REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 58 OF 2016

(Consolidated With Criminal Appeal No. 59 of 2016)

(CORAM: J.A. MAKAU – J.)

EVANS ODHIAMBO SIFUNA……...……..……..……..1ST APPELLANT

JAMES OMONDI ODHIAMBO……...…..……..…….2ND APPELLANT

VS

REPUBLIC…….....……...…….RESPONDENT

(Being an Appeal against both the conviction and the sentence dated 10.5.2016 in Criminal Case No. 68 of 2015 in Ukwala Law Court before Hon. C.N. Wanyama-RM)

JUDGMENT

1. The Appellant **EVANS ODHIAMBO SIFUNA** and **JAMES OMONDI ODHIAMBO** (formerly accused no. 1 and no. 3 at the Lower court) were jointly with another charged with an offence of preparation to commit a felony contrary to **Section 308 of the Penal Code.** The particulars of the charge are that: on the 9/2/2015 at Sigomere Trading Centre in Ugunja Sub-County within Siaya County, were jointly found armed with offensive weapons namely panga and a pen knife in circumstances that indicated that they were so armed with intent to commit a felony namely kidnapping.

2. After trial the appellants were found guilty, convicted and sentenced to serve 7 years imprisonment.

3. Aggrieved by the conviction and sentence, they filed separate appeals in person, however, before the hearing of the appeal, the first appellant appointed the firm of M/s Dola, Magani & Co. Advocates whereas the second appellant appointed the firm of M/s Wakla & Co. Advocates. That at the hearing Mr. Wakla, Learned Advocate, appeared for the 2nd appellant and held brief for M/s Dola Advocates for the first appellant.

4. Mr. Wakla, Learned Advocate, relied on grounds of appeal filed by the appellant being supplementary grounds of appeal which are as follows: -

> ***(a) The learned trial magistrate erred in law and fact in convicting the Appellant when the evidence on record was manifestly insufficient and had glaring gaps and incapable of sustaining a conviction hence convicted the appellant against the weight of the evidence on record.***
>
> ***(b) The learned trial magistrate erred in law in falling to give adequate consideration to the defence of the Appellant.***

(c) The Learned Trial Magistrate failed to give due and adequate consideration to the glaring abuse of the Appellant's constitutional rights by the State which rendered the trial unconstitutional.

5. Mr. Wakla, Learned Advocate, urged the prosecution's case was riddled with contradictions, inconsistencies and the charge was not proved beyond reasonable doubt, the defence was not considered and that the charge against the appellants is in violation of the appellant's constitutional rights.

6. M/S Odumba, Learned State Counsel, appearing for the state did not oppose the appeals. She concedes the appeals on the ground that there is no sufficient evidence to support the charge.

7. I am the first appellate court and as expected of me have to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I neither saw nor heard any of the witnesses and have to give due allowance. I am guided by the Court of Appeal case which sets out the principles that apply on a first appeal. These are set out in the case of **Issac Ng'anga Alias Peter Ng'ang'a Kahiga V Republic Criminal Appeal No. 272 of 2005** as follows:-

"in the same way, a court hearing a first appeal (i.e. a first appellate court) also has duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There are now a myriad of case law on this but the well-known case of OKENO -VS- REPUBLIC (1972) EA 32 will suffice. In this case, the predecessor of this court stated:-

The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses (See Peters Vs. Sunday Post, (1958) EA 424)"

8. The record of appeal forms part of the Prosecution case and I need not reproduce the same, however, I shall summarize the Prosecution's case and the defence.

9. The Prosecution case is as follows: - on 9/2/2015 at 8.30pm, No. 93278 PC Samoei Kiprotich based at Ugunja Police Station while on general duties in company of Sgt. Hamisi, (PW3), Cpl Edward Munene and APC Zachary Obiri got a tip from an informer that a three member gang in a Toyota Probox Reg. No. KBL436B were en route to Ruwe with aim to kidnap and kill one William Ochieng (PW1), a resident of Ruwe sub-location. They then laid an ambush along Ugunja-Musanda murram road 500km from Sigomere. That they saw a vehicle, ordered the driver to stop and fired in the air. They asked the occupants to alight, searched and recovered a panga, Kenya Army Military Barret from Joannes Oduor; a rope and a rough sketch map drawn on a paper showing the homestead of the person to be kidnapped. That it was with Evans Odhiambo, first appellant. They interrogated the three people and established the master mind and proceeded to the scene, pursued him and arrested him at his homestead. The suspects were put in custody pending further investigation. The Probox had four occupants, the driver, his crew and the two suspects. They established the vehicle had been hired by the gang. James Omondi, a resident of Ruwe was on a motor cycle. A pen knife was recovered from Joanne's pocket, sketch map was produced as exhibit 1; panga exhibit 2 and rope exhibit 3; pen knife exhibit 4 and Kenya Army Barret exhibit 5. The Prosecution stated they established from the 3rd accused's phone, that he was communicating with the other accused persons.

