



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 14 OF 2014

JOHN MWINZI MWENDWAAPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

The appellant was charged in the subordinate court with preparation to commit a felony contrary to section 308 (1) of the Penal Code. The particulars of offence were that on 15th September 2013 at Wamwathi village in Mwingi Central District within Kitui County, was found armed with one sledge hammer and two fireworks implements in circumstances that indicated that he was armed with the intent to commit a felony namely robbery.

He denied the charge. After a full trial he was convicted of the offence and sentenced to serve 12 years imprisonment.

Aggrieved by the decision of the trial court he has appended to this court against both conviction and sentence. He filed his initial petition of appeal on 4th March 2014. On the 12th July 2014 however, he filed amended grounds of appeal and written submissions. His grounds of appeal in summary are that:-

1. He was convicted while the prosecution did not prove the case beyond reasonable doubt.
2. The trial court erred in convicting him on the basis of an alleged offence where there was an undisclosed informer.
3. The prosecution evidence was contradictory.
4. He was wrongly convicted as he was not found in possession of the alleged exhibits.
5. The magistrate did not consider the defence of the appellant, which was strong enough to rebut the prosecution case.
6. The magistrate did not adhere to section 211 of the Criminal Procedure Code.
7. The sentence was too harsh and excessive.

The appellant also, with permission of the court filed written submissions.

At the hearing of the appeal, the appellant relied on the amended petition of appeal and the written submissions. I have perused and considered the written submissions.

The Learned Prosecuting Counsel Mr. Orwa opposed the appeal. Counsel submitted that the appellant admitted possession of exhibits found in his homestead. He was the person who showed the police the exact place the exhibits were. In counsel's view possession need not be actual physical possession. Since the items were within his house, that was adequate.

On investigations counsel, submitted that investigations were properly done. With regard to contradictions counsel argued that there was none, and if same were present they were minor and inconsequential.

On proof of the case, counsel argued that the prosecution had proved its case against the appellant beyond reasonable doubt. Counsel also argued that though section 211 of the Criminal Procedure Code was not specifically referred to on the record, since the appellant tendered sworn evidence, it could be presumed that the section was complied with.

Counsel submitted also that the trial court did not shift the burden of proof to the appellant, and lastly that the sentence was not excessive.

At the trial, the prosecution called three witnesses. PW1 was Simon Mbutu the Assistant Chief of Enzui Location. It was his evidence that on 15/09/2013 at 5.30am he received a report from the area chief that a community member had reported that some tools used in an earlier attack where 7 people were killed, had been found in the appellant's home. He mobilized people who proceeded to the appellant's house and enroute found him going to water his animals. They arrested him and he admitted possession of the tools. They found a sledge hammer and explosives in a dug hole in his compound one metre from the house.

PW2 was PC Tony Akkungu a police officer based at Mwingi Police Station. It was his evidence that on 15/09/13 at 12pm while at the office he received information that the appellant had been arrested. He proceeded to the scene with PC Taslow and found a crowd surrounding the appellant. He was handed over the hammer and two fire works implements, which the appellant said he found in his farm.

PW3 was PC Julius Shonolla of CID Mwingi. His evidence was that on 15/09/2013 about 4pm while in office, Cpl. Taslow and the assistant chief brought the appellant to the station. He recorded witness statements.

When put on his defence, the appellant tendered sworn testimony. He stated that on 13/09/2013 at 5pm, he learnt from a neighbor that a hammer had been found near his homestead. He took it to his home and enquired from neighbours whether anybody had lost a hammer. The following day, he was surprised to be arrested by the Chief in a crowd of 20 people. He led them to his house where they recovered the hammer.

On the above evidence the learned trial magistrate found that the prosecution had proved its case against the appellant beyond reasonable doubt. He was thus convicted and sentenced.

This is a first appeal. As a first appellate court, I am required to re-examine the evidence on record afresh and come to my own conclusions and inferences.

The appellant admitted possession of the hammer. He stated that the same was recovered by him, after he was informed of its presence near his home by a neighbour. He admitted leading the police to its recovery. The appellant however mentioned nothing about the explosives.

The alleged explosives were not taken to the ballistic examiner. No technical report was tendered in evidence on the same. I find that the prosecution did not prove that the items were indeed explosives. Therefore even if the appellant was found in possession of the same, he cannot be said to have committed an offence in respect of the same.

With regard to the hammer the appellant admitted possession of the same. He admitted taking the assistant chief and others to its recovery. In my view possession was proved by the prosecution beyond reasonable doubt.

The appellant was charged with preparation to commit an offence of robbery. The evidence was that a search for weapons was done due to a recent killing for 7 people. No evidence was tendered

indicating any intended robbery. The appellant was also not, for example, found with the sledge hammer at night, carrying the same in suspicious circumstances. Possession of a sledge hammer per se is not an offence. In addition possession of a sledge hammer does not per se mean that the possessor intends to commit robbery. That is not the only purpose for which a sledge hammer can be used.

The sledge hammer was found buried under the ground. However, even that, in my view, does not prove that the appellant intended to use it for robbery. If it was connected to the commission recent killing of 7 persons, he should have been so charged. He was not.

In my view, the prosecution did not prove the allegation that the sledge hammer was connected with preparation to commit a felony. In my view, it could have been hidden in the ground for another purpose.

As such, it is my finding that the prosecution did not prove the charge against the appellant beyond reasonable doubt. As a consequence, the appellant has to be given the benefit of the doubt and the appeal allowed.

Consequently, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be released forthwith unless otherwise lawfully held.

Dated and delivered at Garissa this 22nd day of April, 2015

GEORGE DULU

JUDGE