**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL APPEAL NO 109 OF 2015**

**BERNARD MUTUA MULWA** *alias* ***KAALIA*****.....APPELLANT**

***VERSUS***

**REPUBLIC .....RESPONDENT**

*(Being an appeal from the judgement and Sentence of Principal Magistrate's Court at Kangundo delivered by* ***Honourable JAPHET BII (Resident Magistrate)*** *on 30TH December, 2014 in* ***KANGUNDO P.M.CR CASE NO. 530 OF 2014)***

**JUDGEMENT OF THE COURT**

1. The Appellant herein BERNARD MUTUA MULWA alias KAALIA was charged with *two counts* before the trial court where the *first count* was escaping from lawful custody contrary to Section 123 of the Penal code while the *second count* was preparation to commit a felony contrary to Section 308 (1) of the Penal Code. He was tried, convicted and sentenced to serve one (1) year and seven (7) years imprisonment respectively and that the sentence were to run concurrently from 30/12/2014. It seems he has already served sentence for the *first count*. The Appellant was aggrieved by the decision of the trial court and has now appealed against the conviction and sentence on the offence of preparation to commit a felony contrary to Section 308 (1) of the Penal Code.

2. The Appellant lodged a Memorandum of Appeal which was amended and raised the following grounds namely:-

***(i) That the kitchen knife alleged to have been recovered is NOT an offensive weapon but a domestic tool and implement available in all homesteads.***

***(ii) That there was insufficient police investigations.***

***(iii) That the plauisible defence of the Appellant was ignored and/or neglected.***

***(iv) That the Appellant was arrested in a public place in broad daylight and the said circumstances cannot be taken to be that the Appellant intended to commit a felony.***

***(v) That the trial court considered extraneous evidence against the Appellant.***

***(vi) That the burden of proof was shifted to the Appellant contrary to judicial precedents.***

3. The Appellant seeks that the conviction be quashed and the sentence of seven years imposed by the lower court set aside.

4. With the leave of the Court, parties filed submissions. Counsel for the Respondent filed submissions while the Appellant relied on his grounds as well as amended grounds of appeal. it was submitted for the Respondent that the Prosecution had proved its case on the *second count* of preparation to commit a felony contrary to Section 308 (1) of the Penal Code beyond reasonable doubt since the Appellant was found armed with a knife inside his jacket in circumstances that he indicated he was prepared to commit a felony. The Respondent submitted that a kitchen knife falls within the purview of dangerous or offensive weapon since it is capable of causing injury. It was further submitted for the Respondent that the Appellant's defence was considered and burden of proof not shifted at all as what was required of the Appellant was to give an explanation as to why he was walking around with a kitchen knife during the day, Counsel for the Respondent urged this court to dismiss the appeal and uphold both conviction and sentence.

5. The Appellant faulted the trial court for compelling him to establish to the satisfaction of the court that he had the knife for other purposes. The Appellant further submitted that the court's mind seemed to have been poisoned in that the Appellant was at the time of arrest being sought for other offences namely robbery with violence. The Appellant sought for the quashing of the conviction and setting aside the sentence of the trial court.

6. This being a first appeal this court is obligated to re-evaluate the evidence adduced at the trial court and come to an independent conclusion bearing in mind that it neither saw nor heard the witnesses testifying and to make a reasonable allowance for that ( see **OKENO =VS= REPUBLIC [1972] EA 32).**

**7. PW.1 Brethwel Kingele** testified he was the Isinga location Chief and that he received a tip off from members of public that the Appellant herein whose nickname went by the name *"**Kaalia"*** had been spotted at Syanthe area. Apparently the Appellant had been alleged to have been a notorious criminal and was then being sought in relation to a robbery with violence complaint. The OCS then dispatched PC. Philip Omayo (PW.2) and PC. Chweya (PW.3) who proceeded to Highway Bar where they found the Appellant enjoying a drink with friends. The Appellant was searched and a kitchen knife recovered from his jacket. He was handcuffed and bundled into a police vehicle. As the vehicle drove the Appellant managed to jump off and escaped. He was however rearrested and after investigations he was charged with the two offences of **escape from lawful custody** and **preparation to commit a felony**. The trial court found that the Appellant had a case to answer and put him on his defence. The Appellant then tendered an unsworn statement and stated that he had borrowed the kitchen knife from one **Mumbua Nthenge** with which to use in grafting some oranges and was then waiting for her to hand it back to her when the police pounced on him while he enjoyed a drink with friends. He stated that his protests that they should wait for the owner of the knife fell on deaf ears and was handcuffed and unceremoniously bundled onto a police vehicle.

