



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 196 OF 2012

JAMES MWANGI NDERITU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

(Being an appeal against the conviction and sentence in judgment of Hon. W.A.Juma (C.M) dated 27th November,,2012 in C.M.CR.Case No. 751 of 2011.)

FACTS

1. The appellant was charged with the offence of Preparation to commit a Felony Contrary to Section 308 (1) of the Penal Code. The particulars are that on the 20th day of April, 2009 at Giakatiga along Nyeri-Karatina road in Nyeri District within Central Province jointly with others already convicted was found armed with dangerous weapons or offensive weapons namely pangas, knives and runigus in a motor vehicle REG. No. KBD 470T Toyota Matatu in circumstances that indicated that he was so armed with intent to commit a felony namely robbery with violence contrary to section 296(2) of the Penal Code.
2. After the trial, the Appellant was found guilty and was convicted at the Chief Magistrate's Court at Nyeri and sentenced to serve eight (8) years imprisonment.
3. Being aggrieved by the conviction and sentence, the Appellant filed a Petition of Appeal and listed six (6) grounds of appeal which are summarized inter alia as;
 - i. That the Charge sheet was defective as it failed to establish an offence;
 - ii. The appellants constitutional rights were violated;
 - iii. The prosecution failed to call crucial witnesses;
 - iv. There were contradictions in the evidence of the prosecution witnesses;
 - v. That the prosecution failed to prove its case to the desired threshold;
 - vi. The trial court rejected his sworn defence without giving reasons.
4. At the hearing of the appeal the appellant relied on his written submissions whereas Prosecuting Counsel for the State made oral submissions; hereunder is a summary of their respective submissions;

APPELLANTS SUBMISSIONS

5. The trial court convicted him on a charge that was totally defective; that any person charged ought to be charged with an offence known in law; that the charge read that the appellant with other

- convicted persons were jointly found in possession of crude weapons; whereas the evidence of PW2 was that out of the 23 suspects 17 had pangas 20 had knives and simis one (1) had a rungu and another had tobacco; that the prosecution ought to have applied for amendment of the charge under the provisions of Section 214(3) of the Criminal Procedure Code.
6. The appellant submitted that he was arrested on the 20th April, 2009 and taken for plea on the 11th August, 2011 which was after a period of two (2) years and some months; that no plausible reasons were offered to the court.
 7. That the prosecution failed to prove intention to commit the offence of robbery with violence; that he was arrested only on suspicion; the appellant made reference to the Court of Appeal case of **James Mwangi vs R** which held that suspicion however strong cannot form the basis of a conviction.
 8. That essential witnesses namely the driver of the motor vehicle or the tout were never called to confirm that the appellant was in the vehicle; there was contradictory evidence by the prosecution witnesses on the registration number of the matatu.
 9. That the trial court should have weighed the defence against the prosecutions' case which was tainted with doubts; and the trial court ought to have given him the benefit of doubt.
 10. The appellant prayed that his appeal be allowed to succeed in totality.

RESPONDENTS SUBMISSIONS

11. The appeal was opposed; that the appellant did not expound on the what was defective on the Charge Sheet; that there was no defect detected on the Charge sheet; the charge sheet demonstrated the offence contemplated at Section 308 (1) of the Penal Code;
12. The appellants constitutional rights were not violated; the incident occurred on the 20/04/2009; the appellant was granted bail and absconded and was re-arrested and arraigned in court on the 11/08/2011 which was about two (2) years after the initial arrest; the prosecution tendered an explanation and reasons for the delay to the trial court.
13. On crucial witnesses not being called; there was no evidence of there being a tout at the time of arrest; the driver could not be called as a prosecution witness as he too was charged together with the appellant.
14. That the appellant and 22 others were arrested on board a matatu; all occupants had rungu, pangas and knives; it was at night and the inference drawn from the circumstances is that they were proceeding to commit an offence; they had weapons so the offence could not have been a misdemeanor but a felony.
15. Counsel conceded that there contradictions relating to the registration number of the vehicle the appellant was arrested in; **PW3** said it was KPD 470T; **PW1, PW2, PW5** and **PW6** said it was KBD 470T; **PW4** said it was KBD 470D; but the matatu was photographed by **PW5** and he gave the correct registration number and that the appellant was arrested on board; **PW6** confirmed the registration to be KBD 470T; that this contradiction was not material as it did not go to the root of the matter.
16. That the trial magistrate rightfully disregarded the appellants defence of alibi as the evidence of DW2 was considerably at variance with that of the appellant; the appellant stated that the witness was a motorcyclist and he was a pillion passenger on the material date; DW2 stated that he was a cobbler and testified that the appellant was arrested on the 26/04/2009 as to the date of arrest.
17. That the prosecution had proved its case beyond reasonable doubt; Counsel prayed that the appeal be dismissed.

ISSUES FOR DETERMINATION

18. After taking into consideration the parties oral and written submissions this court has only framed one issue for determination which is;
 - i. whether the prosecution proved intention to the desired threshold.

ANALYSIS

19. This being the first appellate court, it is trite law and also incumbent upon this court to reconsider and re-evaluate the evidence and arrive at its own independent conclusion always keeping in mind that it did not have an opportunity to see nor hear the witnesses. Refer to the case of **Okeno vs Rep (1972) EA**.
20. The prosecution called a total of six (6) witnesses and out of the six prosecution witnesses five were policemen; the evidence of the prosecution was that the appellant was arrested on the material date whilst in a matatu which had 23 passengers; the matatu was found to have an assortment of dangerous weapons namely pangas, rungas, knives and simis; the appellant was found armed with a panga which was produced as an exhibit; **PW2** prepared an inventory and assigned the panga to the appellant.
21. Section 308 (1) of the Penal Code reads 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 (emphasis mine) is guilty of a felony and is liable to imprisonment of not less than seven years and not more than fifteen years”

22. This court takes note of the fact that there was one independent civilian witness (**PW6**) who testified for the prosecution; that he was the owner of the matatu and that his brother had given the motor vehicle to the driver; he stated that he did not know the appellant; but he never gave any evidence as to whether he had received a report from the driver that the appellant had commandeered the matatu; or that he had threatened this driver, or that the appellant had brandished the panga at anybody in particular any passengers on that material night.
23. It is also noteworthy to note that none of these police witnesses gave evidence of having received any report from the owner of the matatu on threats that may have been made by the appellant to the driver or tout if any or on the owner himself so as to prove intention to commit a felony.
24. This court's considered view is that suspicion alone cannot be a basis for conviction there must be evidence that goes to prove that there was an overt act of intention to commit a felony; there must be evidence of steps taken or a chain of events to demonstrate intent and or objective.
25. This court is satisfied that the prosecution failed to prove intention; and thus failed to prove its case beyond reasonable doubt.

FINDINGS AND DETERMINATION

26. In the light of the forgoing this court finds that the prosecution failed to prove its case to the desired threshold; the conviction is found to be unsafe.
27. The appeal is found to be meritorious and is hereby allowed.
28. The conviction is hereby quashed and sentence set aside.
29. The appellant be set at liberty forthwith unless otherwise lawfully held.

Orders Accordingly.

Dated, Signed and Delivered at Nyeri this 9th day of June, 2016.

HON. A. MSHILA

JUDGE