REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 242 OF 2010

(Being an appeal against conviction and sentence in Nyeri Chief Magistrates' Court Criminal Case No. 966 of 2009 (Hon. M. Nyakundi) in a judgment delivered on 6th October, 2010)

MOSES KAMAU THUO……..1ST APPELLANT

JOSEPH MAINA GITONGA…….....…….2ND APPELLANT

PAUL MWANGI GITONGA……...…..3RD APPELANT

VERSUS

REPUBLIC…….……RESPONDENT

JUDGMENT

The appellants were jointly charged with the offence of preparation to commit a felony contrary to **section 308 (2)** of the **Penal Code.** Initially, there were four accused persons but one absconded and the case against him was withdrawn under **section 87 (a)** of the **Criminal Procedure Code**.

According to the particulars of the offence, on the 22nd September, 2009, at Nairutia shopping centre in Kieni West District within Central Province, the appellants, while not in their place of abode, had with them articles for use or in connection with robbery namely, one home-made AK 47 gun, two pangas, and three home-made explosives with which they intended to commit an offence of robbery.

The trial court found the appellants guilty as charged and sentenced each of them to ten years imprisonment with hard labour. It is this conviction and sentence that the appellants have appealed against. When the appeal came up for hearing the third appellant opted to withdraw his appeal and therefore this judgment ought to have been in respect of the first two appellants but for reasons to be stated, it will also affect the third appellant's sentence. The appellants' grounds of appeal are more or less similar; they have faulted the learned magistrate's decision mainly on the grounds that:-

1. He erred in fact and in law in convicting the appellant's when common intention was not proved;

2. He erred in fact and in law in convicting the appellants based on contradictory prosecution evidence;

3. He erred in fact and in law in failing to consider the appellants' defence;

4. He erred in fact and in law in convicting the appellants on a charge that was not proved;

5. He erred in fact and in law in sentencing the appellants without taking into account the period they had been in custody before they were sentenced;

To appreciate whether there is any merit in the appeal or whether the decision of the learned magistrate should be upheld, it is necessary for this court to analyse the evidence at the trial afresh and come to its own conclusions subject only to the understanding that the trial court had the advantage, which this court does not have, of seeing and hearing the witnesses. (See the Court of Appeal decision in **Okeno versus Republic (1972) EA 32** at page 36).

The narrative at the trial went like this; members of the public sighted the appellants huddled together at Nairutia shopping centre on the morning of 22nd September, 2009. They were suspicious that the appellants were not up to any good and therefore they decided to inform the police of the presence of these characters who apparently were strangers to the Nairutia community. According to **Police Constable Alex Gikundi (PW1)** who was attached to Nairutia Police Station at the material time, he was informed by his colleague, Corporal Too that the Officer in Charge of the Station had telephoned him about the presence of the appellants at Nairutia centre.

According to this witness, he and his colleague **Corporal Ekalale (PW2)** proceeded to the centre apparently to arrest the appellants. The appellants took to their heels when they saw the police officers but with the help of the members of the public the officers went after them and managed to arrest all of them. The third appellant is said to have been arrested with an assortment of weapons made up of a home AK 47 gun, two machetes and explosive devices all wrapped up in paper bags which were themselves hidden in a gunny bag. The witness testified that the appellants did not give any satisfactory explanation as to why they had the weapons or why they were in that particular area. He also established that the 2nd and 3rd appellants were brothers and that the accused persons hailed from Nyahururu and Eldoret.

Corporal Ekalale (PW2) testified that indeed both he and **Constable Gikundi (PW1)** went to Nairutia trading centre when they received a report about the appellants' presence at the centre; he also stated that the third appellant was arrested with the weapons. The witness said that that he interrogated the appellants and entered the exhibits recovered from them in the occurrence book.

One of the members of the public who reported to the police about the appellants' presence at the centre and led the police officers to where they were was one **Phillip Kivoi Gichuki (PW3).** He carried the police officers on his motor cycle and as he was approaching the centre the appellants saw them and started running away. He helped the police chase and arrest the third appellant whom he confirmed had a bag with the weapons and the explosive devices that were produced in court as exhibits. The witness said he operated motor-cycle taxi services at the centre and in fact he had earlier approached the appellants to offer his services but they told him that they weren't going anywhere.

The **government firearms examiner, Emmanuel Lagat (PW4)**, testified that **Police Constable Michael Bowen (PW5)** submitted for analysis, the firearm and the explosives that were recovered from the appellants. In his opinion, the firearm had the general appearance of a conventional gun and could be used on unsuspecting person. The explosive devices were meant to explode and produce a sound of a firing gun. His report was admitted in evidence. **Constable Michael Bowen (PW5)** himself confirmed that these exhibits were recovered from the third appellant and that he prepared an exhibits memo with which he presented them to the Government analyst **(PW4)**.

When they were put on their defence, the first appellant gave a sworn statement in which he said that he was a conductor of a lorry registered as **No. KXH 347** (Isuzu FTR) and that on 21st September, 2009 he had been hired apparently to ferry goods from Nakuru to Karatina. He said that they arrived at Karatina at 8.30 pm where they packed the lorry and left for Nyeri.

On 22nd September, 2009 at 5.30 am they left for Nakuru but their lorry stalled at Nairutia because it had a mechanical problem; he was then sent to look for a mechanic at Nairutia shopping centre. This appellant testified that with the assistance of someone at the centre he spoke to a mechanic on phone; according to

this witness' testimony, the mechanic promised to be available at 9 am. The witness said that he was arrested soon thereafter with fake money with which he was buying airtime. He denied having been arrested while running away. On cross-examination the witness said that he did not know who the owner of the lorry was and that its driver had died in a road traffic accident.

