



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 125 OF 2015**

**RICHARD KINYUA.....APPELLANT**

*versus*

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in*

*Nanyuki Chief Magistrate's Court Criminal Case No. 29 OF 2013*

*by Hon. E. BETT Senior Resident Magistrate on 15<sup>th</sup> July 2015).*

**JUDGMENT**

1. **RICHARD KINYUA (Kinyua)** was convicted before the Nanyuki Chief Magistrate's Court with the *offence of preparing to commit a felony contrary to section 308(1) of the Penal Code Cap 63*. On conviction the trial court sentenced Kinyua to serve **8 years** imprisonment. He has brought this appeal against that conviction and sentence.

2. I need to remind myself the duty of this court being the first appellant court. This court has a duty as discussed in the case of **KENYA PORT AUTHORITY versus KUSTON(KENYA) LIMITED (2009)2EA 212** wherein the Court of Appeal held inter alia that :-

**“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it had neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”**

3. On 12<sup>th</sup> January 2013 at around 2 a.m. **PATRICK WACHIRA (Wachira)** while asleep at his house in Mwireri area had his dogs barking. He went out of his house with a torch. According to Wachira his compound is brightly lit with electricity. He also stated that his compound was fenced all around. When he came out of his house in response to the barking dogs he saw three people in his compound. He could not identify them. Two of the three ran away but he chased one of them. He got hold of that person next to his fence. This is what Wachira stated before court:-

**“He (Kinyua) came to the fence and was unable to jump the fence. I took a big (sic) and hit him since he was now facing me. He then fell down..... I hit him severally**

**using a stick until neighbours came.”**

Wachira proceeded to state that he screamed and also made phone calls to his neighbours. His neighbours came to his compound and amongst the people who came were John Njogu PW 2 and Mwangi Wanjohi PW 3. Both PW 2 and 3 responded to his phone call by going to his compound. When they arrived at Wachira's compound they found Kinyua the appellant seated in Wachira's cow shed. PW 2 and 3 and son of Wachira took Kinyua to Mwireri police post. Kinyua was re-arrested by PC Nelson Kirui PW 4. On the following morning PC Kirui in the company of Wachira went around the compound of Wachira and recovered one panga and a metal bar. These were found next to the fence by PC Kirui. PC Kirui said that those items could not have been recovered at night because it was dark. He however confirmed that it was he who recovered the items. Whilst at Wachira's compound he noted the part of the fence where Kinyua and the other two persons entered through into Wachira's compound.

4. The trial court also undertook *locus in quo* and received further evidence from Wachira whilst there. Kinyua also choose to address the court at the scene. He said:-

**“I wish to show the court since we are at the scene**

**where the incident occurred.”**

In so doing Kinyua indicated to the court that his house was two hundred (200) metres away from Wachira's compound where he said he had lived for 20 years.

5. In his defence Kinyua choose to give unsworn evidence. In that evidence he did not deny the offence and more particularly he did not deny that he was arrested by Wachira in the circumstances in which Wachira narrated at the trial court. Instead Kinyua stated that Wachira was operating an illicit brewery at is premises and that when he was raided by the chief he blamed the raid on Kinyua. Kinyua alluded to a time when he said that Wachira's dogs attacked his goats and Wachira was made to pay compensation to him. He said Wachira at one time had an accident he blamed Kinyua alleging Kinyua had bewitched him.

6. Kinyua on his grounds of appeal and his written submission before court faulted his conviction and sentence on the ground that the prosecution did not meet the criminal standard of proof. In raising that ground Kinyua brought before court various issues which he attributed to the failure of the prosecution to prove its case.

7. First Kinyua submitted that the items recovered at Wachira's compound were common items and could not be termed as dangerous weapons. The particulars of the charge which Kinyua faces at the trial court stated that Kinyua was found armed with dangerous weapons namely, a panga (simis) a file and a metal rod in circumstances that indicated they were intended to be used to commit a felony.

