



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 53,51,52,46 AND 50 OF 2014(CONSOLIDATED)

- 1. OSMAN ISSA MUHAMED**
- 2. HAMAD A. HUSSEIN**
- 3. ALI MNONGERWA**
- 4. MUYA NOOR POTWE**
- 5. MIHIMA JUMA MBERWA APPELLANTS**

V E R S U S

REPUBLIC RESPONDENT

(From the original conviction and sentences in the Chief Magistrates criminal case no. 953 of 2014 at Garissa).

J U D G M E N T

The above five(5) appeals were consolidated and heard together as they emanated from the same trial.

The five appellants were charged in the subordinate court with preparation to commit a felony contrary to Section 308(1) of the Penal Code. The particulars of the offence were that on 19th May 2014 at IFO II refugee camp in Lagdera District within Garissa County were found armed with dangerous weapons namely pangas in circumstances that indicated that they were so armed with the intent to commit a felony namely assault. All denied the charge. After a full trial, they were convicted of the offence and sentenced to serve 7 years imprisonment each.

Dissatisfied with the decision of the trial court, they have come to this court on appeal. The grounds of appeal were filed by Muya Noor Kotwe the 4th appellant. He also filed written submissions. All the appellants agreed in court to rely on the same petition of appeal and written submissions. The grounds of appeal are as follows

1. The trial magistrate erred in convicting them without signs of threat or a signal of a fight at the time of arrest thus implicating them for nothing.
2. The learned trial magistrate erred in law and facts to convict them without considering that the prosecution case was not proved beyond reasonable doubt as required under Section 109 and 110 of the Evidence Act.
3. The learned trial magistrate erred in law and facts to convict them without considering that only accused 4 and 5 were personally searched and not all of them.

4. The trial magistrate failed to note that a panga is a farming tool and not a weapon unless it is found on actual commission of a felony.
5. There was clear elaboration that all the appellants were on normal duties and that the intent to commit a felony was not proved.
6. That no witness stood to say that any felony was to be committed against him.
7. The trial magistrate erred in law and facts to convict them without considering that the information was maliciously transmitted to the police station without proper investigations.
8. The sentence was harsh and excessive.

At the hearing of the appeals, the appellants relied on the written submissions filed by Muya Noor Potwe. I have perused and considered the said written submissions.

Learned prosecuting counsel Mr. Orwa opposed the appeal. Counsel submitted that there were inter clan fighting between two clans of the Somali community the day before the incident. Counsel submitted that when arrested, all the appellants claimed that they wanted to defend their community. Counsel asked the court to note that on the previous day the Basigau clan had attacked the Berntile clan from which all the appellants come. Counsel submitted further that all the appellants admitted possession of the offensive items, and that their defences were not believable and the court considered their defences before conviction. Counsel contended that it was clear from the evidence on record that all the appellants were taking instructions from the 1st accused.

On sentence, counsel submitted that section 308(1) of the Penal Code provided for a minimum sentence of 7 years imprisonment. Counsel emphasized that though a panga is ordinarily a farm instrument, it could be used as a weapon.

During the trial the prosecution called 3 witnesses. PW1 was Police Constable Issa Osman of IFO II Police Patrol Base. It was his evidence that on 19th May 2013 at 10.00 Am while on patrol at the IFO II refugee camp, he saw 5 men who looked suspicious. He stopped them and discovered that they had pangas under their clothes. They were near the red cross hospital. He was aware that on the previous day there were clashes between the Wasigua and the Berntile clans. He searched the fourth appellant and recovered a panga.

PW2 was Police Constable Ewalam Eshwa. It was his evidence that he was together with PW1 at 10.00 am when they met five people. They found that each of them had a panga inside the trouser. They arrested them because the previous day there were inter clans fighting. He searched 4th appellant and 5th appellants and recovered pangas.

PW3 was Corporal Katana Kana. He was the Investigating Officer. He stated that on the material day together with other police officers they were in a vehicle when they found 5 youths standing near the red cross hospital at IFO II refugee camp. They were in a vehicle. They alighted and told the 5 youths to stop. The youth then started moving away in different directions. They restrained and searched them and found that each had a panga. The appellants were thus arrested and charged with the offence.

When put on their defences Muya Noor Potwe who was first accused stated on oath that he came from Lagdera Refugee Camp. That on the date of arrest, he left from Lagdera and went to IFO where he met with police officers who asked him where he was going with a panga. He told them that he was going to look for work and that he had been given work by one Sonto for Kshs 2,500/-. The police however said that he was preparing to commit an offence and arrested him.

