REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 50 OF 2019

SULEIMAN JUMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal From The Judgment of the Resident Magistrate Hon. D. Odhiambo

delivered on the 13th Day of September 2018, In Shanzu Criminal Case Number 557 of 2018).

Coram: Hon. Justice R. Nyakundi

Ms. Ocholla for the State

Appellant in person

JUDGMENT

The appellant herein was initially charged with the offence of preparation to commit a felony contrary to Section 308(2) of the Penal Code. The charge sheet suggests that on the 21st April 2018 at Magogoni Area in Kisauni Sub-County in Mombasa County, the appellant jointly not being at the place of abode, had with him articles for use in the course of or in connection with robbery with violence namely two knives. He convicted and sentenced to serve seven years imprisonment after a full trial. The appellant was aggrieved by both conviction and sentence meted out by the Learned Trial Magistrate. He has since filed the instant appeal on the basis of numerous ground couched in the petition of appeal dated 4th of April, 2019.

The prosecution called a total of three witnesses in support of its case. **(PW1), John Njoroge (9344)** testified that on the material date, he was on patrol within Kisauni in company of his colleagues. He averred that he received information that the appellant and his colleague were vending bang and mugging people in Magogoni area. They went the area and found the appellant and his colleague. **(PW1)** told the court that he knew the appellant prior to the material date as he had apprehended him before. The appellant and his colleagues had back packs which the officers searched and found knives in each of them. He specified that the appellant had a red knife which was produced as Exhibit 1(a) while his colleague had brown red knife which was produced as exhibit in court and marked as Exhibit 1(b). **(PW1)** also told the court that the appellant told him that they use the knives to cut bang. He then arrested them and took them to Nyali Police station.

(PW2), PC Mwangi, was the investigation officer in this matter. I have noted that the better part of his testimony was basically what he was told by **(PW1).** He produced the aforementioned exhibits before court. **(PW3), Cpl David Mutai's** testimony basically corroborated **(PW1's)** testimony since he was part of the officers who arrested the appellant his colleague. The Learned Trial Magistrate was convinced that the appellant and his colleague had a case to answer and proceeded to place on their defence. Of interest in this matter is the testimony of the appellant, he testified that on the material date, he had been sent to the shops by his mother to purchase some potatoes. He met police officer's on the way who asked him for his ID which he did not have. They then asked him for money, which he failed to give them and they then proceeded to arrest him.

Submission

The appellant filed submission in support of his grounds of appeal. The appellant argued that the prosecution failed to demonstrate an overt act that a felony was to be executed. That the prosecution witnesses did not demonstrate that the knife had been used or attempted to be used to commit a felony. He is adamant that he was just in mere possession of a knife and the same does not indicate that he was preparing to commit a felony. That the officers testified that they had received information that they were selling but no bang was recovered upon their

arrest. The appellant argued that the prosecution ought to have called witnesses in form of the people who claim that they were mugged or who witnessed the commission of the same by the appellant. He therefore added that his conviction was based on mere suspicion. The appellant also produced a child health card to show that he was a minor at the time he was charged and convicted since he was born on the 20th of June 2001. He therefore argued that his conviction and sentence goes against the provisions of section 191 of the Children Act.

On the other hand, the prosecution filed submission to oppose the instant appeal. The prosecution conceded that the offence of preparation to commit felony was not proved since nothing was placed before court to demonstrate some overt acts that a felony was about to be committed. The prosecution also conceded that it failed to call relevant witnesses who could have proved allegations of mugging and whether the knives were welded in the process such that an intention to commit a felony can be inferred. Lastly the prosecution also conceded that the appellant's conviction and sentence violence the provisions of the Children Act.

The main issue of determination herein is whether the prosecution proved his case beyond reasonable doubt. The offence of preparation to commit a felony defined in terms of section 308(1) of the Penal Code. It is provided 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."***

The Court of Appeal decision in **Manuel Legasiani & 3 others v Republic [2000] eKLR** defined the offence as follows;

> ***"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. Mere possession of a fire-arm not coupled with such an overt act is not an offence under section 308(1) of the Penal Code."***

Again, **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."***

For an offence of preparation to commit a felony to suffice, there must an overt act to show that an offence is about to be committed is established. A departure from this definition is given the case of **Re. T. Munirathinam Reddi A.I.R 1955 And. Prad. 118** where it was held thus:

> ***"The distinction between preparation and attempt may be clear in some cases, but in most of the cases, the dividing line is very thin. Nonetheless, it is a real distinction. The crucial test is whether the last act, if uninterrupted and successful, would constitute a crime. If the accused intended that the natural consequence of his act should result in death but was frustrated only by extraneous circumstances, he would be guilty of an attempt to commit the offence of murder."***

In view of the foregoing judicial precedents, it is intrinsic that the prosecution shows 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. The phrase "dangerous or offensive weapon" is not defined in Section 296 of the Penal Code or in Section 4 – the interpretation section of the Penal Code. Section 89(1) of the Penal Code creates the offence of possession of a firearm or other "offensive weapon" etc and section 89(4) of the Penal Code defines "offensive weapon" for purposes of section 89 as meaning:

> ***"any article made or adapted for use for causing injury to the person or intended by the person having it in his possession or under his control for such use".***

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".***

It can therefore be argued that albeit the knife is not made for purposes of causing injury to a person, it can suffice to be a dangerous weapon in terms of section 296(2) of the Penal Code if the robbers in wielding it in the cause of robbery intend to use it for causing injury to any person. I'm not therefore satisfied that the knife which the appellant had in this case were intended to cause injury to the public and cannot

suffice to be termed dangerous weapons. The prosecution did not specify the kind of felony the appellant intended to commit and no evidence was placed before me to show that the knife was adapted in such a manner to make it dangerous since it was found in a backpack. The prosecution has conceded to the same in its submissions.

In light of the foregoing, this court finds that the learned magistrate was in error and misdirection of law and fact since it was not proven that the knife in possession of the appellant for the purposes of committing a felony. The allegation that the information that the appellant was mugging members of the public remained an unsubstantiated allegation which was not proved by way of evidence beyond reasonable doubt. The prosecution had a chance to call witnesses who perceived the appellant committing the alleged offences. 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 THIS 22ND DAY OF DECEMBER, 2020

R. NYAKUNDI

JUDGE

In the presence of:

Ms. Onyango for the State

Appellant in person