



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CRIMINAL APPEAL NO 143 OF 2015

JAMES MWALO ISIKA
JUSTUS MUSYIMI KINYUA
MWANDIKWA MUSYIMI SYENGO
ROBERT KARISA KAZUNGU
MUSA KITSAO GISIGHA
PETER MUINDI WASUA
KARISA ZOWENA MWANZA
MUMO KITHUMU
SINENO KAZUNGU MDUDUAPPELLANTS

VERSUS

REPUBLICRESPONDENT

(An Appeal from original conviction in criminal case No 609 of 2014 by the Senior Principal Magistrate at Mariakani law Courts)

JUDGMENT

1. The Appellants were charged with Preparing to commit a felony contrary to Section 308 (1) of the Penal code.
2. The particulars of the offence are that on 23rd day of September, 2014 at Mwanda area in Kinango sub-county within Kwale county in Coast Region, the appellants were jointly found armed with dangerous weapons namely machetes in circumstances that indicated that they were so armed with the intent to commit a felony namely murder.
3. The appellants pleaded not guilty and the matter proceeded to trial whereby they were each found guilty, convicted and sentenced to serve seven (7) years imprisonment.
4. Being against the conviction and sentence, each appellant filed an appeal and raised the following grounds, which I found similar and therefore consolidated, them as follows;

(a) That the learned trial magistrate erred in law and fact by arriving to his conclusion considering the fact that the charge preferred against the appellant was defective for it did support the charge contrary to section 214 of CPC;

(b) That the learned trial magistrate erred in fact and law by convicting the appellants without considering that the prosecution's case was not proved beyond reasonable doubt, hence the sentence imposed upon them was unsafe;

(c) that the learned trial magistrate erred in law and fact by failing to see that section 150 of the Criminal Procedure Code was not adhered to;

(d) That the learned trial magistrate erred in law and fact by failing to consider the appellants defence.

5 Being the first appellant court, I am guided by the principles set out in the case of OKENO VRS REPUBLIC (1972) E.A 32, that;

“An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to first and exhaustive examination (PANDYA VRS REPUBLIC (1957) EA (336) and to the appellate Court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (SHANTILAL M RUWALA VRS REPUBLIC (1957) EA 570) it is not the function of the first appellant court merely to scrutinize the evidence to set if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witness (see PETERS VERS SUNDAY POST (1958) E A 424)”.

PROSECUTION'S CASE.

6. The prosecution called three (3) witnesses whose evidence was that on 23rd day of September, 2014 at around 10.30 am, Pw1 PC Keneth James Kalya, Pw2, PC Frankline Sigei and Pw3 PC Eric Odero and others, were on duty at the Kaloleni CID offices at Mariakani police station, when they received information that a group of people, who were armed with machetes had been seen boarding a matatu and heading toward Samburu area (7) the three officers were directed by the DCIO to pursue the said matatu vehicle.

7. The three (3) officers together with others pursued the said matatu registration No KAM 309 N in a Government vehicle registration GK B 728 E.

8. They all said that the matatu vehicle diverted from the main road but they persisted in pursuing until Mwanda where they went ahead and blocked it to stop.

9. That some people who were armed with machetes jumped out of the vehicle through the window while others advanced towards them in a manner, that they had to fire on the air, and they ran away.

10. The prosecution's witnesses told the court that they secured the matatu vehicle and arrested the people who were inside it.

11. They also searched the said vehicle and recovered seven (7) machetes and file for sharpening the pangas (exhibit P (i)-(vi), 1 (h) and 2.

12. They escorted the suspects to Mariakani police station, where upon interrogation, released some and remained with eight (8) suspects who had failed to give satisfactory reasons why they were armed with dangerous weapons, were running away and tried to attack them upon being cornered.

13. Later, they received information from members of public that one other suspect had been arrested at Mwanda. They proceeded to re arrest him.