8. As the Appellant appeared to have served his sentence on the charge of escape from lawful custody, the appeal herein is only on the **second count** of **preparation to commit a felony** of which he was sentenced to seven (7) years imprisonment. I have considered the submissions of the Appellant and Respondent as well as the evidence adduced before the lower court. The issue for determination is whether the case had been proved beyond any reasonable doubt against the Appellant.

Section 308 (1) of the Penal Code provides 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 a felony and is liable to imprisonment of not less than seven (7) years and not more than fifteen (15) years."***

9. The prosecution was thus to establish that the Appellant was armed with a dangerous or offensive weapon and that he was about to commit an offence. Indeed a kitchen knife is a common implement in almost all households for use but at the same time it can turn out to be a dangerous weapon if not properly used as it can cause injury to a user or others. The same kitchen knife could also cause injury if used by a holder to hurt another. Hence the recovery of the knife from the Appellant must be seen from that perspective. It is not in dispute that the kitchen knife was recovered from the Appellant. The issue for

determination before the trial court and in this appeal is whether he had an intention to commit an offence. It is trite law that the duty to prove the guilt of an accused is upon the Prosecution and which must always be beyond any reasonable doubt. In **WOOLMINGTON =VS= DPP [1936] AC 462** the court held thus:-

> "***It is not for the prisoner to establish his innocent; the Prisoner is merely required to cause doubt as to his guilt in either case and he is entitled to the benefit of doubt."***

10. The record of the lower court clearly reveals that the Appellant was found drinking in the company of his friends and it was during the day. He was found nonchalantly enjoying a drink and was rudely interrupted by being searched whereupon the knife was recovered. The offence under Section 308 (1) Penal Code becomes complete if the weapon that can cause injury is recovered from an offender and that the offender was intending to commit an offence. The circumstances herein do not convince me that the Appellant had prepared himself and was ready to commit a felony since he was enjoying a drink with his friends in broad day light. Even if there was suspicion that the knife might later on be used for commission of an offence that suspicion alone was not sufficient to convict the Appellant as the Prosecutor was under obligation to establish the *mens rea* (intention to commit). Had the Appellant been found at some suspicious place such as at night and had conducted himself in such a manner as to leave no doubt that his presence there was upto no good but to commit an offence, then the Prosecution would have been justified in their case against him. However the circumstances pertaining during the arrest were quite different in that the Appellant was relaxing and enjoying a drink with friends at around 12.30 p.m. in broad day light. I find the only reason the Appellant was arrested was due to an allegations that he had been involved in criminal activities in the past and hence the suspicion about him. Indeed the area Chief upon receiving a tip off that Appellant had been spotted in Syanthe area relayed the same to the police who rushed to Highway Bar and picked up the Appellant. Nothing was disclosed as to the outcome of the alleged criminal activities attributed to the Appellant prior to his arrest. The trial court received the Appellant's defence which was to the effect that the knife belonged to one **Mumbua Nthenge**. Indeed the Appellant sought for witness summons to issue for his witness as he was in custody but eventually the witness was not contacted and Appellant was forced to close his case. Even if the Appellant presented an explanation regarding the knife, it was still the duty of the Prosecution to prove his guilt beyond any reasonable doubt. The burden of proof could not shift. The lower Court record in the judgement of the learned trial Magistrate reveals that there was shift on the burden of proof upon the Appellant as shown in page 34 of the record of appeal:-

> "***The accused had the knife in the bar. It is the evidence of the Prosecution witnesses that the knife was recovered from his jacket. The accused denied the knife was his. He did not call the owner to testify on this. I find his line of defence on this not plausible. He had to show to the satisfaction of the court that he had the knife for other purposes. The fact that he was being sought for other offences as adduced by the Prosecution goes a long way to show the accused had intention to commit a felony. I find that similarly this second count has been sufficiently proved.***

11. It is clear from the above that indeed the learned trial Magistrate had shifted the burden of proof upon the Appellant. This was a misdirection. Even if the witnesses had claimed that the Appellant was wanted for other crimes, that was no excuse to suppose that the recovery of the knife had anything to do with the alleged offences. In any case the Appellant had already given an explanation as to the ownership of the knife. The Appellant had not been charged with any offence as regards possession of the kitchen knife.

12. It is the finding of this court that the evidence adduced before the trial court was not sufficient to sustain the charge of preparation to commit a felony contrary to Section 308(1) of the Penal Code. Hence the conviction of the Appellant was not safe as the charge had not been proved beyond any reasonable doubt.

13. In the result it is the finding of this court that the Appeal has merit. The same is allowed. The lower court's conviction is quashed and the sentence of seven (7) years set aside. The Appellant is ordered to be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

Dated, signed and delivered at Machakos this **30TH** day of **MAY** 2017.

**D. K. KEMEI**

**JUDGE**

**In the Presence of:**

Bernard Mutua Mulwa – Appellant in person

Saoli for Respondent

C/A: Kituva