



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**CRIMINAL APPEAL NO. 173 OF 2011**  
**CHARLES WACHIRA NDIRANGU.....APPELLANT**  
**VERSUS**  
**REPUBLIC.....RESPONDENT**  
*(Appeal against conviction and sentence in the Nyeri Chief Magistrates’*  
*Court Criminal Case No. 134 of 2011 (Hon. J.Kiarie) on 28<sup>th</sup> July, 2011)*

**JUDGMENT**

The appellant was charged and convicted of the offence of preparation to commit a felony contrary to **section 308(2)** of the **Penal Code** Cap.63. The particulars were that between the night of 10<sup>th</sup> and 11<sup>th</sup> day of December, 2010 at Majengo estate in Nyeri county within central province jointly with others not before court, the appellant not being at his place of abode had with him an article for use in the course of or in connection of theft namely one blue steel cutter. He was sentenced to three years imprisonment.

The appellant appealed against both the conviction and sentence; in his petition, he raised the following grounds:-

1. The learned trial magistrate erred in law and in fact in convicting the appellant on evidence that was totally insufficient and not to the required standard.
2. The learned trial magistrate erred in law and in fact in relying on contradictory evidence in convicting the appellant.
3. The learned trial magistrate erred in law and in fact in convicting the Appellant of an offence without considering the ingredients and/or requirements of the offence.
4. The learned trial magistrate erred in law and in fact in convicting on the basis of a steel cutter which was not found in possession of the appellant.
5. The learned trial magistrate erred in law and in fact in disregarding the evidence of the appellant and his witnesses.
6. The learned trial magistrate erred in fact and in law in convicting the appellant of an offence on evidence that did not at all support the charge sheet.

When the appeal came up for hearing, the appellant's counsel urged that the appeal should be allowed mainly because the major elements of the offence with which the appellant was charged and convicted was not supported by evidence and thus not proved; in particular, he argued that the appellant was not found with anything that could be described as an offensive weapon as understood under **section 308(2)** of the **Penal Code**.

Again, the appellant having been shot by the police at his mother's house, it could not be said, so counsel argued, that the appellant was not at his place of abode.

Counsel also argued that the evidence proffered by the prosecution was contradictory and the appellant ought to have been given the benefit of doubt.

The appeal was opposed and counsel for the state argued that there was sufficient evidence to prove that the appellant was not at his place of abode and that he was in possession of a steel cutter which would fit the description of the article described in **section 308(2)**.

Counsel also urged that contrary to the appellant's arguments, the defence of the appellant was considered but was dismissed because it could not displace the otherwise firm and concrete prosecution case.

I have to consider these rival submissions from the perspective of the law under which the appellant was charged and the entire evidence presented at the trial.

**Section 308 (2)** of the **Penal Code** under which the appellant was charged provides as follows:-

**308. Preparations to commit felony**

**(2) Any person who, when not at his place of abode, has with him any article for use in the course of or in connexion with any burglary, theft or cheating is guilty of a felony, and where any person is charged with an offence under this subsection proof that he had with him any article made or adapted for use in committing a burglary, theft or cheating shall be evidence that he had it with him for such use.**

Two critical elements in this offence are the locus in quo in relation to the accused person's place of abode and his possession of an article for use in connection with or in the course of committing certain offences.

In analysing the evidence on record for the purpose of satisfying itself whether the learned magistrate was correct in his decision and more particularly, whether he properly directed himself on the evidence, this court, as the first appellate court has to consider whether these elements of the offence were proved to exist.

To begin with, the complainant, **Anthony Munene Kamau (PW1)**, was at his home when he was alerted in the wee hours of 11<sup>th</sup> December, 2010, more specifically at around, 2.00 am, that there had been a commotion at his agrovet shop in Nyeri town. He received this information through a phone call from a watchman who was apparently guarding neighboring premises; the watchman also informed him that the suspects had left.