Osman Issa the 2nd accused at the trial also gave his testimony on oath. He stated that he was a refugee from Daghaley refugee camp and that he was arrested at IFO in possession of a panga. He told the police that he was going for work with the panga. He denied any intention of committing a felony.

Hamad Abubakar also testified on oath. He stated that he came from Lagdera refugee camp. That while walking with 4 others near the hospital at IFO, he was stopped by the police who asked for the pangas. At the police station, he explained that he was going to make a fence using the panga but the

police charged him.

Ali Mongelwa mnodwa also gave his defence on oath. He stated that he was a refugee at Dagahaley refugee camp. That the 1st accused was called by Sonto and came and informed him to go there for work. 1st accused asked them to carry pangas. As they waited at the gate of red cross hospital at IFO, they met the police who searched them and told them that they were going to cut people. He stated that he was going to use the panga to make a fence.

Mihina Juma Mberwa also testified on oath. He stated that he was a refugee from, Dagahaley refugee camp. That on the date of arrest, he left Dagahaley to IFO to look for work. While at IFO, police came and found them and arrested them. He denied going to IFO to cut people to pieces.

As a first appellent court, I am required to evaluate all the evidence on record against each of the five appellants and come to my own conclusions and inferences. **See the case of Okeno -vs- Republic (1972) EA 32.**

I have re-evaluated the evidence on record. The first complaint of the appellant is that there was no evidence of threat or a signal of a fight at the time of arrest. The evidence on record, which was not denied, is that there was an inter clan fight just the previous day. The fact that the appellants were 5 in number and they were each armed with pangas which they were hiding in their clothes, in my view created a signal of an impending fight. I thus dismiss that ground of appeal.

The second complaint of the appellants is that pangas are ordinary farming tools and not weapons, unless they are used for commission of an offence. They rely on the case of **Daniel Moraa -v- Republic – Mombasa Criminal Appeal No. 36 of 2000.** I agree that pangas are ordinary domestic implements. However depending on the circumstances of the case, the same could be used as vicious weapons against others. A panga can be used as a weapon in a fight. I deduce from the circumstances of this case that the pangas were not meant to be used as an ordinary farming tools. There was no evidence or indication at all that the pangas were going to be used for construction work, otherwise same would have been carried openly. Though the appellants stated that they were going to work on Sonto's fence on that day, that defence is not believable. Why would they stand near the hospital if they were going to work for somebody. In my view, if the appellant were going to work for somebody they would have gone straight there or asked for his whereabouts if they did not know where he stayed, instead of standing idly. It was also not necessary, in my view, for any witness to state that he was threatened by any of the appellants for the offence of preparation to commit a felony to be committed. The offence was not one of threatening to assault or cut somebody, but preparing to commit a felony. Thus it was the mind and actions of the accused and not the mind of the complainant, which determined whether the offence had been committed.

The appellants have stated that ingredients of the offence were not proved beyond reasonable doubt and that the information against them was malicious. I see no malice in a police officer's searching people and finding them to be hiding pangas and then concluding that they were preparing to commit a felony. As to whether the prosecution proved their case beyond reasonable doubt, my view is that in the present case they did. All the appellants did not deny that they came from another refugee camp. There is no denial that there was inter clan fighting the previous day. There is no denial that each of the appellants was hiding a panga under his clothes. There is no denial that they were standing together near the hospital. There is no denial that they attempted to walk away when the police told them to stop for a search. In my view therefore there can be there no other conclusion, then that the appellants were preparing to commit a felony which would result in the injury to a person or persons. Assault is such a felony.

I find and hold that the prosecution proved their case against each of the appellants beyond any reasonable doubts. The appellants in my view had a common intention of committing a felony and they were merely intercepted before they committed that offence.

With regard to sentence, the section under which the appellants were charged provided for a minimum sentence of 7 years imprisonment. The learned trial magistrate pronounced the minimum

sentence for each of the appellants. The sentence is thus lawful and this court cannot revise it downwards, as it is the minimum statutory sentence.

To conclude I find no merits in the appeals of the five appellants. I dismiss all the appeals and uphold both the convictions and sentence of the trial court. Right of appeal explained.

Dated and signed at Garissa this 29th day of June 2015.

GEORGE DULU

JUDGE