14. The suspects were charged in court for the offence of preparation to commit a felony contrary to Section 308 (1) of the penal code while the driver of the matatu vehicle was charged with a traffic offence.

DEFENCE CASE

15. Upon the close of the prosecution's case, the learned trial magistrate found each appellant had a case to answer and placed them on defence.

16. The 1st, 4th and 5th appellants opted to give sworn evidence in defence and indicated that they would call one witness each.

17. The 2nd, 3rd, 6th, 7th, 8th and 9th appellants opted to give unsworn evidence in their defence and indicated they had no witness to call.

18. In his sworn defence, 1st appellant, James Mwalo Isika stated that on 23.9.2014, he woke up and went out to look for work. That he met someone at the bus terminus, who told him there was work of clearing the forest. He was then taken to a certain lady who told him she had work and they boarded a vehicle. That they were pursued by the police who arrested him as some of the passengers ran away.

19. When cross examined, the 1st appellant stated that he did not have any weapon and they were stopped after they had taken a short cut. He also stated that he was surprised when the matatu took the route it did. He confirmed that some people ran away through the woods which was unusual. He also confirmed that there were pangas in the vehicle and that gun shots were fired. He denied having any intention to commit a felony.

20. The 2nd appellant, JUSTUS MYSYIMI in his unsworn defence told the court that he also woke up on 23.9.2014 and went to look for casual work. And on his way home, he met someone who told him he was looking for people who wanted to work. He then met a lady who had the work of clearing bushes and they were joined by other people. The 1st appellant also told court that the lady brought pangas and a slasher and they boarded a matatu for Samburu. But on the way, police vehicles intercepted and they were arrested and charged.

21. The 3rd Appellant MWANDIKWA MUSYIMI, in his sworn defence stated that on 23.9.2014 he met some people who offered him some work and on the way, they were arrested.

22. The 4th Appellant, ROBERT KARISA gave sworn evidence in which he stated that on 28th September 2014 had gone to look for work when he met someone he knew directed him to where there was clearance work in Samburu. That the lady brought some pangas and slashers and they boarded a matatu. But on the way they met police who intercepted the vehicle at Mwanda and they were taken to the police station.

23. In cross examination, the 4th Appellant stated that he knew the work he had been called for was lawful and when the vehicle they had boarded took a divert, he thought they were running away from the traffic police. He also stated that he did not know why the shots were fired.

24. In this sworn defence, the 5th Applicant, MUSA KITSAO told court that on 23.9.2014, he woke up to go and look for work when he was told that there was some work. That he met a lady who wanted them to clear a bush and they boarded a matatu after she bought pangas. He saw that a police vehicle came, intercepted them and they were arrested and charged for an offence he did not know.

25. The 5th appellant said he was surprised when the vehicle took a diversion.

26 The 6th Appellant, PETER MUINDI gave an unsworn statement in defence. He told court that on 23.9.2014, he had gone for treatment at Mariakani. He went to board a vehicle at the bus stage and he met a lady who told him he had work for clearing a bush at Samburu and needed casual workers. The 6th Appellant told the lady that he would do the work and proceeded to board a vehicle. That the lady also boarded the vehicle and started conversing with the driver. The vehicle then left the main road and took a detour. A police vehicle came and shots were fired causing people to run away from the vehicle. The 6th appellant stated that they were put in the police vehicle and taken to the police station from where he was arraigned in court for an offence he did not commit.

27. KARISA SOWENI, the 7th appellant told court in his unsworn statement in defence stated that on 23.9.2014, he had left home to go and look for casual work when a certain lady approached him saying she had some work which involved clearing of a bush in preparation for planting. She then requested him to get other people who could assist with the work and he did. They went to hardware and she bought slashes and pangas for the work. He also said that they boarded a vehicle to the farm but met police officers on the way who stopped the vehicle while firing shots in the air. They were arrested and taken to the police station. He denied committing the offence in question.