The complainant went to the police who accompanied him to the scene; according to him, he was driving in his own vehicle while the police officers followed him in their own vehicle. As he approached his shop the watchman told him that there was a stranger there; he drove on and when he reached where this person was alleged to be standing he immediately swerved in his direction to face him; however, his vehicle landed in a ditch. The man who is alleged to have been the appellant fled as the police pursued him; one officer fired in his direction and unfortunately for him, a bullet caught him on the leg and was thus rendered immobile almost 100 metres from the complainant's shop. The witness testified, however, that he did not see the appellant carrying the steel cutter.

A watchman, **James Kuria Wachorong'i (PW2)** guarding a nearby business property testified that he heard the commotion at the complainant's shop; he informed his colleague whom he identified as Mureithi and who was also a guard at a nearby property. This witness said that he saw someone standing as the commotion went on in the shop. As the police chased this stranger, this witness and the complainant went to the latter's shop. There were apparently people at the roof of the shop; they jumped down and fled. According to Wachorong'i they proceeded to where the appellant was; he heard some women say that the appellant was their son and that one of the women was familiar to him (the watchman) because he always saw him at or near his place of work. Just like **(PW1)** this particular witness denied having seen the steel cutter; he was categorical that he saw the cap and the cutter at the police station, apparently for the first time.

**Wachorong'i's (PW2's)** colleague, **Joseph Mureithi Guandaru (PW3)**, who was a fellow guard nearby, also testified that he heard people break into the complainant's shop on the material day; he testified that "they" called the complainant who later came with the police. The intruders, according to this witness, jumped from the roof and fled but he heard that a person they had seen standing at the complainant's shop had been shot. This witness also said that he only saw the cutter and the cap at police station.

The police officer who was on crime standby when the case was reported was police constable **Dennis Ouko Ntabo (PW4)**; he testified that the complainant came to the station and reported that there were people who were intent on breaking into his shop and that they were armed with crude weapons.

The police decided to drive to the scene together with the complainant though he was in his own car, ahead of that of the police. The officer testified that he saw six to seven men at the scene; they ran behind the shop when the police arrived; one of them dropped some object and this officer pursued him for a distance of about 200 metres towards Majengo slums. He tried to climb over a gate and it is then that the officer shot at him and caught him on the left leg. The officer produced in court a cap the appellant is said to have been wearing and a steel cutter which is alleged to have been in his possession. The officer also testified that he heard the appellant's mother asked him (the appellant) what he had been up to the material night.

According to the officer, the appellant and his accomplices were attempting to break into the complainant's shop by using the steel cutter to cut the padlocks but they were stopped in their tracks when the police arrived.

The other police officer who visited the scene together with constable **Dennis Ouko Ntabo (PW4)** was police constable **Joseph Baraza (PW5)**; he testified that besides Ntabo, the other officer who was with them when they visited the scene was constable Jama who was driving their vehicle. He testified that they saw six people armed with crude weapons at the front door of the complainant's agrovvet shop; they dispersed when the police arrived. The appellant appears to have hesitated but he too fled dropping the steel cutter behind him.

According to this officer, when these men dispersed, the officers immediately pursued them as they fled in different directions; **Ntabo (PW4)** pursued the appellant while he chased the other men.

Even then, he still testified that he found the appellant with a cap and that he also saw him drop the steel cutter as he fled. He again said that the officers recovered these items after the shooting incident.

The appellant gave an unsworn testimony and said that on 10<sup>th</sup> December, 2010 at about 10 p.m. he was coming from a neighbour's house where there was a party and found his **grandmother (DW3)** outside her house. Suddenly a police officer in civilian clothes shot him. He testified that he was drunk and denied having been in possession of the items alleged to have been recovered from him. He also denied having been at the scene where the crime was about to be committed.

The appellant's mother, **Alice Mumbi (DW2)** testified on his behalf; she testified that on the material night, at about 10.30 pm she heard a commotion and that when she ventured out she found her son crying

behind a toilet. She told the officer who inquired why she was there that the appellant was her son.

