



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CRIMINAL APPEAL NO. 105 OF 2016

(Being an appeal arising from conviction and sentence in Kitale Chief Magistrate's Court Criminal Case No. 982 of 2015 delivered by C.C. Kipkorir Resident Magistrate on 18/9/2015)

CHARLES WAMALWA KARANIAPPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

1. The appellant was charged with the offence of **Preparing to Commit a Felony contrary to Section 308 (1) of the Penal Code**. The particulars of the offence were that on the **2nd day of March 2015 at St Johns Matisi village in Trans Nzoia County were jointly found armed with dangerous weapons namely panga in circumstances that indicated that they we so armed with intent to commit a felony namely robbery**.
2. The appellant denied the charge and the matter went to full trial. His co-accused was acquitted under Section 210 of the Criminal Procedure Code. He was however convicted and sentenced to 5 years imprisonment hence this appeal.
3. The fact as presented by **Corporal Daniel Luvonga PW1 and P.C. Hezbon Odongo PW2** were clear and straightforward. The two police officers were in their usual patrol at St Johns area Matisi. Previously there were reported cases of rampant robberies. At around 10 pm they spotted 3 people who took off when they saw them. They managed to arrest 2 of them. The appellant upon being searched was found with a panga concealed inside his trouser.
4. The appellant then took the police officers to the house of the 2nd accused where they recovered 2 pangas under the mattress. The said pangas were produced as part of the exhibits. Basically they were arrested as they could not explain why they were there at such a time. They suspected them to be preparing to commit a felony as the same was prevalent in the area.
5. PW2 added that they arrested them **“because even their walking was questionable”**.
6. In his unsworn evidence the appellant stated that he was a hawker selling biscuits. That he met two people who were in civilian clothes and he greeted them. He was arrested and taken to Matisi police station and charged. He denied that he had a panga.

Analysis and Determination

7. I have read the entire proceedings as well as the submissions by the appellant and the respondent counsel in support and in opposition to the appeal. I have equally perused the authorities so far cited.

8. For the offence in issue herein to be proved one ought to establish the following;

a) that the accused was armed with a dangerous weapon.

b) that the accused is found not with in his place of abode.

c) the weapon /articles found was in cause or connection of a crime, burglary or theft.

9 The entire reading of the grounds of appeal advanced by the appellant centres on one fact, namely, that the burden of proof shifted from the respondent to the appellant. In other words the trial court demanded an explanation why the appellant was found with a panga at such a time and in that place.

10. There is no doubt that having a panga in the ordinary course of events is not necessarily dangerous. However when it is suspected that the same is to be used to advance a crime then the same would be taken to be dangerous. The appellant and his co-accused were found within Matisi area by PW1 and PW2 allegedly – preparing to commit a felony. Their believe was based on the fact that there had been reported many cases of robbery in the area. According to them the three suspects took off.

11. Was the appellant within the area of abode? I think so. The landlord infact confirmed that he did not know the 2nd accused but he knew the appellant. If this was the case how could he be suspected to have been in preparation to commit a felony yet he was within his area. Infact he took the police officers to his place within St John area Matisi.

12. The alleged landlord in my view ought to have been called to rebutt this .

13. For the police officers to suspect them first because they walked in a funny way was to say the least absurd. We know from the usual happenings that the normal “**Wanjiku**” in the street is apprehensive of police officers more so during the night.

14. Perhaps it would have added value at least to call some members of the public who were present when the chase was made to buttress what the witnesses said.

15. I find that the argument that there had been prevalent robberies in the area to be mere hearsay and suspicion.

16. Consequently and without delving into the other issues raised by the appellant I find the appeal meritorious. The same is allowed. The appellant set free unless lawfully held.

Delivered this 27th day of July, 2017.

H.K. CHEMITEI

JUDGE

In the presence of;

Kakoi for state present

Appellant – present

Kirong/Silvia – Court Assistant

H.K. CHEMITEI

JUDGE

27/7/2017