



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 26 OF 2017

(An Appeal arising out of the conviction and sentence of Hon. S. Jalango –SRM delivered on 24th September 2015 in Makadara CMC. CR. Case No.3173 of 2014)

JOHN IRUNGU MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, John Irungu Mwangi was 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 8th July 2014 at Korogocho slums in Nairobi County, the Appellant was found armed with a dangerous weapon, namely a Somali sword, in circumstances that indicated that he was so armed to commit a felony, namely robbery. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged and sentenced to seven (7) years imprisonment. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of insufficient, fabricated and incredible evidence. He took issue with the fact that he had been convicted by the trial court yet the prosecution had not established its case to the required standard of proof. The Appellant was of the view that he had been framed on the charge. He faulted the trial magistrate for failing to take into consideration his defence before arriving at the impugned decision. In the premises therefore, the Appellant urged the court to allow the appeal, quash his conviction and set aside the custodial sentence that was imposed on him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. He urged the court to allow the appeal. Ms. Sigei for the prosecution opposed the appeal. She submitted that the prosecution had adduced sufficient culpatory evidence which connected the Appellant to the crime that he was convicted. In the premises therefore, she urged the court to disallow the appeal. This court shall revert to the arguments made on this appeal after briefly setting out the facts of this case.

PW1 Cpl Stephen Mulwa of Korogocho Administration Police Post and PW2 PC Thomas Onduso of Kariobangi Police Station were on patrol in Korogocho Slums on the night of 8th July 2014. It was about 8.00p.m. They received information from members of the public that there was a group of young men who were robbing members of the public. They were told that one of the young men was wearing a black T-shirt while another was wearing a white T-shirt. The group was operating at a scene near the Tumaini Stage. The two officers proceeded to the scene and saw the group. On spotting them, the group of young men ran away. They ran in hot pursuit of them and managed to apprehend the Appellant. Upon searching him, they recovered a knife hidden on the left side of his waist. The knife was produced as an exhibit in court. They arrested the Appellant and took him to the police station where he was later charged with the offence.

When the Appellant was put on his defence, he denied that he was engaged in any criminal activity. He told the court that on the material day, he was returning home from Dandora where he had gone to visit his friend. When he arrived at Korogocho, he met with the two police officers who demanded a bribe from him. When he failed to pay a bribe, he was arrested and charged with the present offence. He explained that other persons who had been arrested with him were released after they had paid a bribe. The Appellant's sister, Judy Muthoni testified on his behalf and denied the assertion by the prosecution that the Appellant is a criminal or had engaged in any criminal activities.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge -Vs- Republic [1987] KLR 19 at P.22:**

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are

entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwala v R [1957] EA 570)”.

In the present appeal, the issue for determination by this court is whether the prosecution established the case against the Appellant on the charge of **preparation to commit a felony** contrary to **Section 308(1)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

For the prosecution to establish the charge of **preparation to commit a felony**, it must establish the following ingredients as was succinctly held in Moses Kabue Karuoya –vs- Republic [2016] eKLR:

“When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is said to attempt or to prepare to commit the offence.

“The essential ingredients of an attempt to commit it, secondly, preparation to commit it, thirdly to commit it if the third, that is, attempt is successful, then the crime is complete. If the attempt fails, the crime is not complete but the law punishes the act. An ‘attempt’ is made punishable because every attempt, although it fails of success, must create an alarm, which, of itself, is an injury, and the moral guilt of the offender is the same as if he had succeeded”

Thus, for there to be an attempt to commit an offence by a person, that person must:-

a. Intend to commit the offence;

b. Begin to put his intention of commit the offence into execution by means which are adapted to its fulfillment. 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;

c. Do some overt act which manifests his intention; that is, the accused performs an act which is capable of being observed by another (although it may not have been) and which in itself makes clear his intention to commit the offence.

But in fact he does not commit the whole offence. For the offence of or attempting to commit an offence to be proved, the prosecutor must prove each of those three elements beyond reasonable doubt.”

In the present appeal, it was clear to the court that the circumstances set forth in the evidence of the prosecution witnesses established that indeed the Appellant was arrested in circumstances that clearly pointed out that he was preparing to commit a felony. According to the prosecution witnesses, they received information from members of the public that there was a group of young men who were robbing members of the public near a bus terminus. The two police officers took action and visited the scene of crime. They were spotted by the group of young men before they could apprehend them. They went in hot pursuit of one of them. They managed to arrest the Appellant. They found the Appellant armed with a knife. The knife was hidden in his clothes near his waist. The Appellant did not give a reasonable explanation why he was so armed with a knife when he was arrested. Although the Appellant denied that he was involved in the attempt to rob members of the public, this court upon re-evaluation of the evidence adduced, reached the irresistible conclusion that the circumstances explained by the two police officers clearly pointed to the fact that the Appellant was a member of the gang that intended to rob members of the public at the said bus terminus. Further, this court was persuaded by the prosecution’s evidence pointing to the fact that the Appellant ran away from the scene when he saw the police. There would be no reason why the Appellant would run from the said bus terminus if indeed he was not preparing to commit a felony. The Appellant’s appeal against conviction lacks merit and is hereby dismissed.

On sentence, the Appellant is on a firmer ground. Being a first offender, this court is of the view that the sentence of seven years imprisonment that was meted on the Appellant was harsh and excessive in the circumstances. The three years that the Appellant has been in prison is sufficient punishment. In the premises therefore, the custodial sentence imposed upon the Appellant is commuted to the period served. He is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 29TH DAY OF JANUARY 2019

L. KIMARU

JUDGE