The appellant's grandmother, **Pauline Wanjiru (DW4)** testified that the appellant was his grandson and that he was with her that material night; she met him when she went out to answer a call of nature. As they proceeded to their respective house, the appellant saw the police and started running away; it is then that they shot him.

The neighbour who is alleged to have been hosting a party where the appellant was coming from that night identified himself as **Abdalla Kanuthu (DW5)**; he testified that the appellant left his house at 10.30 pm and after about five minutes he heard his mother scream saying that her son had been shot. Apart from this witness, one **Asha Yusuf (DW6)** also testified that she was in that party and that she was aware that the appellant left at 10:30 pm but soon after his departure they heard screams. They went out and found that the appellant had been shot by the police.

Looking at the evidence in its entirety I am unable to come to the same conclusion that the learned magistrate did that the appellant was found in possession of the steel cutter which was to be used in commission of or in connection with any of the crimes prescribed under **section 308 (2)** of the **Penal Code**. My hesitation to accept that there was sufficient evidence to prop the prosecution case is informed by what I hold to have been inconclusive and inconsistent evidence of the prosecution.

According to the two police officers who testified, the complainant was driving ahead of them; the lights of his car were on and therefore when he approached his shop where the appellant is said to have stood with the cutter in his hand, he had a clearer vision of him than these officers who were driving behind him. As a matter of fact, the complainant stated that he swerved towards him but then his car was stuck in a ditch. Curiously, while the complainant testified that he did not see the appellant with the cutter the police officers behind him were somehow able to see the appellant armed with it; I am unable to make out how this could possibly have happened but suffice it to say, there was sufficient doubt that the officers could see what complainant did not see in circumstances where he, the complainant was best placed to see more clearly whatever it was that anybody in front of him was holding.

The second aspect of inconsistency in the prosecution case about this very cutter was the evidence of **Joseph Baraza (PW5)** who said that he saw the appellant drop the cutter; his evidence was that they raced after the appellant and his accomplices who fled in different directions. He testified that the officer who pursued the appellant was Dennis **Ouko Ntabo (4)**. If one takes this officer's statement at his word, it is reasonably doubtful that he could have seen the appellant dropping the cutter when his attention had been drawn by the other persons who were running in a different direction from that the appellant had taken.

The two watchmen who testified as the second and third prosecution witnesses said they had seen someone outside the complainant's shop; it is not clear from the evidence whether there was any light or sufficient light for them to see the person who is alleged to have been the appellant. Whatever the case may have been, they were both consistent that they did not see the stranger with the cutter and that they only saw the cutter and the cap alleged to have been in the position of the appellant at the police station.

It is also noted that the two watchmen only saw one person, as others are alleged to have been on some roof, it is not clear of which building; even at the time of arrival of the complainant and the officers, one of them alerted the complainant that there was a person on the lookout as others were apparently busy trying to break into the complainant's shop. The police officers, on the other hand, testified that they saw six to seven men including the appellant at the front door of the complainant's shop. There is a clear contradiction here which casts a heavy cloud of doubt on the prosecution evidence that the appellant was at the scene of crime and more importantly, that he was there armed with an offensive weapon.

Having analysed the evidence as I have done, I am persuaded that the learned magistrate misdirected herself on the evidence and came to an incorrect decision. In my view it was not proved beyond reasonable doubt that the appellant was in possession of a weapon which in the words of **section 308(2)** was "***an article for use in the course of or in connexion with any burglary, theft or cheating.***" Without

satisfactory proof of possession, the appellant's conviction was in my humble view, unsafe. Accordingly I find merit in his appeal and I hereby allow it; the conviction is quashed and the sentence set aside. It is so ordered.

**Signed, dated and delivered in open court this 26<sup>th</sup> day of April, 2017**

Ngaah Jairus

**JUDGE**