



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL CASE NO. 49 OF 2017

ALPHOYO OKWARO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(from the original conviction and sentence by F.M. Nyakundi, RM, in Mumias PMC cr.case No. 1070 of 2016 dated 5.5.2017)

J U D G M E N T

1. The appellant was convicted in count 1 of the offence of preparation to commit a felony contrary to section 308(1) of the penal code and in count 2 of possession of public stores contrary to section 324(2) as read with section 36 of the penal code. In count 1, he was sentenced to serve 4 years imprisonment and in count 2 to serve a period of one year imprisonment. He was dissatisfied with the conviction and sentences and filed this appeal.

2. The grounds are that:

1. That the appellant was convicted me on the evidence that was fabricated, malicious and inconsistent and lacked probative value.

2. That the trial court did not consider the appellant's defence.

3. That the trial court did not serve a copy of the charge sheet to the appellant.

4. That the appellant's rights to have access to the evidence the prosecution wished to rely on were violated contrary to provisions of article 50 of the constitution of Kenya.

3. The prosecution case was that on the 23rd September 2016 P.C.Kiseu PW1 of Harambee police station was on patrol with a colleague when they received information from members of the public that there was a brew seller in the area. They were led by an informer to the house of the person. They found the appellant and another in the house. They were eating. There was a bag near where they were. They searched the bag and found government stores therein. They took two the appellants to Mumias police station. PC Juma PW2 investigated the case. He charged the people with the two counts. They denied the charge.

4. When placed on his defence the appellant denied that he was found with the goods. He said that he was arrested in his house at Angola village. He denied that he knew the other accused person.

5. Section 308 (1) of the penal code states as follows:

“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 year.”

6. The particulars of the offence in count 1 were that the accused persons were found in possession of an offensive weapon, namely a strangling rope in circumstances that indicated that they were so armed with intent to commit a felony, namely robbery.

7. The first question is whether the rope the accused were alleged to have been found with fits the definition of an offensive weapon for the purposes of section 308(1) of the penal. In *Mwaura & Others vs Republic* (1973) EA 373, where a panga, iron bar, wheel spanner, screw driver etc were discovered in the accused's car, the High Court held that:

“ In our view dangerous or offensive weapon mean articles made or adapted for use of causing injury to the person such as a

cosh, knuckle, digger or revolver , or any articles intended by persons being found with them for use in causing injury to the person..... It cannot be said that the iron bars were offensive or dangerous by make or adaptation which could cause injury to any person.

8. In this case the prosecution witnesses only said that the appellant and his colleague were found with a rope that is used for strangling people. They did not adduce evidence that the rope was a kind of rope that is specifically made or adapted for the purpose of causing injury to persons. The witnesses did not distinguish the rope from the ordinary rope. The rope did not thereby fit the description of an offensive weapon. There was thereby no evidence that the appellant was armed with an offensive weapon.

9. The second question is whether the circumstances the appellant and his colleague were found in indicated that they were preparing to commit a felony, namely robbery.

10. The Court of Appeal in the case of **Manuel Legasiani & 3 others Vs Republic [2000] eKLR** defined the offence under section 308(1) 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.”

The appellant is said to have been found in the house of the 2nd accused. There was thereby no overt act to prove preparation to commit a felony. One cannot be said to be preparing to commit a felony while in his own his house.

11. Section 308(2) of the penal code states that:

“ Any person who , when not at his place of abode , has with him any article for use in the course of or in connection with any burglary , theft or cheating is guilty of a felony.”

12. The offences under **section 308(1) and 308(2)** of the penal code are only limited to burglary, theft or cheating. There was no evidence that the appellant was found with any article for use in or connection with burglary, theft or cheating. The rope he was alleged to have been found with was not for use for any of these purposes. The appellant was said to be preparing to commit robbery. Robbery is not one of the offences mentioned in section 308 (2) of the penal code. The charge was thereby defective.

13. The particulars of the offence in count 2 were that on the 23rd day of September, 2016 in Matungu Location, Matungu Sub- County within Kakamega County, the accused jointly had in their possession public stores namely a dark blue beret fitted with Kenya Police head Badge, Navy Blue Shirt Kenya Police Shirt, Blue Jersey of the Kenya Police Service, and Military

boots, such property being reasonably suspected of having been stolen or unlawfully obtained.

14. Section 324 (2) of the penal code states as follows:-

“ Any person who is charged with conveying or having in his possession, or keeping in any building or place , whether open or enclosed, any stores so marked , which may be reasonably suspected of having been stolen or unlawfully obtained, and who does not give an account to the satisfaction of the court how he came by the same , is guilty of a misdemeanour.”

Section 324(1) states that :

“The minister may, by notice in the Gazette, give directions as to the marks which may be applied in or on any stores under the control of any branch or department of, and being the property of, the Government of Kenya or the Kenya Railways Corporation and the Kenya ports Authority.”

15. In this case there was no evidence that the goods allegedly found with the appellant were marked government stores as stipulated in section 324(1) of the penal code. There was no evidence that the goods were the property of the government of Kenya. There was thereby no case made up against the appellant that he was in possession of marked government stores.

16. In the foregoing the appellant was wrongly convicted of the offences. There was no evidence that he was found with an offensive weapon. There was no evidence that he was preparing to commit a felony. Neither was he found with any government stores. The convictions are thereby quashed and the sentences set aside. The appellant shall be set at liberty forthwith unless lawfully held.

17. The 2nd accused, Charles Akidiya, does not seem to have appealed because he was placed on probation. As the conviction and the sentence against him were similarly unlawful, I do hereby exercise my powers of revision under section 362 of the Criminal Procedure Code and quash the conviction and set aside the sentence against the 2nd accused Charles Akidiya.

Delivered, dated and signed in open court at Kakamega this 31st day of July, 2018

J.NJAGI

JUDGE

In the presence of :-

Appellant.....appearing in person

Mr. Juma.....for respondent/ state

George.....Court Clerk.

14 days Right of Appeal.