at which the appellant was found is the period where one is prone to commit an offence. These facts constituted the overt act of preparing to commit a felony. The prosecution added that when the appellant conducted his defence at the trial court, he said he was going to the farm.

Analysis and Determination

The role of this court in a first appeal such as this one is well settled. In **Pandya v R {1957} EA 336** it was held that a first appellate court is duty bound to appraise the evidence availed to the trial court afresh, analyse it and arrive at its own independent conclusion on the matter all the while keeping in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.

I have dispensed with the duty to rehash the evidence adduced at the trial court. What I now have to do is analyse it in the context of the pertinent law and arrive at my own independent conclusions. The issue for determination is whether on the evidence presented before the Court, there was any evidence to show any preparation to commit a felony namely robbery contrary to **Section 308 (1) of the Penal Code** which provides thus:

> ***"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."***

In the case of **Manuel Legasiani & 3 others v Republic [2000] eKLR** adverted to by Counsel, the Court of Appeal opined:

> "***The word 'Preparation' is not a term of art. In its ordinary meaning it means "the act or an instance of preparing" or "the process of being prepared". This is the meaning ascribed to the word 'Preparation' in the Concise Oxford Dictionary, Eighth Edition. To prove the offence in question some overt act, to show that a felony was about to be committed, has to be shown.***

In order that the prosecution successfully sustain a conviction for the offence of preparation to commit a felony, it must show that the

Appellant had the intention to commit the offence. In **Criminal Appeal 12 of 2019 David Ndiema Moikut v Republic [2019] eKLR** the Court held:

> ***It must be shown that the appellant had put in motion his intention by making preparations to commit the offence. The prosecution must establish that the appellant made the attempt to put into effect his intention. This means that the accused begins to carry out his intention to commit the offence in a way suitable to bring about what he intends to achieve.***

The court in **Holmes C.J in Commonwealth v Peaslee (177 Mass 267, 272, 59 N.E Rep 55)** held as follows:

> ***"That an overt act, although coupled with an intent to commit a crime, commonly is not punishable if further acts are contemplated as needful, is expressed in the familiar rule that preparation is not an attempt. But some preparation may amount to an attempt. It is a question of degree. If the preparation comes very near to the accomplishment of the act, the intent to complete it renders the crime so probable …, although there is still a locus poenitentiae, in the need of a further exertion of the will to complete the crime."***

In **P v Murray (14 Cal. 159)** it was held that:

> ***"Preparation consists in devising or arranging the means or measures for the commission of the offence; the attempt is the direct movement toward the commission after the preparations are made."***

The Court must be convinced that the accused person had begun to carry out their intention to commit a robbery in a way suitable to bring about what he intended to achieve. In **Criminal Appeal 55 of 2019 Suleiman Juma v Republic [2020] eKLR** I had occasion to opine on a similar matter. In that instance I held:

it is intrinsic that the prosecution show the felonious intent on the part of the appellant or the preparation to execute felony. This can be seen through the circumstances under which the appellant was arrested.

In the instant case, the cross-cutting testimonies of the prosecution witnesses was that on 10th April 2019 at 10p.m while on night patrol around Mbwajumwali village, they received a tip off that there were some young men moving around terrorizing villages with pangas. They bumped into the Appellant who was walking in their direction and became uneasy when he saw them. This arose their suspicion and upon searching him, they retrieved a panga concealed in the left side of his trousers. The officers asked him why he was armed but the accused person did not give them a reason hence they arrested him. The learned trial magistrate found that these circumstances constituted an overt act. On Appeal, the Appellant maintains that contrary to the reports that had been received by the officers that a group of men were terrorizing villagers, he was found alone. That he was on his way to look for food and that the time he was found was not late as that is the time fisherfolk often go out to sea. Furthermore, the panga he had was concealed in his trouser and was therefore not a dangerous weapon in the context of the offence.

The evidence by the prosecution was that the officers suspected the Appellant was preparing to commit an offence because he did not offer an explanation to them upon being found at night with a concealed panga. However, contrary to the reports the police officers had received, the Appellant was not found with a group of young men. He was all alone. That he became uneasy upon meeting three police officers while alone at night at a time when fisherfolk usually go out to sea cannot suffice to infer an overt act in preparation to commit a robbery. On the issue of suspicion in a criminal case, my position is that suspicion, however strong it may be, in and of itself cannot rationalize an inference of guilt on an accused person in the absence of supporting evidence. I am not alone in this belief. In **David Ndiema Moikut v Republic [supra]** the Court while echoing my sentiments drew inspiration from the Court of Appeal decision of **Joan Chebichii Sawe v Republic Crim. App. No. 2 of 2002.** It was held:

14. In my considered view, PW1 and PW2 Complainant appear to have been suspicious of the Appellant only because they had allegedly received various reports of robbery with violence incidents in that area.

15. It is important to state that suspicion cannot suffice to infer guilt. The Court of Appeal in the case Joan Chebichii Sawe v Republic Crim. App. No. 2 of 2002 had this say about suspicion in a criminal case:

> ***"The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this court made clear in the case of Mary Wanjiku Gichira vs Republic (Criminal Appeal No. 17 of 1998 (unreported), suspicion however strong cannot provide a basis for inferring guilty which must be proved by evidence."***

In **Mwaura and Others v. Republic [1973] EA 373** the High Court in dealing with the question whether a panga, an iron bar, a wheel spanner, a king shaft, screw driver, a stone and a chisel were "dangerous or offensive weapon" for the purposes of the offence of preparation to commit a felony under **Section 308 (1) of the Penal Code** held at page 375 letter F:

> ***"In our view "dangerous or offensive weapons" means any articles made or adapted for use for causing injury to the person such as a cosh knuckleduster or revolver or any article intended, by the persons found with them for use in causing injury to the person".***

In the absence of evidence of an overt act, it cannot be said that the panga found with the Appellant was a dangerous weapon with which he had intended to use to cause injury on a person. I agree with Counsel for the Respondent that the panga is a tool used both in the shamba and by fisherfolk in the course of their work. The current circumstances where the Appellant was found walking alone and not with a group of

young men and with a concealed panga points towards an alternative conclusion other than him preparing to commit a felony.

In light of the foregoing, I form the view that the learned magistrate erred since the prosecution did not prove that the panga was in possession of the appellant for the purposes of committing a felony. The allegation that there was a group of young men terrorizing villagers could not mutate to impute guilt on the part of the Appellant merely because he was found in possession of a panga. The evidence provided by the prosecution herein fell far short of the required threshold as a result of which the appeal against both conviction and sentence succeeds.

The upshot is that the appeal succeeds. I quash the conviction and set aside the sentence. I therefore order that the appellant be and is hereby set free unless otherwise lawfully held.

It is so ordered.

DATED, SIGNED AND DELIVERED AT GARSEN THIS 30TH DAY OF JULY 2021

…….

R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Mwangi for the state