REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CRIMINAL APPEAL N0. 28 OF 2019

JOHN KIOKO THOMAS.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the judgment of Honourable D. Orimba- SPM delivered on 29th November, 2018, at Senior Principal Magistrate's Court, Kangundo in criminal case no. 1196 of 2017)

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

JOHN KIOKO THOMAS.....ACCUSED

JUDGEMENT

1. The appellant, **John Kioko Thomas**, was charged in at Senior Principal Magistrate's Court, Kangundo in criminal case no. 1196 of 2017, with three counts. The first court was that of escape from lawful custody contrary to section 123 of the ***Penal Code*** the particulars being that on the 18th day of December, 2016 at Tala Police Station of Matungulu sub county within Machakos county being in lawful custody at Tala Police Cells, he escaped from lawful custody.

2. In count II he was charged with wilfully resisting arrest by police officers in due execution of their duties contrary to section 103(a) of the National Police Service Act of 2011. The particulars of the said count were that on the 27th day of November, 2017 at Plan B Bar in Tala Market of Matungulu sub-county within Machakos county, the appellant wilfully resisted being arrested by police officers No. 66375 **Sgt. Joseph Muruiki**, No. 209105 **Cpl. George Wanjohi** and No. 90703 **PC Samson Mwendwa** and at the time of such resistance was being arrested for the offence of being in possession of Narcotic drugs and escape from lawful police custody.

3. In count III the appellant was charged with the offence of Malicious Damage to Property Contrary to Section 339(1) of the ***Penal Code*** the particulars being that on the on the 27th day of November, 2017 at Plan B Bar in Tala Market of Matungulu sub-county within Machakos county, the appellant wilfully and maliciously damaged a pair of designer shoes valued at Kshs 1,800/- the property of No. 66375 Sgt. Joseph Muruiki.

4. In count IV he was charged with preparation to commit a felony contrary to section 308(1) of the ***Penal Code***, the particulars being that on the 27th day of November, 2017 at Ngomeni village of Matungulu sub-county within Machakos county, the appellant was found armed with a dangerous weapon namely two heavy sharpened curved metal bars, one hack saw I circumstances indicating that he was so armed with intent to commit a felony namely burglary.

5. In count V he was charged with being in possession of cannabis contrary to section 3(1) as read with section 3(2) of the ***Narcotic Drugs and Psychotropic Substances Control Act, No. 4 of 1994***, the particulars being that on the 27th day of November, 2017 at Tala Police Post reporting office in Matungulu sub-county within Machakos county, he was found being in possession of cannabis sativa to wit sixty-three rolls with a street value of Kshs 1,260/- which was not in medication form.

6. After hearing the case, the learned trial magistrate found the appellant guilty of the charges in counts I, II, III and V and proceeded to convict him accordingly. From the proceedings and the judgement, it would seem that he was discharged in count IV under section 210 of

the ***Criminal Procedure Code***. However, in count I he was sentenced to a fine of Kshs 15,000/- and in default 6 months' imprisonment. In count 2 he was sentenced to a fine of Kshs 25,000/= and in default 6 months' imprisonment. In count 3 he was fined Kshs 15,000/= and in default 6 months' imprisonment. In count 4 he was fined Kshs 30,000/- and in default 9 months' imprisonment. In count 5 he was fined Kshs 35,000/= and in default 12 months' imprisonment. Clearly his sentence in count IV was erroneous since he had been discharged in the same count.

7. The prosecution's case was that on 16th December, 2016 the appellant was taken to Tala Police Station where PW3 was the Officer Commanding Station, by two administration police officers and was placed in the cells by one PC Nyakundi vide OB 34/16/12/16. The appellant was to be charged with the offence of being in possession of 100 rolls of bhang. However, on 18th December, 2016 at 3am PW3 received a phone call that the appellant had escaped from the cells after cutting grills at the back side though the tools used for doing so were never found.

8. According to PW3 they started searching for the appellant and on 27th November, 2017 he got information that the appellant had been spotted at Plan B Bar in Tala. In the company of PW1 and PW2, PW3 proceeded there and they found the appellant in the company of other people and they introduced themselves. Upon seeing them the appellant jumped on the table and according to PW1, resisted arrest by wrestling PW3 to the ground. However, the said police officer subdued him and he was arrested. In the said process, however PW3's shoes were damaged by the appellant when he pulled the same and tore them.

9. After his arrest, the appellant was taken to his home since there were earlier reports that the appellant was among persons who were breaking into people's shops at Tala. At his home they found the appellant's mother and sister who pointed out the appellant's house. After the door was opened the police officer conducted a search in his house where they found a hacksaw, an iron rod and a claw bar. According to the said police officers, when they asked the appellant the nature of his work, they realised that he was not engaged in any work that required him to use the said tools so they suspected that the same were being used for breaking into people's shops at Tala. According to them the said tools are mostly used by masons and the appellant said he was not engaged in that kind of work and he failed to offer any explanation.