28. The 8th Appellant, MUMO MWANZA also gave unsworn evidence in defence. He told court that on 23.9.2014, he left his home to look for some work. He then boarded a matatu together with people. And on the way, the matatu took a detour on a claim that there were traffic police officers ahead. He said a police vehicle came and he heard gun shots, that people started running away and he was shot in the process that he ran to a nearby homestead for help. He was taken to hospital and then Mariakani police station.

29. SINENO KAZUNGU NDUDU, who is the 9th Appellant opted to give an unsworn statement in defence. He told court that on 23.9.2014, he left his home to go and look for work when a friend told him there was some work to be done. He found a lady who said she had some work at Samburu and they boarded a vehicle to go there. That the vehicle took a detour on the way but the driver said that he was avoiding police officers who were ahead. And suddenly a police vehicle came and they started shooting in the air, causing some people to run away. They were arrested and taken to the police station from where he was arraigned in court over an offence he knew nothing about.

30. None of the appellants called a witness. They closed their case.

31. The learned trial magistrate analyzed the evidence of all the prosecution witnesses and the defence of all the appellants. In conclusion that the appellants were guilty and in convicting them, the trial magistrate stated that;

“However someone going about their legitimate business has no reason to run away from the police and attempt to attack them on the process. The accused persons were found armed with dangerous and offensive weapons namely machetes. The circumstances indicate that they were so armed with the intent to commit a felony.”

32 The trial magistrate sentenced the appellants to serve seven (7) years imprisonment.

SUBMISSIONS

33. Mr Wachithea, Advocate for the 5th appellant submitted that the court should rely on the case of Okeno vrs Republic (1972) EA 32 which prescribe the duty of the court on the first appeal being to reverse the evidence a fresh, analyze it, evaluate it and come to its own independent conclusion while always being aware that the trial court had the advantage of hearing the witnesses and seeing their demeanor and giving allowance for that.

34. He analyzed the evidence which was adduced before the trial court. In submitting, Mr Obera pointed out the inconsistencies in the evidence of the prosecution's witnesses with regard to the number of suspects who were arrested;

(a) why the driver diverted,

(b) whether the driver was charged before the trial court.

(c) time of the incident

35. Mr Waithera also submitted that the court needed to determine;

(a) whether the ingredients of the offence of failing to prevent a felony were satisfied.

(c) whether the appellants were found in actual possession of the same items.

36. He further submitted that from the facts of the case, the prosecution's evidence did not prove who among the appellants was in possession of what panga.

37. Mr. Waithera's submissions were, that the prosecution could not prove that the appellants were prepared to commit a felony

38. Mr Obera submitted on account of 8th appellant that he was arrested elsewhere by members of public and found with the other appellants. However, there was no evidence from any of the members of public who arrested the 8th appellant to confirm where he was arrested and how he was linked to the them.

39. He also submitted that apart from Pw3, none of the prosecution's witnesses mentioned the 8th appellant and so he should have been acquitted.

40. For the other appellants, Mr Obera submitted that it was alleged that the prosecution witness said that they arrested between 13-15 of them in the matatu and recovered 7 machetes and a file. It was however not indicated which of the seven were found with the machetes, which two were not found with the machetes and which one was found with the file.

41. Mr Obera contended that the element of possession is crucial and it must clearly come out who was found with the machetes.

42. According to Mr Obera, a panga on its own does not amount to be a dangerous weapon. It must be shown that it was intended to be used for a dangerous activity.

43. Mr Obera, in his submissions wondered why the lady mentioned by the prosecution's witness and appellants and other passengers who were released were not called to testify in this case to corroborate their evidence.

44. He also raised the issue of the informer not having been called a witness as a practice which has been done away with the enactment of the witness protection Act.

45. He cited three authorities which he was relying on in this case being;

(a) Criminal Appeal No 354 of 1983

(b) Criminal Appeal No 36 of 1973

(C) Criminal Appeal No 118 and 120 of 1981

46. M/s Ocholla counsel for the state, in opposing the appeal submitted that the prosecution had proved beyond reasonable doubt that;

(a) the 8th appellant was among the three (3) people who escaped from the matatu;

(b) the appellants had offensive weapons namely machetes which they intended to use to commit a felony, in this case, Murder.’

