



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 48 OF 2015

BONIFACE MWANGI MUTHONI APPELLANT

VERSUS

REPUBLIC RESONDENT

(From the Original Conviction and Sentence in the Criminal Case No. 173 of 2014 of the Chief Magistrate's Court at Malindi – C.M Nzibe, RM)

JUDGEMENT

The appellant was charged with the offence of preparation to commit a felony contrary to section 308 (2) of the Penal Code. The particulars of the offence were that the appellant on the 8th of October 2014 at Barani in Malindi sub-county, Kilifi District within Coast Province, jointly with others not before court not being at their place of abode, had with them articles for use in the course of or in connection with breaking or stealing namely 1 pliers, 1 hammer and 3 screw drivers.

The trial court heard the case and convicted the appellant. The appellant was sentenced to serve seven (7) years imprisonment. The grounds of appeal are that the appellant pleaded not guilty to the charge, that the sentence of seven (7) years is too harsh and ought to be reviewed and reduced. The appellant is seeking the court's leniency as he is the sole bread winner for his family. In his written submissions the appellant stated that he was taken to the scene of crime by a friend who had told him that there was work to be done. The friend ran away but he stayed at the scene and he was arrested since he thought it was genuine business. He is an electrician and had been told to go and do an electrical work. He also submit that the sentence is harsh.

Mr. Fedha, prosecution counsel, opposed the appeal. Counsel submit that the case was proved beyond reasonable doubt. The complainant's evidence was also corroborated.

The record of the trial court show that three witnesses testified for the prosecution. PW1 SAID OMAR SAID was the complainant. He testified that he had a business by the name Algamal Gulf Agency in Malindi but he comes from Ganda. On the 7th October, 2014 at about 7.30 pm two of his tenants called him while he was at his rural home in Ganda. They told him that two men had tried to break into his premises but they had run away. On the 8th October, 2014 at about 1.15 pm he received another phone call and was informed that the two men had returned at his store. He went there and found the two running away. He chased them and managed to arrest the appellant. The appellant was having a screw driver, a hammer and pliers. They took the appellant to Malindi Police Station. PW1 did not know the appellant. The appellant alledged that he was an electrician.

PW2 HARUN SAID OMAR is the son of PW1. On the 8th October, 2014 he left the mosque at about 1.00 pm and went to his place of work at Algamal Gulf Agency. He found a group of people and saw his father holding the appellant. The appellant was having a hammer, screw driver and pliers. The door to their store was partially broken. They interrogated the appellant and he said he was an electrician. The room where they attempted to break in is used to store machines including printers and laptops.

PW3 P.C. JOHN MAYANI was attached to the Malindi Police Station. On the 8th October, 2014 at about 2.00 pm he was in the office. PW1 and PW2 went to the station while holding the appellant. He was told that the appellant had attempted to break into PW1's house. He investigated the case and caused the appellant to be charged with the offence. The appellant was arrested with a harmer, screw driver and pliers. The appellant informed him that his colleague had called him to PW1's house to repair a door. The accomplice was not even a tenant in that compound.

The appellant was put on his defence but he opted to remain silent.

The main issue for consideration is whether the prosecution proved its case beyond reasonable doubt. The prosecution evidence does establish that there were two attempts made to break into PW1's store. In both occasions two men were involved. In the second occasion, PW1 managed to go to his store and saw the two men running. The appellant was not lucky and was arrested. The appellant had with him a hammer, pliers and three screw drivers.

According to the appellant, he was taken to the premises by the colleague who ran away. He thought it was genuine work and that is why he remained at the scene. The appellant did not tell the court this story. It is just coming up in his submissions. He opted to keep quite. Assuming his explanation is proper, why then didn't his colleague open the premises using his key in the first attempt if he had told the appellant that he was the owner of the premises. The appellant did not give the name of the alledged colleague.

Given the evidence on record, I do find that the prosecution proved its case beyond reasonable doubt. The appellant was arrested while trying to run from the scene of crime. This was the 2nd attempt to break into the premises. It can be concluded that the appellant was also present during the first attempt. The case was proved beyond reasonable doubt.

The appellant was charged under section 308 (2) of the Penal Code. Under Section 308 (4), any person found guilty under section 308 (2) of the Penal Code shall be sentenced to imprisonment with hard labour for five years if he is a first offender. The sentence can be extended to ten (10) years if the accused was previously convicted of a felony relating to property. The appellant is a first offender. The trial court was of the view that the seven (7) years imprisonment is the minimum sentence. The seven year imprisonment is the minimum sentence under section 308 (1) of the Penal Code. Section 308 (4) does not state that the five year sentence with hard labour is the minimum sentence. It can be taken that the five (5) years prison sentence under section 308 (4) of the Penal Code is the maximum sentence.

Since nothing was stolen and the appellant is a first offender, I do find that the seven (7) years imprisonment sentence is excessive. The sentence is hereby set aside and replaced with two (2) years imprisonment from the date of conviction.

In the end, the appeal on conviction is disallowed. The seven (7) years imprisonment sentence is hereby set aside and replaced with two (2) years imprisonment from the date of conviction.

Dated and delivered in Malindi this 20th day of September, 2016.

S.J. CHITEMBWE

JUDGE