



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**(CORAM: CHERERE-J)**

**CRIMINAL APPEAL NO. 12 OF 2019**

**BETWEEN**

**DAVID NDIEMA MOIKUT.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(Appeal against Conviction and Sentence in Criminal Case No. 103 of 2018 in the Senior Resident Magistrate's Court at Sirisia by Hon. L.N.Kiniale (SRM) on 21.03.18)**

**JUDGEMENT**

**The Trial**

1. On 21<sup>ST</sup> March, 2018, **DAVID NDIEMA MOIKUT (hereinafter referred to as the Appellant)** was convicted for the offence of preparation to commit a felony contrary to section 308(1) of the Penal Code Chapter 63 Laws of Kenya was sentenced to serve 07 years' imprisonment.

**The Appeal**

2. Being dissatisfied with the conviction and sentence, the Appellant lodged the instant Appeal. In the amended Petition of Appeal filed on 18<sup>th</sup> January, 2018, Appellant raised 9 grounds of Appeal which I have summarized into 3 grounds **THAT:**

**1. The prosecution case was not proved beyond reasonable doubt**

**2. His right under Article 49(1) was breached**

**3. The prosecution did not call crucial witnesses**

3. When the Appeal came up for hearing on 06<sup>th</sup> August, 2019, Appellant indicated 24<sup>th</sup> July, 2018. Mr. Akello, learned counsel for the state opposed the appeal and submitted that the prosecution case was watertight. He submitted that the Appellant and others were found with pangas at night and ran away upon being stopped by police but Appellant was apprehended and did not explain what he was doing out at night armed with a panga our why he ran away upon seeing the police.

**Analysis**

4. The Court of Appeal in the case of **GABRIEL NJOROGE VS REPUBLIC (1982 - 88) 1 KAR 1134** described the role of the first Appellate Court on an Appeal from the subordinate Court in the following terms: -

**“....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 on the question of fact as on the question of law to demand a decision of the Court of the first Appeal, and as the 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 nor heard from the witnesses and to make due allowance in this respect.....”**

5. This being a first Appeal, this Court has a duty to evaluate the evidence, analyze it afresh and draw its own conclusion, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses testify as did the trial Court, and give due allowance for that.

#### **The prosecution's case**

6. The prosecution called 3 witnesses in support of the charge. **PW1 CPL RONALD SANDE** and **PW2 PC BANTE BORU** testified that on 19<sup>th</sup> January, 2018 at about 02.00 am, they were on night patrol in Huruma area that had witnessed a spate of robberies when they came across 5 men who were armed with pangas and rungas out of which they arrested the Appellant when he failed to explain what he was doing out at night while armed with a panga.

7. **PW3 CPL PHILIP RIPIS**, the investigating officer received appellant from PW1 and PW2 who also handed to him a panga allegedly recovered from appellant after recording their statements charged the appellant.

#### **The Defence Case**

8. When put on his defence, the Appellant stated that he went out of his house after he heard dogs barking outside and it was then that he met police officers who arrested him and had him charged after torturing him for 3 days.

#### **THE ISSUE FOR DETERMINATION BEFORE THE COURT**

9. 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.

10. In the case of **Manuel Legasiani & 3 others v Republic [2000] eKLR**, the Court of Appeal had this to say: -

***“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.***

11. For the prosecution to prove the offence of preparation to commit a felony therefore, it must be established that the Appellant had the intention to commit the offence. (See **Kimaru J. in Simon Kandege Ondego v Republic, Nakuru High Court Criminal Appeal No. 142 of 2005**).

12. 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.

13. Evidence tendered is that Appellant was with others and that they were armed with pangas and rungas but he denies it. But whether or not the Appellant was with others and that they were armed is not the issue. The issue is whether he had begun to carry out their intention to commit a robbery in a way suitable to bring about what he intended to achieve.

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.”***

16. From the foregoing, I find that the prosecution did not prove beyond doubt that appellant was armed with intent to commit a robbery. Reasonable doubt is logically derived from the evidence or the absence of evidence and if a single circumstance creating reasonable doubt in a prudent mind exists about the guilt of an accused, the same is sufficient to give an accused the benefit of doubts.

17. Accordingly, the conviction is quashed and the sentence set aside and unless otherwise lawfully held, it is ordered that Appellant shall be released and set free forthwith.

18. It is hereby so ordered.

**DATED AND DELIVERED IN BUNGOMA THIS 09<sup>th</sup> DAY August 2019**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

**Court Assistant** - Brendah

**Appellant** - Present

**For the State** - Mr. Akello