(c) that there was a common intention by the appellants to commit a felony’

(d) that appellants were all strangers to each other

47. she also submitted that it was not necessary to call the three witnesses who had been released from the informer.

48. she further submitted that the defence offered by each of the appellant was an afterthought and the trial magistrate was right in imprisoning them.

49. I have considered the ground of appeal by the appellants, facts and circumstances of the case, submissions by all counsel and the law in dealing with the issues raised in the grounds of appeal.

50. In doing this, I have cautioned myself that any duty is to carefully re-examine, re-evaluate and analyze the evidence on record afresh to arrive at my own conclusion. I have also cautioned myself that I did not have the benefit of seeing the witnesses and observing their demeanor. (See also James Otengo Nyarombe and Two others vrs Republic, Criminal Appeal No 184 of 2002).

51. In the first ground of appeal, the appellants contended that the charge preferred against the appellants was defective for it did not support the charge contrary to section 214 of the criminal procedure code. Provides for variance between the charge and amendment of the charge.

52. Looking at the charge in this case, as reproduced at the beginning of this judgment, it is clear that the provisions of section 137 of the criminal procedure code have been complied with in so far as the rules for placing charges and information are concerned.

53. By the evidence adduced being at variance with the particulars of the charge, the charge cannot be rendered fatal and incredible. It can only be said that the charge and the particulars have not been proved by the evidence which with have been adduced.

I therefore dismiss the grounds of appeal.

54. As for grounds 2, and 3 I will deal with them as one as they both relate to be the issue of whether the prosecution proved their case beyond reasonable doubt.

55. The issues raised from these grounds are as follows;

(a) Did the prosecution prove the offence of “preparing to commit a felony under section 308 (1) of the penal code?”

(b) Was the prosecution’s evidence sufficient/adequate?

(c) Was the prosecution’s evidence corroborated?

56. The appellants were charged with an offence under section 308 (1) of the penal code which provides that;

“Any person found armed with any dangerous or offensive weapon in circumstances

that indicate that he was so armed with the intent to commit a felony is guilty.....”

57. To sustain an offence under section 308 (1) of the penal code, the essential ingredients that need to be proved are

(a) That a person was found armed with any dangerous and offensive weapon.

(b) That circumstances must indicate that he was so armed with the intention of committing a felony.

58 In the case of Mwaura and others vrs Republic , Nairobi High Court Criminal Appeal No 36 of 1973, the definition of dangerous no offensive weapon was said to have been adopted from the case of Smeage vrs Balmr (1965) 2 all ER 248, where it was held

“any dangerous or offensive weapon ispostulated a weapon instrument made or adopted or intended for causing injury to a human being”.

59. According to the particulars of the charge, the appellants are alleged to have jointly been found with dangerous weapon namely machetes.

60. A machete is equivalent to a panga, which to me, has many uses, some of which are not dangerous. In fact on its own, a panga cannot be dangerous. It must be shown that the matter in which it was being used or handled was for dangerous purposes.

61. Pw1,2 and 3 gave evidence that they arrested the appellants and others, in PSV vehicle and recovered 7 machetes and a file .

62. This worth notice that neither of the said witnesses gave evidence that they physically found either of the appellants with a panga.

63. Pw1 told court at page 7 lines 5-6 of the proceedings that;

“We secured the vehicle and apprehended the people inside. We conducted a quick search and recovered 7 machetes and a file used to sharpen the panga.”

Pw2 at page 12, lines 18 and 19 of the proceedings said;

“We arrested the people who were in the vehicle and on search yielded 7 machetes.”

And Pw3 on page 26 lines 5-6 of the proceedings stated

“We found 13 people in the vehicle included the driver we recovered 7 pages with 1 file”.