10. The appellant was then taken to the police station where he was searched and was found to be wearing two sets of clothes. Outside he had a jeans trouser while inside he had a track suit in which there were 63 rolls of bang concealed in his pocket.

11. According to PW3, exhibit memo form was prepared and the bhang taken to the government chemist for analysis. The appellant was subsequently charge with the said offences. A report was produced as exhibit as well as the said tools.

12. Upon being placed on his defence, the appellant testified that he was a quarry worker. On 27th November, 2017 he was at home doing his usual chores. At 3pmhe boarded a vehicle to go to Tala to watch football in a club. At about 7pm he saw three people entering the club and they started arresting him telling him to accompany them. Not knowing who they were, he declined to accompany them. He was then handcuffed and taken to his home in Katine where they broke into his house from where they took two iron rods and a hacksaw after which he was taken to Tala Police Post. According to the appellant, he did not know why he was arrested.

13. He however stated that in 2016 he was arrested with his wife. While the wife was implicated with 10 rolls of bhang, he was on the other hand implicated in an offence of preparation to commit an offence. He was however discharged of the said offences and according to him, the court cautioned the police officer not to arrest him again and the police were fined Kshs 10,000/= for lying to court. It was therefore his case that this was the genesis of the grudge between him and the said police officers. According to the appellant on 18th he had not been arrested.

14. The appellant called his grandmother, DW2 as his witness. According to her, the iron bars in question belonged to her husband.

15. In her submissions, **Ms Mogoi**, learned prosecution counsel, conceded the appeal in respect of count I and count IV. However, the mere fact of concession by the State does not automatically lead to the decision of the lower court being upset. This court has the duty to put the evidence to afresh scrutiny and arrive at its own determination. In **Odhiambo vs. Republic (2008) KLR 565,** the court said:

> **"the court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on evidence".**

16. As regards count I it was conceded on the ground that there was no evidence that the appellant was arrested on 18th December, 2016 as was alleged since no OB extract was availed and there was no evidence by the arresting officer. According to her the issue of the appellant's arrest was therefore hearsay. I agree with the learned prosecution counsel that the evidence adduced fell short of the standard expected to prove guilt in a criminal case. There was simply no evidence that the appellant was in lawful custody as at 18th December, 2016 as alleged. Whereas an adjournment was granted for the purposes of availing the OB at the adjourned hearing the same was never availed and it was subsequently not availed. Accordingly, the appeal against count I must succeed.

17. The learned prosecution counsel also conceded with respect to count IV. Obviously it was a misnomer to convict the appellant on this count yet he had been discharged under section 210 of the CPC. Nevertheless, according to **Ms Mogoi**, there was no evidence to prove preparation to commit a felony since the items listed were recovered from the appellant's home and he was not found in possession thereof at the scene in order to prove that he was preparing to commit the offence. According to learned prosecution counsel, the circumstances of the recovery did not amount to preparation to commit an offence.

18. The appellant in Count IV was charged with the offence of preparing to commit a felony contrary to section 308(1) of the ***Penal Code*** which section provides that:

> ***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.***

19. To prove the offence with which the appellant was charged it was important to prove that the appellant was armed with dangerous or offensive weapons. In this case the prosecution's case was that the appellant was found in possession of iron bars and a hacksaw. From the prosecution's own evidence, the said items are normally used by masons. Their only quarrel with them being in possession of the appellant was that the appellant did not explain why they were in his possession yet he was not a mason. Clearly, therefore the said tools are not ordinarily dangerous or offensive weapons. Unless it is shown that the items were found with the appellant in a manner suggesting that the appellant was intending to use the same for the purposes of committing a felony, the mere fact that they were found in possession of the appellant cannot be the basis of him being convicted of the same. In this case the tools were not even found with the appellant but were found in his house after the police officers took the appellant there. There is no evidence that the appellant was preparing to commit a felony with the same. In fact, DW1 stated that the tools belonged to her husband. The Court of Appeal in **Manuel Legasiani & 3 Others vs. Republic [2000] eKLR,** while dealing with that offence expressed itself as hereunder:

