



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 66 OF 2015**

**FRANCIS MUKUNDI ..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**JUDGEMENT**

1. The appellant has appealed against conviction and sentence of 7 years imprisonment in respect of the offence of preparations to commit a felony contrary to Section 308(1) of the Penal Code (Cap 63) Laws of Kenya, imposed upon him by the court of the Resident Magistrate on 17<sup>th</sup> August 2015.

2. The state through Ms Mbae has supported both the conviction and the sentence.

3. This is the first appeal. As a first appeal court, according to the Court of Appeal in *Pandya v R (1957) EA 336*. I am required to re-assess the evidence produced at trial and come to my own conclusions, while deferring to findings on credibility made by the trial court generally.

4. I have re-assessed the evidence produced at trial and I find that the appellant was arrested at Pala bar because he was engaged in a scuffle with a woman. At that point in time, Peter Githaka Gitwene (PW1) saw a knife tucked on the hip of the appellant. PW1 told him that he was not allowed to bring a knife into the bar. PW1 suspected that the appellant had bad intentions. He then called the supervisor and they arrested the appellant whom they handed over to the police.

5. Furthermore, PW1 testified that they put the appellant in a taxi while en route to the police station. According to this witness, the accused escaped from that taxi and they then chased him and re-arrested him again. The evidence of PW1 is supported by that of the supervisor of Daily Security Company, Nicasio Mugendi (PW2). His evidence is that he assisted PW1 in subduing the appellant after which they arrested him and handed him over to the police. The evidence of Jackson Mbogo Ileri (PW3) was that he was a watchman with Daily Security Services at the Pala bar. At about 1am, there was a scuffle between the manager and the appellant. PW3 found the appellant exchanging words with the manager of the bar. According to him, the appellant was violent and was ready to fight. By that time head been disarmed of a knife which he had on him. In all other aspects, the evidence of PW3 supports that of PW1 and PW2.

6. No. 46796 PC William Muthamia (PW4) while on duty he re-arrested the accused person and charged him with this offence. He produced a knife which was recovered from the appellant as exhibit 1.

7. Upon being put on his defence, the appellant gave sworn testimony. He testified that he was a customer at Pala bar where he had gone to drink beer. He further testified that before entering the bar he was screened for weapons, and no weapon was found on him. According to appellant, PW1 wanted him to buy him beer. He declined to do so. He then paid for 5 beers and his roast meat. Instead of being given

change quickly, there was delay. He then stood up and went to look for PW1 in search of his change. At that time, PW1 told the appellant that he was drunk. As a result he told him to move out of the bar. Again in response to that he insisted that he should be given his change. An argument ensued leading to his arrest and being dragged out of the bar and he was then put into a taxi and then taken to police station, where he was charged with this offence.

8. The appellant has raised 8 grounds of appeal in his petition to this court. There are three important grounds of appeal namely, ground no. 4, ground No. 6 and ground No. 7.

9. In ground 4 he has faulted the judgement of trial court for failing to observe that vital witnesses were not called to testify. In this regard it is important to bear in mind that the woman with whom the appellant had a scuffle was not called to testify. This was a material witness because it is that scuffle with that woman that led to the arrest of the appellant. It was important for that woman to be called to shed light as to why they had a scuffle. Her evidence would have shed light as to whether the appellant had issued threats to her in the course of that scuffle. In addition to this ground of appeal, there is the same issue which was raised in ground 7 namely that the appellant was screened before he entered the bar and nothing was found on him.

10. There is evidence from PW3, who was a watchman in that bar at the material time. According to him there was a lady security officer who was not allowed to search the appellant on grounds that the appellant was a male person. This lady security officer was not called as a witness. The failure to call her as a witness dented the prosecution case. It is her alone who could have testified as to whether the appellant was screened **or not before entering that bar**. Failure to call these crucial witnesses was fatal to the prosecution case.

11. The above 3 grounds of appeal are important in the light of the following findings by the trial court that ***“the accused had concealed the knife at his waist. I scrutinized the knife, it is larger than a kitchen knife and well sharpened. I don't think that the accused had any reason for carrying the knife other than for criminal intent. That is why the knife was concealed at his waist. Weapons of this kind are never carried to places of eating and drinking save to be used to commit crimes”***.

12. It is clear from the foregoing that the findings of the trial court are not supported by the evidence adduced in that court. For instance, the trial court stated that it did not think that the accused had any reason for carrying the knife other than for a criminal intent. None of the prosecution witnesses testified as to why the appellant was carrying the knife in issue.

13. A finding of fact by a court must be based on evidence adduced at trial. No evidence was adduced as to why the accused was carrying that knife. Furthermore, there is another finding of fact that this was a larger knife than a kitchen knife. Again no witness testified as to the size of the knife being larger than a kitchen knife. Furthermore, the finding that weapons such as the knife in issue are never carried to places of eating and drinking except to be used to commit crime is also not supported by evidence. A trial magistrate is not allowed to import into the case his personal knowledge or extraneous matters. This is exactly what the learned trial magistrate did.

14. According to the Court of Appeal in ***Oketh Okale and others vs R (1965)E.A 555*** in every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadvisable for a trial court to put forward a theory that was not canvassed in evidence or in counsel's speeches. Further more according to ***Bukenya and others v. Uganda (1972) EA 549*** ***the prosecution is required to place before the court all the evidence that is required to prove the charge even if that evidence is adverse to the prosecution case. Failure to call all witnesses that are required to prove the charge entitles the court to draw an adverse inference.*** The totality of these misdirections and the omission to call the woman with whom the appellant had a scuffle and the lady security officer, who was not allowed to search the appellant, is that they are fatal to the conviction entered against the appellant.

15. Furthermore, it is important to bear in mind that section 308 of the Penal Code (Cap 63) Laws of Kenya, creates special offences that require careful consideration before they are instituted. It is for this

reason that the Court of Appeal in *Makokha v. R (1985) KLR 726* pointed out that future prosecution for these offences should be referred to the Attorney General or his provincial representative before being taken to court. I do not understand why the appellant had been charged with this offence, when it was open to the police to charge him with creating a disturbance or common assault or threatening the woman with whom they had a scuffle, which offences could easily have been proved.

16. In the light of the foregoing considerations I find that the offence was not proved as required. The findings of facts upon which his conviction was based were not borne by the evidence tendered in that trial court.

17. It therefore follows that the conviction and sentence of the appellant are hereby set aside. He should be set free unless otherwise held on other lawful warrants.

**JUDGEMENT DATED, SIGNED and DELIVERED** in open court at **EMBU** this **17<sup>th</sup>** day of **MAY 2016**

In the presence the appellant and Ms Mbae for the State

Court clerk Njue

**J.M BWONWONGA**

**JUDGE**

**17.05.16**