64. The seven (7) pangas/machetes and file were produced in court as exhibits P 1 (i) – 1 (b) and 2 but the witnesses could not identify and point which appellant was found with which panga or the file.

65. It is worth noting that the prosecution’s witnesses told court that when they intercepted and blocked the matatu vehicle where the appellants and others were travelling, five (5) passengers who were armed with pangas (machetes) jumped out, advanced at them but were scared off by gun shots in the air.

66. It is therefore clear that the prosecution’s evidence in respect of whether the appellants were armed with dangerous weapons namely machetes was not proved beyond reasonable doubt.

67. The second ingredient that needs to be proved is whether the appellants case found under circumstances indicating that there were so armed with the intention of committing a felony.

68. According to the prosecution witnesses, they received information from an informer that there were people who had been seen entering a vehicle while armed with machetes and headed towards Samburu area. The prosecution witnesses pursued the vehicle in their official vehicle and the matatu vehicle diverted from the main road. They managed to block it at a place called Mwanda. Other five passengers who were armed with pangas jumped out and advanced towards them menacingly. They managed to scare them by shooting in the air and they ran off. The prosecution witness then proceeded to the vehicle where they managed to arrest other people and recovered 7 machetes' and a file.

69. From this evidence by the prosecution's witnesses, there are two groups of passengers there are those who jumped from the vehicle while armed with machetes and advanced toward them in a manacing manner, and those who remained in the vehicle.

The question here is, which group of passengers would reasonably be said to have portrayed conduct of people who were upto to no good?

70. I find no evidence from the prosecution's witnesses which portrayed the passengers who remained in the vehicle and were arrested as persons who were destined to commit a felony or any other crime. They were not even found in physical possession of the recovered machetes/pangas and neither did they act violently towards the three police officers when they arrested them. Like the other five nothing is said to have stopped them from jumping off the vehicle and running off.

71. Aftertelling court that they were going to Samburu, the prosecution did not tell court whether Samburu is known for crime or whether where the vehicle diverted to a dangerous route.

72. As I analyzed the evidence of the prosecution witnesses. I came across inconsistencies and discrepancies which were of concern.

For instance, Pw1 in his evidence in chief said

“We secured the vehicle and apprehended the people inside

We then took 8 suspects to Mariakani police station”.

Pw2 in his evidence in chief said

“We arrested a group of 11 people on that day. “

Pw3 on the other hand said;

“We found 13 people in the vehicle including the driver”

73. The question then becomes how many people were found inside the vehicle and arrested? There is clearly a contradiction in the evidence of the prosecution's witnesses in regard to this fact.

74. These contradictions were further reflected when these witnesses were cross examined by the appellants respectively.

75. All the prosecution witnesses told court in their evidence in chief hat the 7 pangas/machetes and file were recovered in the vehicle upon search.

76. However, on being cross examined by the appellants it was not clear where the pangas were recovered from .

In his evidence, Pw1 did not indicate where the pangas were recovered in the vehicle. But on cross examination by 7th and 9th appellant, he said that the appellants had the pangas.

Pw3 on the other hand, when cross examined by the 1st, 2nd and 9th appellants told court that some pangas were in a paper bag while others were under the seats and others in the hands of the suspects.

77. I found that these contradictions are material in that it makes it difficult to tell which witness was telling the truth considering that they all said they were involved in the arrest of the appellants and subsequent recovery of the exhibits.

78. In view of the inconsistencies and discrepancies I have pointed out in the evidence that was adduced before the trial court, I find they raise doubts as to what the true scenario was with regard to what the appellants were arrested and charged for .

79. It would only be prudent to grant the appellants the benefit of these doubts by finding that the prosecution's evidence was not proved beyond reasonable doubt.

80. The appellants other ground of appeal was that the trial magistrate did not adhere to the provisions of section 150 of the Criminal Procedure Code, which provides that;

“A court may at any stage of a trial or other proceedings under this code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall, and re examine the person already examined , and the court shall summon any such person if his evidence appears to be essential to the first decision of the case.”

