REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 146 OF 2014

(From the original conviction and sentence in Criminal Case N. 580 of 2013 by

Hon. L. K. GATHERU (RM) sitting at Mariakani Law Courts on 4th August, 2014)

MGANDI MAMBO MLAI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. TheAppellant, MGANDI MAMBO MLAI was charged with the offenceof preparation to commit a felony contrary to section 308 (1) of thePenal Code.

The particulars were that;

> ***"On the 20th day of December, 2013 at Bonje area along Mombasa – Nairobi Highway in Rabai District within Kilifi County of the coast Region, the appellant jointly withanother not before court were found armed with offensive weapons namely a metal bar cutter and a knife in circumstances that they were so armed with intent to commit a felon namely theft".***

2. The Appellant pleaded NOT GUILTY and the matter proceeded to full hearing whereby he was found guilty and convicted for the offence. The appellant was then sentenced to serve seven (7) years imprisonment.

3. Upon being aggrieved and dissatisfied by both the conviction and sentence, the appellant filed an appeal seeking to have all the orders set aside and to be set free.

4. In his memorandum of appeal, the appellant cited the following grounds (amended);

> (a) THAT the learned trial magistrate erred in law and fact inconvicting him without considering that the burden of proof in the present case was not established beyond any reasonable doubt thus contravening section 107 as read with section 109 of the Criminal Procedure Code.
>
> (b) THAT the learned trial magistrate erred in law and fact inconvicting the appellant without considering that there were massive contradictions and inconveniences in the prosecution's evidence thus contravening section 153 as read together with section 154 of the CPC

(c) THAT the learned trial magistrate erred in law and fact in convicting the appellant without considering that the exhibit that was mentioned and subsequently put in the committal proceedings wasnever brought to court to clear the dust upon the prosecution's evidence this contravening to section 63 (3) of the Evidence Act.

(d) THAT the learned trial magistrate erred in law and fact in convicting the appellant without considering that the key witnesses who were mentioned and subsequently put in the committal proceeding were never compelled to testify in court so as to clear thedust upon the prosecution evidence thus contravening section 144 asread together with section 150 of the CPC.

(e) THAT the learned trial magistrate erred in law and fact in convicting the appellant without giving due consideration to the ALIBI defence advanced by the appellant that was substantial enoughto vindicate him this contravening section 212 as read with section 235 of the CPC.

5. This being the first appellate court , it is its duty to look at the evidence that was adduced before the trial court, evaluate and analyze it afresh so as to be able to arrive at its own conclusion, while warning itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did, to be able tell their demeanor (See the case of OKENO VRS REPUBLIC, E.A 32).

6. Briefly, the prosecution called two witnesses whose evidence was put on 20.12.2013 at about 7.00pm, Pw2, No 92860 P.C Tasul Sankei was on patrol/duties with P.C John Mwangare, P.C Mark Waweru and P.C Din Bakari along Mombasa –Nairobi highway at Bongi area in the police motor vehicle made Grand Tiger registration No GK B 095 D,when they saw three people walking.

7. That on stopping the vehicle, one of the men ran away leaving two others, who were arrested. Pw 2 said that the searched the bodies of the two suspect. He said that he found a seal cutter (a pair of scissors) from the 1st accused person's waist while the 2nd accused person had a pen-knife .

8. He described the area where they had met the two accused persons as a section where transit motor vehicles have their seals cut off and things stolen from them. They knew that the pen knife was to cut canvas and boxes while the seal cutter would open seals. The accused persons did to have a satisfactory account of carrying what they were carrying except to say that they were in the business of finding for their children.

9 They escorted the accused persons to Mariakani police station where they handed them to Pw1, No 54797 P.C Johnston Makokha with an explanation of why they had taken the two accused persons there. He booked the two accused person at Mariakani police station and investigated the matter. He said that the two accused persons did not explain the purpose for which they carried the metal cutter except for 2nd accused person who said that he uses the knife to cut coconuts.

10. According to Pw1, the place where the two men were found had no palm trees and the knife was also too small for that purpose. He charged the two with the offence before court. He also produced metal cutter as exhibit P1 and the pen knife as Exhibit P2.