10. The first appellant Evans Odhiambo Sifuna (DW1) in his sworn testimony stated that on 9/2/2015, he was from a funeral with Johannes as he was to go to Thika. Johannes asked him that they go and visit his uncle. That they alighted at Ugunja and took a motorcycle to his home. On arrival at Sigomere, the rider

asked for an additional Kshs. 500/= but a Probox came and the driver stated he was heading to Musanda and charged Kshs. 200/= but they were immediately arrested, taken to Sigomere Police Station, then to Ukwala Police Station where they remained in custody upto 18/2/2015 when they were arraigned in court. The first appellant denied knowledge of the items, the police claimed they belonged to them and stated he saw them in court for the first time. On cross-examination, the first appellant stated they were going to the home of the second appellant. The first appellant stated he had been assaulted and that they did not have any ill motive and that he saw the second appellant at the police station.

11. The second appellant, James Omondi Odhiambo stated on oath that on 9/2/2015 at 11.00pm he was at his home when he heard the door being knocked by police, he opened the door, was arrested, handcuffed and taken to Sigomere Police station. That for 2 days he was taken to Ukwala Police Station and later arraigned before court on 18/2/2016. He denied committing the offence.

12. The appellant faced an offence of preparing to commit a felony. **Section 308(1) of the Penal Code** provides: -

> ***"308. (1) 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".***

13. In a charge under **Section 308(1) of the Penal Code**, the ingredients of the offence are mainly as follows: -

> ***(i) the intention to commit a crime.***
>
> ***(ii) the preparation to commit the crime.***

14. An attempt to commit a crime must be distinguished from the intention or the preparation to commit a crime. The intention is inferred by the direction of the conduct towards the object, which points to show that progress has been made in the direction of the deed. Preparation on the other hand, is in devising or arranging the measures necessary for the commission of the offence. It differs from attempt which is the direct movement towards the commission after the preparation has been made. In a case of preparation to commit a felony, the Prosecution must prove the intention to commit a crime, and then prove preparation to commit the crime. That whether there was a preparation to commit a felony is a question of facts. Preparation is a mental act followed by certain external acts; hence the prove of intention to commit crime, secondly actus reus, to do certain criminal acts in the furtherance of the intention.

15. Mr. Wakla, Learned Advocate, appearing for both appellants contends that the evidence on record is manifestly, insufficient and has glaring gaps incapable of sustaining a conviction. In the instant case, the police purportedly received a tip off from undisclosed source, that a three member gang in a Toyota Probox Reg. No. KBL 436B were enroute to Ruwe with an aim to kidnap and kill PW1, William Ochieng. PW1 in his evidence clearly stated on 10/2/2015, he was at home when the police called him seeking his assistance after they had arrested some people with a map purportedly of his homestead from the 1st appellant, exhibit 1. In this case, there is evidence that the 2nd appellant is a neighbour to PW1.

16. In this case, PW1 was not aware of the intentions of his alleged kidnapping and he stated that no one had threatened to harm him. The police did not call any single witness nor produced any evidence of PW1 having complained of his life being in danger either from the appellants or from unanimous caller nor had he complained of receiving any demands or his life being threatened. The purported sketch plan or map exhibit 1 is home drawn. I have very carefully perused the same. It is a silent sketch plan with no heading. It is alleged to be a map of PW1's home. It has no directions, thus north, east, west or south; it has no key. It cannot with all due respect be said it is the sketch plan of the home of PW1. The sketch could for all purposes and intentions be a plan for anyone's future home or anything for that matter. PW1 stated:-

> ***"it had a road to the river and a junction. The home had a fence of wire. There was a latrine***

and a posho mill. I was shown the map which was of my home."

I have keenly perused the sketch map which as I have stated has no key to the features that are there. There is no indication that the road leads to a river nor fence or latrine and posho mill. Those things referred to by PW1 can even be found at other homes. It does not mean that it is only at his home where such features can be traced. PW2 and PW3 claim they found the sketch map exhibit 1 with the 1st appellant yet the same was not subjected to handwriting examination to link it to the first appellant or the 2nd appellant.

17. The first appellant denied having been found in possession of the document exhibit I and stated he saw it before the court for the first time. PW2 stated the map was with the 1st appellant, however, PW3 who was in the company of PW2 in his evidence in chief, stated they did search and found handmade map of the home where the appellants were going to. He did not state for instance where they found the map. He did not state whether the map was with any of the appellants or was in the vehicle. The vehicle in question was allegedly occupied by four people apart from the two appellants, the driver and his crew were not called to give evidence as to the ownership of the sketch map exhibit 1, panga exhibit 2, rope exhibit 3, pen knife exhibit 4 and Kenya Army Barret exhibit 5. They could have been theirs or could have been left there accidentally by one of their many customers, the vehicle being a taxi. The 2nd appellant was not in the vehicle when the first appellant was arrested. I find no evidence linking him with the ownership of any of the items recovered. It is possible that none of the items recovered by police belonged to any of the appellants.

