



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 186 OF 2013

MOHAMED YUSSUF.....APPELLANT

versus

REPUBLIC.....RESPONDENT

Consolidated with

CRIMINAL APPEAL NO. 297 OF 2013

LILLIAN MWIKALI.....APPELLANT

versus

REPUBLIC.....RESPONDENT

JUDGMENT

1. **Mohamed Yusuf** (1st Appellant) and **Lilian Mwikali Peter** (2nd Appellant) were charged jointly with two(2) others with the offence of **preparation to commit a felony contrary to section 308(1) of the Penal Code**. Particulars of the offence were that ***“on the night of 22nd and 23rd of May 2013 at Kyeni village in Mbilini Location within Kangundo District in Machakos county, jointly were found armed with dangerous or offensive weapons namely, panga, kitchen knife, Somali sword and a Masai sword in circumstances that indicated that they were so armed with intent to commit a felony namely robbery with violence.”***
2. Facts of the case were that on 22nd May 2013 the 2nd appellant purportedly called PW 4 Joseph Ngotho Mawinda and attempted to lure him into a group that was to carry out robbery. PW 4 informed his mother, PW 1, Benedecta Kitavi who informed PW 2 Barnabas Kingola who was to be robbed. They reported the matter to the police who moved to the 2nd appellant’s home at 12.00 a.m. They found 5 people inside the house. They recovered from the house some two (2) pangas and one kitchen knife. They were charged.
3. When put on their defence the 1st appellant stated that he visited his girlfriend the 2nd appellant on 21/5/2013. On 22/5/2015 he took her to Tala Shopping Centre. They went to a bar where they had drinks.

At 8.00 p.m. PW 4 found them at the bar. They fought over the 2nd appellant and PW 4 left. Ultimately they left going back to the 2nd appellant’s home. At midnight PW 4 followed them to the 2nd appellant’s home and became violent. His mother also went there and pleaded with them to resolve the matter amicably. When the police arrived five (5) of them were arrested but PW 4 was released.

4. The 2nd appellant confirmed in material particular what was stated by the 1st appellant whom she acknowledged as her boyfriend.
5. The trial magistrate evaluated evidence adduced, found the defence put up not plausible and reached a finding that a joint criminal intent existed among the appellants and their two (2) co-accuseds. He convicted them and sentenced them to serve seven (7) years imprisonment.

Being dissatisfied with the conviction and sentence they appealed on grounds that the offence was not proved beyond any reasonable doubt.

Weapons described as offensive and dangerous were in effect

household implements found in every home.

6. This being the first appellate court it has the duty to review the evidence of the case and reconsider the materials before the trial court, make up its mind not disregarding the judgment appealed from but carefully weighing and considering it. This court must remember that it neither saw nor heard witnesses who testified. (**See Pandya vs R (1957) EA 336 and Okeno vs Republic (1972) EA 32**).
7. The appellants were charged with the offence the offence of preparation to commit a felony. The term “preparation” as envisaged by section 308(1) of the Penal Code was considered by the Court of Appeal in the case of **Manuel Legasioni & others v Republic Msa CA Criminal Appeal No. 59 of 2000 (2002)eKLR** which observed as follows:-

“The word ‘preparation’ is 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 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”.

8. This is a case where it was stated that the appellants co-accused who was the 4th accused person in the lower court (Alex Mubere Thomas) was an employee (farm labourer) at the 2nd appellants home. According to PW 4, weapons recovered namely – two (2) pangas, a kitchen knife and sword were recovered under his bed in his house.
9. When the police arrived at the home of the 2nd appellant they surrounded the house and fired gunshots in the air. When the door was opened the lamp was on. The 2nd appellant was hiding under the bed. While the rest were hurled in a corner. This was a demonstration of an act of fear. Under the bed were weapons that were recovered. The implements recovered were items that may be used in any household and by any farmhand. The prosecution had a duty of proving that they were to be adapted as offensive or dangerous weapons. This was not done.
10. PW 4 who volunteered the information that eventually led to the arrest of the appellants was inside the same house. He had gone to the house of the 2nd appellant at 7.00 p.m. Alex (farmhand) was sent to buy alcohol. They stayed until 1.00 a.m. when the police arrived and arrested them. The witness did not tell the court what was done to prepare them to commit the intended offence. There was no expression of an open, manifest act that was done by the appellants from which criminality may be implied. The witness did not suggest that they were armed with the implements that were recovered. He did not seem to have seen the implements prior to the police recovering them as he was silent on that particular fact.
11. What prompted the police to effect arrest of the appellants and their co-accused’s was the allegation of PW 4. He stated that the 2nd appellant requested him to accompany them in their mission to rob PW 2. When he later went to the 2nd appellants home he found her with the 1st appellant and they were listening to a radio. She made the request once again. At 4.00 p.m. she asked him to get them a motor cycle which he did. The motor cyclist Mutinda took both appellants and Alex (their co-accused) to Tala as he went home to inform his mother.
12. The appellants on the other hand argued that the problem was rivalry between PW4 and the 1st

Appellant over the 2nd Appellant. On cross examination by the 1st Appellant PW 4 admitted having met him at Stepps Bar while in the company of the 2nd appellant but denied having talked to him. This is an issue the learned magistrate should have interrogated prior to dismissing the defence put up as having not been plausible.

Evidence that PW 4 was being lured to join the appellants to commit the offence of robbery required confirmation of the fact that indeed they intended to commit the felony and at the time of their arrest they were preparing to do so. This kind of evidence was lacking.

13. None of the ingredients of the offence was established therefore it was erroneous on the part of the learned trial magistrate to reach a finding that the appellants committed the offence in issue.

14. In the result, I do quash the conviction and set aside the sentence imposed. The appellants will be set at liberty unless otherwise lawfully held.

15. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 19TH day of MAY, 2015.

L.N. MUTENDE

JUDGE