11. The accused person's were placed on their defence and each one of them opted to give unsworn statement in defence. They called no witness.

The 1st accused, (Dw1) GEORGE RAI NGAO testified that he was an employee of Corrugated sheets as a crane operator. He stated that on 20.12 2013, he was on his way home from work when, after he passed Birikani village, he heard a siren like that of a police vehicle. He looked back, saw lights and head lamps, stood for about 3 minutes, then continued walking.

12. That the motor vehicle came and stopped in front of him and he also stopped. He saw three police officers come out of the vehicle with one of them in civilian clothes. The one in civilian clothes flashed a torch onto his eyes and the 2nd police officer got hold of his trouser by the belt. The 3rd one

requested him for his identity card while another one wanted to know where he was coming from. Dw1 said that he was unable to answer them all at the same time. And when he tried to say something, the one they were referring to as commander hit him on the cheek as another one put his hands in the 1st accused person's pocket.

13. He started resting the treatment, shouted "thieves" and wanted to know why he was being searched without a warrant. They attacked him while saying that he was stopping them from doing their job. He was thrown into the ground, his hands tied to the back and thrown to the back of the Grand Tiger pick up where he found another person who was a stranger to him.

14. Dw 1 said he had a Tecno phone 7350, in his right pocket and a wallet with his identify card, Ksh 1900/= and Equity Bank card and his child's birth certificate in the back pocket. He also said that they wanted him to add the amount of money to Ksh 5000/= but he demanded his money back. They returned his phone and money andhe was booked in the cells without being informed of what he was being booked for. He was arraigned in court with a co- accused. He denied knowing his co-accused person and said that whatever was producedin court was foreign to him. He said that he was later given his phone and money.

15. Dw2, MGANDI MAMBO MLAI, who is the appellant in this case told court that one 20.12.2013 at about 7.30 pm, he was on his way home from work when he saw a police motor vehicle parked on the road side.He was stopped by a police officer who asked him where he was coming from and going to. He then told him he was going to his home from work. That the officer asked him if he was aware of the thieves and burglars around and he said he did not know. He was then handicuffed and made to sit down despite showing them his home and told that he knew the thieves around. He was put in the vehicle as they continued arresting other strangers. They were taken towards Mombasa.

16. At Mazeras, they were each asked to defend themselves. He told them he had no money and was told he was arrogant. They were taken to Mariakani where they were placed in the cells. They were charged and taken to court where an exhibit which was not what he had, was brought. He also said that he was accused of a crime he was not even aware of and hence his denial of the same.

17. In his judgment, the trial magistrate stated that;

> ***" For the evidence adduced , I do find that the prosecution's witnesses, especially Pw1 have established thecircumstances surrounding the arrest of the accused persons. The first accused person was in possession of a metal cutter while the second accused had he pen knife"(lines 14 to 16 at page J18 of the proceedings)***

18. And at lines 35-36 on page J 18 of the proceedings he stated;

> ***" It means the accused were carrying dangerous and offensive weapons along a public road, in the forms of…….and none was offered any reasonable excused in his defence. I find no doubt whatsoever thatthe accusedwas carrying the offensive weapon in question with real likelihood to the intention to commit a felony, namely theft particularly from the transit vehicles".***

19. In determining this appeal, I have examined and analyzed the evidence that was adduced before the trial court with regard to the grounds of appeal, the written submissions by the appellant and oral submissions by counsel for the state together with the cited authorities and the law.

20. I have established that the following issues arise for determination;

1. whether the charge was properly constituted or drafted;

2. whether the prosecution proved beyond reasonable doubt that the appellant was found with

(a) offensive weapon namely a metal bar cutter and a knife, and if so

(b) whether he was found with the said offensive weapons in circumstances that showed the intended to commit a crime, namely, theft.

3. whether the appellant defence was plausible.

21. With regard to the first issue, it will be noted that the appellant and his co-accused were jointly charged in one count with the particulars there of indicating that "they were jointly with another not before court found armed with offensive weapons namely a metal bar cutter and a knife in circumstances……."

22. From the evidence of Pw1 and 2, the appellant was said to have been found with a penknife while his co- accused was found with a metal bar cutter. What this clearly means that they were each searched and separately found with a specific weapon and at different intervals.