81. In their submissions the appellant's side raised the issue of witnesses such as a lady who was arrested together with the appellants in the vehicle. According to the prosecution's witnesses while confirming that there was a lady they arrested among the people who were found in the vehicle, told court that they released her with others because she gave an explanation which was plausible to them .

82. In their submissions, the respondent's counsel, Ms Ocholla argued that the prosecution is not expected to call a superfluity of witnesses. (see Section 143 of the evidence Act).

83. In analyzing the evidence in this instant case, I found the evidence tendered by the prosecution insufficient to prove the charge against the appellants.

84. It came out during cross examination of the prosecution's witnesses and the appellants in defence that this lady had hired them for some casual work and was taking them to do the said work, hence that being found in the said PSV vehicle.

85. I find that the prosecution ought to have rendered her evidence and called her as a witness and when they failed the court should hve made effort to summon her so that she contributes and givesto the evidence tendered which was not able to show that the appellants were travelling in this vehicle with a common intention of going to commit a felony, being murder.

86. this was also the case with the driver of the said PSV vehicle and the other passengers who the prosecution witnesses alleged were released when they explained that they had come from hospital.

87. Then there was evidence by the prosecution's witnesses with that the 8th appellant was presented to them afterwards by people who they claimed had arrested him and that he was among the five suspects who escaped from the vehicle while armed with pangas and even threatened them.

88. The evidence by the prosecution against the appellants in the case before the trial court was purely based on suspicion, which is not tenable in a criminal trial. The court ought to have involved the provisions of Section 150 of the criminal procedure code and required these witnesses called by either the prosecution in defence to clarify some issues or clear the doubts that were raised.

89. It is also clear that the trial magistrate did not take this defence that was raised by the appellants into consideration in arriving at his decision.

90. The evidence on record showed that the appellate remained in the vehicle as five others ran away. And yet the trial magistrate had this to say of their defence.

“However, someone going about their legitimate business has no reason to run away from the police andto attack them on the process”.

This was not the evidence against the appellants.

91. In fact, in analyzing the judgment by the trial magistrate which was delivered on 7th July, 2015, I find the same was not in conformity with the provisions of sections 169 of the criminal Procedure code, which provides;

1 “Every such judgment shall expect or otherwise expressly provided by this code, be written by or under the directions of the presiding officer of the court in a language of the court and shall confirm the point or points of determination, the decision therein and the reason for the decision and shall be dated and signed by the... in open court at the time of ...”

2 ***“In case of a conviction, the judgment shall specify the offence of which and section of the penal code or other law under which, the accused is convicted and the punished”***

92. In the instant case, the applicants were found guilty and convicted by the trial magistrate concluding,

“I find that the prosecution proved its case against all the accused persons beyond reasonable doubt and convict them of the offence charged under Section 215 of the Criminal Procedure Code.”

93. It can be seen from this judgment that the trial magistrate, while he wrote the judgment in English language which is the language of the court, the same did not confirm a point or points of law for determination to explain the reason for his decision. Also, it is not clear whether the offence the appellants were charged with was under the provision section 215 of the Criminal Procedure Code.

94. A proper judgment must be written in the form provided for under section 169 of the Criminal Procedure Code. Since the provisions consist the word “shall” meaning the requirements mandatory.

95. The upshot of my findings in analyzing and re-evaluating the evidence that was adduced before the trial court is that the same with inconsistencies, discrepancies and anomalies.

96. I therefore find the conviction against the appellants unsafe and quash the same. I proceed to set aside the sentence as that was meted against the appellants and order that they be set free forthwith.

This judgment is dated and delivered at Mombasa on this 16th day of September, 2016.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr Ayodo for the state

Mr Odhiambo for 1st – 4th 6th – 9th Appellant and holding brief for

Mr Waithera for 5th Appellant

Mr Kiarie –C/clerk