



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT HOMA BAY**

**CRIMINAL APPEAL NO. 67 OF 2014**

**BETWEEN**

**DAVID OCHIENG OUMA alias JACK.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Appeal from the original conviction and sentence in Criminal*

*Case No. 338 of 2013 at the Principal Magistrate's Court at Ndhiwa,*

*Hon. N.C. Adalo, RM, dated 25<sup>th</sup> March 2014)*

**JUDGMENT**

1. The appellant, **DAVID OCHIENG OUMA** alias **JACK ODONGO ODOYO**, was convicted on a charge of preparing to commit a felony contrary to **section 308(1)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. It was alleged by the prosecution that on 23<sup>rd</sup> December 2013 at Ndhiwa Township, the appellant was found armed with a dangerous weapon namely a sharp sword like knife in circumstances that indicated that he was so armed with the intent to commit a felony namely robbery.
2. The appellant was also found in possession of a roll of bhang with a street value of Kshs. 20.00 contrary to **section 3(2)(a)** of the *Narcotic Drugs and Psychotropic Substances Act, 1994*. He pleaded guilty to the possession charge and was sentenced to one month imprisonment.
3. The prosecution called three witnesses who were all police officers. The tenor of their testimony was that at about 10:30pm, PW1 and PW3 were in Ndhiwa town when they saw 3 people in the dark. They decided to see what they were up to. When the 3 people saw them they all ran away except the appellant who was caught and arrested. He was found with a roll of bang and a two edged sword like knife.
4. The appellant now appeals against the conviction on the ground that the prosecution failed to prove that he committed the offence. Mr Oluoch, learned counsel for the State, concedes that the prosecution did not prove the offence as there was no overt act tending to show that a felony was about to be committed. He also submitted that mere possession of a knife at night is not an offence.
5. Having reviewed the evidence before the subordinate court, I agree with the concession by Mr Oluoch. It accords with the decision in *Manuel Legasiani & Others v Republic MSA CA Criminal Appeal No.*

**59 of 2000 [2000]eKLR** where the Court of Appeal dealt with the issue of “*preparation*” envisaged in **section 308 (1)** of the ***Penal Code***. 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.*

6. It is worth noting that the appellant may have ran away from the police officers as he was in possession of a roll of cannabis, an offence for which he pleaded guilty. The officers who testified did not allude to the fact that he used the knife or did anything with it to suggest that he was about to commit robbery.

7. The appeal is allowed and the conviction and sentence quashed. The appellant is set free unless otherwise lawfully held.

**DATED and DELIVERED at HOMA BAY** this 17th day of **February** 2015

**D.S. MAJANJA**

**JUDGE**

Appellants in person.

Mr Oluoch, Senior Deputy Director of Public Prosecutions, instructed by the Officer of Director of Public Prosecutions for the respondent.