23. While it was right to have the appellant and his co-accused joined in the same charge since the offence they are alleged to have committed was committed in the course of the same transaction, each ought to have been charged with a different count specifying what he was allegedly found with for ease of defence.

24. On the second issue, I wish to reiterate that in a criminal trial, the burden of proof lies upon the prosecution and the standard of proof being one of beyond any reasonable doubt".

Section 107 of the Evidence Act provides that;

" (1) whoever desires any court to give judgment as to anylegal right or liability dependent on the evidence of fact which he asserts must prove the these facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof is on that person".

Section 109 of the same Act provides;

" the burden of proof in any particular case is on the persons who wish the court to believe the existence of afact unless it is proved by any law that proof of a factshall then on any particular person"

25. In the instant case, Pw1, Pc Johnson Makokha told court that on20.12.2013 at 8.00pm, the appellant and another were taken toMariakani police station from Rabai Patrol Base at Bonje area onallegations that he had been found with a pen knife which is used tocut carton or canvas covers (Exhibit P 1) . He was cross examined bythe appellant co-accused person and he told court that

"I got the exhibit from the police officers who explained howyou were found in possession. No other document, photos were found. I was not present during the arrest……."

26. Clearly from the evidence of Pw1, he was not among the officers who arrested the appellant and his co-accused person and neither did he witness them recover the pen knife from him. He only received the appellant from Pw2 and other officers who arrested him while on patrol duties after allegedly searching and finding him with the said weapon.

27. Pw1 told court that he investigated the case but it is worth noting that he did not detail the kind of investigations he conducted to establish that the appellant had been found with the knife in circumstances pointing to his intention to commit a crime namely theft.

28. In his evidence Pw2 testified that he was on patrol duties in thecompany of P.C John Mwangare, P.C

Mark Waweru and P.C DiruBakari when they;

> ***"…….saw a group of 3 people one ran away on stopping the vehicle and the 2 other were arrested.***

None of the other officers were called to testify and corroborate the evidence of Pw 2 since they participated in the search and arrest of the appellant. Pw1 only received the appellant after Pw2 and other officers arrested him. He did not witness the recovery of the exhibit P1. Thus the contention by Mr. Masila, counsel for the state, that the prosecution's case against the appellant was proved because the witnesses were all police officers has no basis in law. Police officers are just witnesses like any other witnesses whose evidence, unless for good reason, require to be corroboration.

29. According to the appellant in his submissions he stated that the failure by the prosecution to call these other police officers who he considers critical, the court to make an adverse finding against their case.

Section 143 of the Evidence Act provides that;

> ***"No particular number of witnesses shall, in the absence of any provisions of law to the contrary be required for the proof of any fact".***

From the import of this provision, the court is not expected to call acertain number of witnesses for it to prove its case. But in a case where the evidence is in adequate, then the rules set out in the case of BUKENYA AND OTHERS VRS UGANDA (1972) E.A 549 apply. In this case, the court of appeal in Uganda held.

> ***"(i) ……the (prosecution) must make available all the witnesses necessary to establish the truth, even though their evidence may be inconsistent.***
>
> ***(ii)…..the court has the right, and the duty to call anyperson whereevidence appears essential to the first decision of the case.***
>
> ***(iii)…..where the evidence called is barely adequate the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution".***

30. According, I find that the evidence that was tendered in this case was insufficient to prove that the appellant was found in possession of a pen knife in circumstances that reveal he intended to commit a felony. And having found so, there was no need to require the appellant to offer any explanation as to why he was in possession of the said penknife.

31. In analyzing the judgment in this case, I find the trial magistrate shifted the burden of proof to the appellant, when the requirement for this had not been established.

Having found so, I find there was no cogent evidence upon which the conviction and sentence of the appellant can be sustained.

32. I proceed to allow the appeal, quash the conviction and set aside thesentence that was meted against the appellant.

The appellant to be set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

Judgment delivered, signed and dated this 28th day of May, 2018.

LADY JUSTICE D. O. CHEPKWOY

28.5.2018

In the presence of;

M/s Ocholla, counsel for the state

Appellant – Present

C/clerk- Beja