The second appellant also gave a sworn statement and said that he was in the business of selling cigarettes at **Nairutia Centre** and on the material day on **22nd September, 2009** he was at the bus stage where he had gone to collect his money from his debtor when he was arrested. He said he was arrested because of making noise at the bus stage and that he was eventually charged because he could not raise the sum of **Kshs. 2,000/=** which the person who arrested him wanted.

As noted the appellants were charged under **section 308(2)** of the **Penal Code**; apart from analysing the evidence at the trial and in order to appreciate the legality or lack thereof of their conviction and sentence it is necessary to reproduce here **section 308** of the **Penal Code** in its entirety:-

308. Preparations to commit felony

> **(1) Any person found armed with any dangerous or offensive weapon in circumstances that indicate that he was so armed with intent to commit any felony is guilty of a felony and is liable to imprisonment of not less than seven years and not more than fifteen years.**
>
> **(2) Any person who, when not at his place of abode, has with him any article for use in the course of or in connexion with any burglary, theft or cheating is guilty of a felony, and where any person is charged with an offence under this subsection proof that he had with him any article made or adapted for use in committing a burglary, theft or cheating shall be evidence that he had it with him for such use.**
>
> **(3) Any person who is found—**
>
> **(a) having his face masked or blackened, or being otherwise disguised, with intent to commit a felony; or**
>
> **(b) in any building whatever by night with intent to commit a felony therein; or**
>
> **(c) in any building whatever by day with intent to commit a felony therein, having taken precautions to conceal his presence, is guilty of a felony.**
>
> **(4) Any person guilty of a felony under subsection (2) or (3) is liable to imprisonment with hard labour for five years or, if he has previously been convicted of a felony relating to property, to such imprisonment for ten years.**

Of particular interest in this appeal is **subsection (2)** and **subsection (4)** thereof. **Subsection (2)** defines the offence and the elements of the offence with which the appellants were charged while **subsection (4)** prescribes the sentence once convicted of this offence.

As far as the offence itself is concerned, there is nothing to suggest that the trial magistrate was in error in finding that the appellants were not at the place of their abode when they were arrested on the material day. The first appellant himself said that he hailed from Nakuru while the second appellant said that he only used to sell cigarettes at the Nairutia centre. My appreciation of the testimonies of **Police Constable Alex Gikundi (PW1), Corporal Ekalale (PW2) and Phillip Kivoi Gichuki (PW3)** is that they were all consistent that all the appellants were strangers at Nairutia centre in the sense that it was not their place of abode as understood under **section 308(2) of the Code**. The second appellant's defence that he was in the business of selling cigarettes at the centre and that he was arrested only because of making noise at the centre does not appeal to me to be credible because if that was so there is no reason why the police could not have preferred against him the appropriate charges relating to his conduct. And even if he was a hawker of some sort at the centre, that in itself does not say that the centre was his place of abode. The

learned magistrate was correct in my view to dismiss the appellant's defence in this regard.

Being a stranger in a particular place is not in itself an offence under **section 308(2)** and that alone could not have led to the conviction of the appellants; in addition to demonstrating that Nairutia centre was not the appellants' place of abode, the state had the burden of proving that the appellants were found "***with any article for use in the course of or in connexion with any burglary, theft or cheating***".

From the testimony of **Police Constable Alex Gikundi (PW1), Corporal Ekalale (PW2) and Phillip Kivoi Gichuki (PW3)** and the investigating officer **Constable Michael Bowen (PW5**), I find that the prosecution witnesses were consistent and their evidence was not displaced that the appellants were found with weapons that could be used either for burglary, theft or cheating. Although the **firearms examiner, Emmanuel Lagat (PW4)** testified that gun was only an imitation of a genuine gun, it is the kind of weapon that could be used for any of the purposes specified in **section 308 (2)** of the **Penal Code**; indeed he testified that the imitation had the general appearance of a conventional gun and could be used on unsuspecting members of the public. In any event, apart from the home-made gun the appellants were found with other machetes and explosives which could also be used to commit the specified crimes. I am satisfied that the learned magistrate was correct in holding that the prosecution had proved its case against the appellants beyond reasonable doubt and the appellants were properly convicted of the offence with which they were charged.

The only issue upon which I find this appeal meritorious is the question of sentence. Under **section 308(4)** the maximum sentence provided for a person convicted of the offence under section **308(2)** of the Code is five years; one can only be sentenced to imprisonment for a term of ten years with hard labour if he has previously been convicted of an offence relating to property. The learned magistrate sentenced each of the appellants to ten years imprisonment with hard labour yet there was no evidence that they had previously been convicted of any offence relating to property; this was in error and the sentence meted out against the appellants is obviously unlawful. If the learned magistrate was inclined to impose a maximum sentence, then an imprisonment term of five years coupled with with hard labour for each of the appellants ought to have been sufficient.

For the reasons I have stated I will allow the appellants' appeal on sentence only; their sentence of ten years' imprisonment with hard labour is, therefore, set aside and substituted with a sentence of five years' imprisonment with hard labour for each of them. Their sentences will be deemed to run from 22nd September, 2009 when they were remanded in prison.

Although the third appellant withdrew his appeal, the court cannot close its eyes to the reality that he is serving an unlawful sentence; if this court was to turn its back on him in these circumstances, it will be perpetuating this illegality. I would therefore invoke the powers vested in this court under **sections 362** and **364** of the **Criminal Procedure Code** and revise the sentence of ten years imprisonment with hard labour meted out against the third appellant to a sentence of five years imprisonment with hard labour. His sentence shall be deemed to have commenced running from 22nd September, 2009 when the appellant was put in custody.

Except for variation and revision of the sentences, the appellant's appeal is dismissed.

Dated, signed and delivered in open court at Nyeri this 13th April, 2015

Ngaah Jairus

JUDGE