



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MURANG'A**

**CRIMINAL APPEAL NO 25 OF 2014**

**(From original conviction and sentence in Muranga'a CM Criminal Case No 664 of 2013 – B Ochieng, CM)**

**HUMPHREY MWANGI WACHIRA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**J U D G M E N T**

1. The Appellant herein, **Humphrey Mwangi Wachira**, was acquitted of the charge in count 1 of attempted burglary and stealing but was convicted after trial of the charge in court 2 of **preparation to commit a felony** contrary to **section 308** of the **Penal Code**. It was alleged in that count that on 14/09/2013 at Vidhu Ramji Estate in Murang'a Town within Murang'a County he was found armed with offensive weapons, namely a kitchen knife and a piece of timber, in circumstances that indicated that he was so armed with intent to commit a felony, namely burglary and stealing. He was sentenced to the minimum seven (7) years imprisonment provided for by the law. He has appealed against both conviction and sentence.

2. In both his original and amended grounds of appeal the Appellant has complained that the prosecution evidence was inconsistent and contradictory and hence unreliable, and that therefore the charge he was convicted of was not proved beyond reasonable doubt.

3. I have read the record of the trial court in order to evaluate for myself the evidence presented there and arrive at my own conclusions regarding the same. This is my duty as the first appellate court. I have borne in mind however that I neither saw nor heard the witnesses, and I have given due allowance for that fact.

4. On the material night between 2 and 3 a.m. PW1 (Fatuma Hassan Amin) who lived in an enclosed compound containing only her house woke up to pray. She heard a loud bang on one of the windows of the house. She rushed to the window and looked outside where she saw a person standing outside the window which had a broken pane. She saw the person by a security light which was on. She called a neighbour who in turn called the police.

5. PW2 (CPL Zacheaus Okoth) and PW3 (PC Nicholas Kimutai) were the police officers who were immediately directed to the complainant's compound. They found two persons outside the house in the enclosed compound. One of them escaped, but they managed to arrest the Appellant. He had in his possession a kitchen knife hidden in his waist-band and a piece of timber. He was unable to satisfactorily explain his presence in the complainant's enclosed compound at that hour. He neither lived in the compound nor offered a legitimate reason to be there. So he was taken to the police station.

6. PW4 (CPL Zablon Mutoko) was the investigating officer. He proceeded to the complainant's compound where he collected pieces of glass from a broken window pane. He produced them in evidence together with the knife and piece of timber recovered from the Appellant.

7. The Appellant gave an unsworn statement in his own defence. He did not call any witness. He stated that he was accosted and arrested by PW2 and PW3 on a public road as he went home. He denied being in the complainant's compound. He also denied being in possession of any knife or piece of timber at the time of his arrest.

**8.** It will be noted that the Appellant was charged generally under section 308 of the Penal Code. That section has four subsections. Subsections (1), (2) and (3) create distinct and separate offences. Subsection (4) prescribes the punishment for the offences in subsections (2) and (3). Subsection (1) prescribes the punishment for the offence in that subsection.

**9.** Obviously the charge should have specified the particular subsection of section 308 that the Appellant was charged under. However, I am satisfied that the evidence tendered by the prosecution fully disclosed the offence in subsection (1), and that therefore the Appellant suffered no prejudice thereby. The omission did not occasion a failure of justice and is curable under **section 382** of the *Criminal Procedure Code*.

**10.** The Appellant was found in the complainant's compound in the wee hours of the night while armed with offensive or dangerous weapons. A window of her house had just been broken from outside. He did not live in the compound, which was enclosed and contained only the complainant's house, and he offered no legitimate reason for being there. His defence was clearly untrue and he was properly convicted. The charge against him was proved beyond reasonable doubt. The conviction is safe and cannot be disturbed for any legitimate reason.

**11.** As for the sentence, the same was not only lawful but the minimum prescribed by the law for the offence.

**12.** There is no merit in the Appellant's appeal. It is hereby dismissed in its entirety. It is so ordered.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MURANG'A THIS 24<sup>TH</sup> DAY OF NOVEMBER 2017**

**H P G WAWERU**

**JUDGE**