



REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CRIMINAL REVISION NO. 26 OF 2015

BETWEEN

DISHON NYAMBEGA MUNENE .....ACCUSED

AND

REPUBLIC .....RESPONDENT

*(Revision of the original conviction and sentence in Criminal Case No. 817 of 2013 at the Senior Principal Magistrate's Court at Migori, Hon. L. K. Sindani, RM, dated 14<sup>th</sup> January 2014)*

RULING

1. This matter came to my attention while I was reviewing sentences under **section 362** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*.
2. **DISHON NYAMBEGA MUNENE** 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 the night of 16<sup>th</sup> November 2013 at Migori Stadium within Migori County, he was found in possession of a panga, a knife, a pair of pliers, torch and hammer in circumstances that indicated he was so armed with intent to commit a felony namely theft. He pleaded guilty and was sentenced to serve 7 years imprisonment.
3. According to the proceedings, the following facts were read out to him after he had pleaded guilty;

*On the material date two officers were on patrol in Migori ... At around 11.00 pm at Migori Stadium they came across the accused in possession of a panga, a knife, a hammer, a torch and a pair of pliers [which were produced as exhibits 1,2,3,4 and 5]. The officers interrogated the accused and he was unable to account for the possession at the time. They arrested him and charged him.*

4. The facts as I have outlined and which the accused accepted do not, in my view, prove the offence. The prosecution did not establish an overt act tending to show that a felony was about to be committed. The possession of the implements at night does not, of itself, constitute an offence and neither does the fact that the accused is unable to account for their possession.
5. The Court of Appeal in *Manuel Legasiani & Others v Republic MSA CA Criminal Appeal No. 59 of 2000 [2000]eKLR* dealt with the 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.*

6. As the offence was not disclosed by the facts, I find that this is a proper case for the court to revise the conviction and sentence and I accordingly quash the conviction and sentence.
7. In view of the facts outlined, I do not think that any purpose will be served by a re-trial as the facts do not disclose any overt act. In any case the accused has served over one year in prison.
8. I would also add that in imposing the sentence the learned magistrate relied on the probation report which stated that the accused had a previous conviction. According to the proceedings, the contents of the probation report were not put to him to comment. A previous conviction must be proved by a record and the accused must be given an opportunity to comment on the same. I adopt the sentiments of Lesiit J., in **Abdi Ahmed v Republic Meru HCCA No. 87 of 2010 (Unreported)** where she stated;

*With due respect to the learned magistrate the way to receive a previous record of an accused person was not followed. In such a case the prosecution is required to adduce proof of previous conviction by producing a certificate from the Central Bureau of Criminal Records as proof of the conviction. In the bare minimum the prosecution could provide the case number and the court in which the accused person was convicted and if possible cause it to be availed to the court. In either case the court is expected to put the record to the accused person and require him to admit or deny the same. In the instant case neither a certificate of previous records nor a conviction nor the court and criminal case number in which the Appellant was convicted were given. The prosecution did not therefore establish that the Appellant was ever convicted of any offence prior to the one on record.*

9. For the reasons I have set out, I quash the conviction and sentence. The accused is set free unless held under a separate warrant.
10. A copy of this decision to be forwarded to the Office of the Director of Public Prosecutions, Migori County.

**DATED and DELIVERED at MIGORI this 16th day of April 2015**

**D.S. MAJANJA**

**JUDGE**