18. **Whether the evidence support the charge?** The particulars of the charge clearly states the accused were found with offensive weapons namely panga and a pen knife yet PW2 in his evidence stated they were informed the appellants were found with a map, a knife, panga and 3 caps, one of which looked like those of police and a rope. PW2 stated they arrested the members of the gang from motor vehicle KBL 436B recovered a panga, Kenya Army Military Barret, a rope, sketch map, a pen knife whereas PW3 talked of a rope, a panga and pen knife, barret of Kenya Army and a map. That the people they arrested were three whereas PW2 talked of 2 people. PW3 talked of motor vehicle Reg. No. KBL 437B whereas PW2 talked of KBL 436B. I find the evidence do not support the charge as it is riddled with contradictions. I find the evidence of PW1, PW2 and PW3 is contradictory, inconsistent and invariance with charge sheet as the map, barret and rope recovered from the alleged appellant is not indicated in the charge sheet. The vehicle from where the appellants were arrested from is in doubt as to whether it was KBL 436B or KBL 437B.

19. **Whether the appellants defence was given adequate consideration?** I have perused the trial court's judgment and indeed I find that the appellants' defence was not considered at all. The first appellant defence is that Johannes the 2nd accused at the Lower Court had asked the 1st appellant to accompany him to go and visit his uncle but they were arrested in a Probox on the way to visit the uncle of the 2nd accused. The 2nd appellant defence is that he was at his home and knew nothing about this offence. There is no dispute that the 1st appellant raised his defence early enough through cross-examination of the prosecution witnesses. There is no dispute that the 2nd appellant was arrested at his home. I find the appellants' defence was not disapproved nor did the Prosecution adduce evidence to establish as alleged by PW2 that the appellants were communicating through their phones. The phone numbers were not given nor were the phones produced or the print outs from the service provider to show the two were communicating as alleged. I find that the appellants were prejudiced by court's failure to consider their defence.

20. Mr. Wakla contends that the trial court failed to give due and adequate consideration to the glaring abuse of the appellant's constitutional rights by the state which rendered the trial unconstitutional. The appellants were arrested on 9/2/2015 but were not arraigned in court till on 18/2/2015. This was contrary to **Article 49(1)(f) of the Constitution of Kenya 2010** which provides: -

"49. (1) An arrested person has the right: -

(f) to be brought before a court as soon as reasonably possible, but not later than: -

(i) twenty-four hours after being arrested; or

(ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day."

In this case, no explanation was given for failure to arraign the appellants before court within 24 hours from the date of their arrest. They were detained at police cells for 9 days. The appellants stated upon their arrest they were assaulted and due to the serious injuries they had sustained, they were detained at cells for longer period. That the police, then preferred the charges as cover up. I find in this case, the appellants were held against the provisions of the Constitution and agree with appellants' counsel that the constitutional rights were violated by the police. That as this court is not sitting as a constitutional court now but as a criminal court in this matter, I hold that the appellants are at liberty to pursue the issue of violation of their constitutional rights before a constitutional court for compensation otherwise the trial at the Lower Court was not rendered unconstitutional by such violation of **Article 49(1)(f) of the Constitution of Kenya 2010**.

21. On the charge of preparation to commit a felony, in view of my findings herein above, I find the Prosecution failed to establish the essential ingredients of intention to commit a crime and secondly preparations or arranging the measures necessary for the commission of the offence. I agree with the trial court's finding that the items allegedly found with the appellants, the panga, rope, and pen knife are items that are commonly available for general use and one cannot draw a conclusion in absence of facts to the contrary that the same were indeed for the purpose of committing a crime. The first appellant was purportedly found with a pen knife and a map. I have stated there was no proof the map was for the home of PW1 nor was it proved that it was in possession of the 1st appellant, nor was it proved he was the author of the map. The 2nd appellant was not found with any of the items nor in company of the 1st appellant and there was no evidence linking him to the offence. In view of the absence of evidence of intention to commit a crime and preparation to commit a crime by the appellants, I find the trial court was in error in finding the appellants guilty as charged.

22. The Learned State Counsel concedes the appeal. I have considered the grounds of appeal raised and I agree the State Counsel correctly concedes the appeal.

23. **The upshot is the appellants' appeals are merited. The convictions are quashed and the sentence set aside. The accused are set at liberty forthwith unless otherwise lawfully held.**

DATED AT SIAYA THIS 23RD DAY OF FEBRUARY 2017.

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT THIS 23RD DAY OF FEBRUARY 2017.

In the presence of:

Mr. Dola: for 1st Appellant

Mr. Wakla: for 2nd Appellant

M/S Odumba: for State

Court Assistants:

1. George Ngayo

2. Patience B. Ochieng

3. Sarah Ooro

J.A. MAKAU

JUDGE