REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO. 31 OF 2014

DAVID KIMANZI PETER.....APPLICANT

V E R S U S

REPUBLIC.....RESPONDENT

(from the original conviction and sentence in criminal case

no. 551 of 2013 of the SRM Magistrate's court at Mwingi)

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 the offence were that on 11th October 2013 at Wimbondo village Mwingi Location within Kitui County not being at his place of abode was found armed with a dangerous weapon namely a dagger in circumstances that indicated that he was so armed with intent to commit a felony namely stealing. He denied the charge. After a full trial he was convicted of the offence and sentenced to serve 7 years imprisonment.

Aggrieved by the decision of the trial court, the appellant has come to this court on appeal. He filed his initial grounds of appeal on 19th May 2014. However at

the hearing of appeal he filed an amended petition of appeal which he relied upon. The grounds of the amended petition on appeal are as follows:-

1. The learned trial magistrate erred in law and facts to find him guilty of preparation to commit a felony, a charge which was not proved by the prosecution witnesses.

2. The learned trial magistrate erred in law by convicting him without putting into consideration that he was running for his safety and not preparing to commit the felony alleged.

3. The Investigating Officer failed to investigate the matter to the required standard.

4. The learned trial magistrate erred in law in convicting him without considering that there were mass contradiction and inconsistencies in the evidence of the prosecution.

5. The learned trial magistrate failed to note that the mode of arrest was poorly carried out.

6. The learned trial magistrate erred in law and facts in convicting him without considering that he

was arrested as a murder suspect and that there was no evidence for him to be charged with the present case.

The appellant also filed written submissions which I have perused. At the hearing of the appeal the appellant relied on the written submissions and added that the case was conducted by one magistrate and judgment read by another. He also complained that the court record showed that he was imprisoned for 5 years, while his warrant for committal to prison referred to imprisonment for 7 years.

The learned Prosecuting Counsel Mr. Orwa opposed the appeal. Counsel started by submitting that the sentence though pronounced by a succeeding magistrate was not pre judicial to the appellant. Counsel emphasized that the law allowed the procedure adopted. Counsel further argued that the sentence was 7 years imprisonment, not 5 years imprisonment.

Counsel submitted further that the evidence of prosecution witnesses corroborated one another. That the appellant did not state why he was fleeing from the crowd when they wanted to arrest him. Counsel added that the appellant merely stated that his mother was a wizard who was after his blood. In counsels view investigations were done properly and the mode of arrest was proper. The charges before court were also proved beyond reasonable doubt.

In responses to the prosecuting counsel's submissions, the appellant stated that he had reported his fears at that time and had so informed the trial court. He thus denied the contention of the prosecuting counsel that he had not reported the threat to him.

At the trial the prosecution called 4 witnesses. PWI was Peter Kimanzi the location chief who stated that on the 11th October 2013 at about 8.00 Pm he received a telephone call from Elijah a teacher that a suspect had been arrested. He was informed that in the attempt to arrest him, the suspect produced a big knife. He also stated that he was informed that the arrested person was suspected of having committed a murder.

PW2 was Elijah Kilonzo a teacher who on 11th October 2013, a Friday, left school at 3.30 Pm together with others. As he walked a man approached while running. That man asked for drinking water and also the direction Mbeere. He claimed that his mother was a devil worshipper and that his life was not safe. They tried to question him and the man tried to flee. They then noted that he had a big knife in his pockets. They restrained him and reported the incident to the chief. That person was the appellant.

PW3 was Sergent Edwin Njeru who testified that the appellant was arrested, and that he received and interrogated him. According to him, the arrested person stated that people were after him. He took him to the police station and booked him in the cells.

PW4 was Police Constable Stephen Ndungu the Investigating Officer. It was his evidence that during interrogation, the appellant claimed that his life was in danger and that people were after him. The appellant however did not give any proof that his life was in danger. He thus decided to charge him. It was his evidence that the appellant was arrested 30 Km from Mwingi and was in possession of a knife which he produced in evidence as an exhibit.

When put on his defence, the appellant gave sworn testimony. He stated that he was a mason and that as he was walking some people attacked him. They also planted a knife on him. He also stated that he had made a report earlier that his mother was after him. He was not cross examined. It was his contention that his mother was a devil worshipper.

Faced with the above evidence, the learned trial magistrate found that the prosecution had proved its case against the appellant beyond any reasonable doubt. The court thus convicted and sentenced him.

This is a first appeal. As a first appellate court, I am duty bound to re-evaluate all the evidence on record and come to my own conclusion and inferences. I am required to be mindful of the fact that I did not have the opportunity to see witness testify to determine their demeanor**.** ***See the case of Okeno -vs-***

Republic. 1972 (EA) 32.

The appellant has appealed to this court on several grounds. He firstly stated that the proceedings were conducted by one magistrate and the judgment delivered by another. From the record it is clear that the proceedings were conducted by V. A. Otieno SRM. He also wrote a the judgment which was delivered by M. W. Murage SRM. The sentence was however pronounced by M.W Murage – SRM.

The law allows a succeeding magistrate to pronounce a judgment written by a predecessor and also determine sentence. Before sentencing, the learned magistrate asked the appellant to give his plea in mitigation. The appellant asked for leniency as he was the first born in the family and he was also the bread winner. The magistrate stated that she had considered the mitigation before sentencing. I find no mistake on the part of the magistrate. In my view also the appellant was not prejudiced by the procedure adopted by the trial court. He was not prejudiced by the sentencing of the succeeding magistrate.

The appellant was charged with preparation to commit a felony of theft. The evidence on record is however that he was arrested as a suspect for murder. This was both the prosecution and the defence position. How the charge was changed to be preparation to commit a felony of theft is baffling. The possession of the big knife itself was not an offence. There was no indication that any law was breached by the possession of that knife. Certainly carrying a big knife is not evidence that someone is preparing to commit a felony or theft. He or she would be preparing to commit a violent crime but not theft.

The prosecution did not give any evidence that would suggest that the appellant was preparing or was likely to steal from anybody, anywhere. That means that the prosecution did not prove that he was preparing to steal. As such the offence of preparation to commit the offence of theft was not proved by the prosecution beyond reasonable doubt

In the judgment, the learned trial magistrate seems to have felt that the appellant should have explained why he was carrying a knife, and why he tried to escape from the public who attempted to arrest him. That was shifting the burden of proof, which was wrong. In addition, explanation is there on the evidence. The appellant stated that believed rightly or wrongly that his mother was a devil worshipper and was after his life. He told the story to the people he met when he asked for water. He gave the same story to the police.

In my view, such a person would certainly have had a reason to carry a weapon to protect himself. Such could not be said to be preparation to commit a felony. It is a self defence mechanism though an exaggerated and unjustified one. However it cannot be preparation to commit a felony.

The burden is always on the prosecution to prove a case against an accused person beyond any reasonable doubt. That burden does not shift to accused person. The prosecution herein was required to prove that the appellant was preparing to commit an offence. It was required to prove that offence was a felony. It was also required to prove that that offence was theft. This is what the charge sheet states. They failed to prove any of these three ingredients of the charge. Consequently the conviction herein cannot be sustained. The sentence will also have to be set aside.

In the result I find that the appeal has merits. I allow the appeal, quash the conviction and set aside the sentence imposed. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Garissa 18th this June 2015.

GEORGE DULU

JUDGE