8. It should be noted that Wachira through his testimony which was confirmed by PW 2 and 3 stated that Kinyua was arrested on his compound at 2 a.m. It follows that whereas depending on the circumstances a person having a panga at 2pm might not be regarded as being armed and dangerous with a view to commit a felony but the same view cannot be held where like kinyua a person is arrested with a panga and metal rod at 2 a.m. As stated before Kinyua did not deny he was at Wachira's compound at 2 a.m and neither did he in his defence deny knowledge or possession of a panga and iron rod. In my view **section 308(1) of Cap 63** was well met by the evidence adduced by prosecution. That section is in the follow terms:

**“Any person found armed with any dangerous or offensive weapon in circumstances that indicate that he was so armed with intent to commit any felony is guilty of a felony and is liable to imprisonment of not less than seven years and not more than fifteen years.”**

In the case of **DISHON NYAMBEGA MUNENE v REPUBLIC (2015)eKLR** it was stated:-

**The Court of Appeal in Manuel Legasiani & Others v Republic MSA CA Criminal Appeal No. 59 of 2000 (2000)eKLR dealt with issue of “preparation” envisaged in section 308(1) of the Penal Code and it observed as follows:-**

**The word ‘preparation’ is not a term of art. In its ordinary meaning it means “the act or an instance of preparing” or “the process of being prepared.” This is the meaning ascribed to the word ‘preparation’ in the Concise Oxford Dictionary, the eighth edition. To prove the offence in question some overt act, to show that a felony was about to be committed, has to be shown. Mere possession of a firearm not coupled with such an overt act is not an offence under section 308(1) of the Penal Code.”**

9. The learned trial magistrate had this to say in his judgment:-

**“The court also had an advantage and benefit of visiting the scene and was shown where the accused (Kinyua) was initially sported which happened to be at the cow pen. This clearly shows that he was there intend on driving away the cows thus committing an act of stock theft which is a felony. The accused despite strong evidence showing he was arrested in the complainant’s compound at this odd hour did not give evidence to explain what he was doing there at the hour.”**

10. I wholly support the finding of the trial court as above. The trial court as well as this court can presume likely facts as provided under **section 119** of the Evidence Act. That section provides as follows:

**“The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”**

11. Kinyua submitted that the prosecution failed to produce evidence to show the intensity of the night on the night he was arrested. He also stated that the prosecution failed to adduce evidence of how long he was chased by Wachira.

12. On intensity of the light or the lack of it does not advance the case of Kinyua. This is because he was arrested at the scene. It would have been material if what the prosecution brought before court was identification of Kinyua who was arrested after the incident. The same logic applies to Kinyua submissions that the length and breath of his chase by Wachira was not adduced in evidence. The simple answer to that submission is that it was not material to the case. He was apprehended by Wachira at the scene.

13. PW 3 in his evidence in chief stated that Kinyua resided across the river from where he and Wachira had their homestead. This evidence was the basis of Kinyua’s submissions that Wachira failed to state that he knew Kinyua which Kinyua attributed to unreliability of Wachira’s evidence.

14. Nothing really turns on that evidence because Kinyua in cross examination of Wachira did not inquire on whether Wachira knew him. Even if Wachira knew Kinyua and did not state it in evidence it is not material to the case and does not show that Wachira’s evidence cannot be relied upon.

15. Similarly there is no basis of stating that Wachira did not state in evidence that he telephone his neighbours seeking their assistance. It will be seen from the summary of the evidence adduced at the trial above that Wachira clearly stated that he telephoned his neighbours.

16. Although Kinyua stated in his submissions that this case was fabricated against him he failed to credibly explain why three prosecution witnesses would have fabricated evidence against him. In this regard I wholly agree with the finding of the trial court in its judgment thus:-

**“Firstly the court noted that the accused was arrested being at the complainant’s (Wachira) compound at 2 a.m. and this is corroborated by PW 2 and 3 who came and found the accused (Kinyua) still at the complainant’s compound. This thus negates and discredits the accused defence on the issue that the charges are fabricated on a past grudge.”**

That too is the finding of this court.

17. In the end **there is no merit in the appeal against conviction and it is dismissed.** Also bearing in mind that Kinyua had a previous conviction of the offence of stealing contrary to Section 275 of Cap 63 the sentence of 8 years imprisonment imposed by the trial court was not excessive. In this regard the provisions of Section 308(1) of Cap 63 should be borne in mind. As a result the **appellant’s appeal against sentence is dismissed.**

**DATED AND DELIVERED THIS 8TH DAY OF JUNE 2016.**

**MARY KASANGO**

**JUDGE**

**CORAM:**

Before Justice Mary Kasango

Court Assistant – Njue

Appellant: Richard Kinyua .....

For the State: .....

**COURT**

Judgment delivered in open court.

**MARY KASANGO**

**JUDGE**