> **"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. If the fire-arm is a lethal weapon and is held without licence another offence may be indicated. We are not concerned with that here. The mere act of flagging down a vehicle does not, per se, denote an overt act of preparing to commit a felony. On that score alone this appeal ought to be allowed; but there is the other issue posed by us. Before a firearm can be classified as a firearm, when the same is stated to be home made, there has to be evidence of a fire-arms' expert, to the effect that the 'home-made' firearm was capable of being classified as one which was made or adopted for use for causing injury to a person or persons. There was no such evidence before the trial court. It was held in the case of Mwaura & others vs. Republic (1973) EA 373 that although there is no definition of "dangerous or offensive weapon" specifically applicable to section 308(1) of the Penal Code it ought to be shown that the weapon was one which could have caused injury. With respect, we agree with that decision. Earlier authorities show that a home-made gun had to be proved, by evidence, to be a lethal barreled weapon. See Mwangi s/o Njoroge vs. R (1954) 21 E.A.C.A. 377 and Gatheru s/o Njagwara vs. R (1954) 21 E.A.C.A. 384. There being no such evidence in the trial court the evidence as regards preparation to commit a felony with a weapon falls short of evidential requirements. Coming to the other two items, namely the torch and the knife we can say straight away that a torch is not an offensive weapon. A knife, per se, is not a weapon of offence although it could be so used. There was no evidence however that the knife was in any manner shown to have been used or even attempted to be shown to be used so as to support the prosecution case."** [Emphasis mine].

20. Similarly, a hacksaw or iron bar *per se* are not dangerous or offensive weapons though there are capable of being so. I therefore agree with **Miss Mogoi** that this count cannot be sustained and the appeal as regards count IV must similarly succeed on two grounds. Firstly, his sentence on the said count in the absence of his conviction therefor was erroneous and secondly there was no evidence to sustain that charge.

21. Regarding the offence of malicious damage to property, section 339(1) of the ***Penal Code*** states as follows:

> ***"Any person who willfully and unlawfully destroys or damages any property is guilty of an offence, which, unless otherwise stated, is a misdemeanor, and is liable, if no other punishment is provided, to imprisonment for five years."***

22. I agree with **Ngenye Macharia, J's** finding in **Wilson Gathungu Chuchu vs. Republic [2018] eKLR** that under the above definition, the elements of the offence may be dissected as proof of ownership of the property; proof that the property was destroyed or damaged; proof that the destruction or damage was occasioned by the accused; and proof that the destruction was wilful and unlawful.

23. In this case the property in question was a shoe. According to PW3, it was removed from his foot in the course of the struggle with the Appellant. There is therefore no doubt that it was PW3's property. The said shoe was produced in court as an exhibit hence it was proved that the property was damaged and from the evidence the damage was caused by the appellant. Was the damage wilful and unlawful? In other words, was it malicious? Malice according to ***Black's Law Dictionary,* 9th Ed.**, in relation to the instant offence means, *"(i) the intent, without justification or excuse, to commit a wrongful act or (ii) reckless disregard of the law or of a person's legal right."* The appellant states that he did not know that the said people were police officers. If that is the position then he could as well have been justified to trying to disengage from their grip and if in the course of his attempt to do so he caught PW3's shoe and it got damaged, that cannot be said to amount to malicious damage. In other words, considering the appellant's explanation I cannot say that the ingredients of malicious damage to property were proved. In his judgement the learned trial magistrate only produced the cases for the respective parties without evaluating the same. Had he done so he would have come to the conclusion that the ingredients of the offence of malicious damage to property were never proved. In **Agnes Nzali Muthoka vs. Insurance Company of East Africa Civil Appeal No. 234 of 2000 [2001] 1 EA 143** the Court of Appeal held that:

> **"It is elementary that a judge has to hear parties, record down as fully as possible what they submit on, crystallise the issues, answer them as fully as possible and eventually hand down a decision."**

24. The failure to evaluate the evidence presented before the trial was therefore a misdirection. However, as stated hereinabove this court sitting as a first appellate tribunal is bound to carry out the duty that the trial court failed to do of course taking into account the necessary caution.

25. With respect to Count V, the evidence was that the appellant was found with 63 rolls of cannabis sativa hidden in his inner track suit. The said substance was subjected to a test by the Government Chemist and a report was submitted that showed that it was in fact cannabis sativa. In his evidence the appellant did not touch on the evidence incriminating him with being in possession of the said substance. In the premises,

I find that the learned trial magistrate's finding on this count cannot be disturbed. I have considered the sentence and I find no reason to interfere with the same.

26. In the premises the appeal succeeds in respect of counts I, II, III and IV, the appellant's conviction therefor is hereby set aside and the sentences therein quashed. I however sustain the conviction and sentence in respect of count V. However, since the said sentence ought to have run from the date of the appellant's arrest on 27th November, 2017, it is clear that the 12 months period imposed on the appellant in count V has already run its course. In the premises unless the appellant is otherwise lawfully held, he is to be set at liberty forthwith.

27. It is so ordered.

Judgement read, signed and delivered in open court at Machakos this 26th day of November, 2019.

G V ODUNGA

JUDGE

In the presence of:

Appellant in person

Ms Mogoi for the Respondent

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