REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO.8 OF 2013

VICTOR BUSAKA…….. ……..……APPELLANT

VERSUS

REPUBLIC …….…..RESPONDENT

(An appeal arising out of the conviction and sentence of the Butali PM'S Court Cr. Case No.203 of 2012 delivered by S.N. Abuya P.M on 29/10/2012)

J U D G M E N T

Introduction

1. The appellant VICTOR BUSAKA was among three (3) persons charged at Butali Principal magistrate's Court in Criminal Case number 203 of 2012 with the offence of preparation to commit a felony contrary to Section 308 (1) of the Penal Code.

2. Particulars of the offence were that on the 21st March 2012 at 01.00a.m. at Butali market Butali sub location in Kakamega North District within Western province the appellant together with THOMAS WAMBUNYA and PETER MAKOKHA were jointly found in the market while armed with a panga at night with intent to commit a felony namely shop breaking.

3. The trial Court at Butali heard the three (3) prosecution witnesses and the testimonies of the 1st and 2nd accused persons and their witnesses and found that the Prosecution had not proved its case against the said 1st and 2nd accused persons. The appellant absconded during the hearing of the defence case. The trial Court however found that the Prosecution had proved its case against the appellant beyond reasonable doubt and convicted him. He was sentenced to serve seven (7) years imprisonment.

The Appeal

4. Being dissatisfied by both conviction and sentence the appellant appealed on the following grounds:

a) THAT the erudite Magistrate erred in law and fact by convicting the appellant and failing to observe that PW1 the complainant was not arraigned in Court.

b) THAT the erudite Magistrate erred in law and fact by failing to observe that there was nothing whatsoever to connect the appellant with the alleged offence.

c) THAT the erudite Magistrate erred in law and fact by failing to observe that the evidence by the Prosecution pertaining to investigations lacked professionalism.

d) THAT the learned trial magistrate erred in law and fact by failing to appreciate that the evidence by the Prosecution was insufficient, unconstitutional and inconsistent.

e) THAT the learned trial Magistrate erred in law and fact by convicting the appellant on the basis of evidence of dock identification.

5. The appellant prays that the conviction be quashed and sentence be set aside so that he is set at liberty.

The Submissions

The appellant filed his submissions dated the 23/07/15. Briefly he submitted that the trial Court based its conviction and sentence on circumstantial evidence that he was found preparing to commit a felony because he was found near a store which had been broken into. He also submitted that the Prosecution failed to prove that the he was preparing to commit a felony even though he was found near a store which had been broken into. He also contended that he was not identified by PW1 and that no descriptions were given regarding him when the first report was made to the Police.

6. The appellant further submitted that there were certain witnesses who were not called to give evidence, and that the exhibits were not dusted to prove who was found with them. He also submitted that the evidence by the suspect who was caught by PW1 at the scene was inadmissible as it contravened the Judges' rules. He also claimed that the trial Magistrate was biased in her judgment and that he was convicted simply for missing to attend Court during the defence. He also submitted that he did not exercise his right to arrest judgment and mitigation. He claimed that the trial was not free and fair and that it violated his rights and freedoms guaranteed by the Constitution.

7. Mr. Omwenga for the State conceded the appeal on grounds that a crucial step in the Criminal Procedure was skipped by the learned Magistrate. He submitted that the appellant was not given a chance to defence himself rendering the conviction and sentence unsafe. Counsel also submitted that there was no reason given by the trial Court as to why the appellant was not given a chance to defend himself.

8. Counsel added that the whole trial did not accord with the provisions of Article 50 of the Constitution. For those reasons he urged this Court to allow the appeal, quash the conviction and set aside the sentence.

The Law

9. This being a first appeal this Court is duty bound to re-evaluate the evidence on record and come up with its own finding bearing in mind that it did not have a chance to hear or even see the demeanor of the witnesses while they were giving evidence. See the cases of **OKENO –VS- REPUBLIC [1972] E.A. 32** and **KIILU & ANOTHER –VS- R.[205] 1KLR 174** in the Kiilu case, Court of appeal held that:-

> **"an appellant on a 1st appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions, it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrates findings should be supported. In doing so, it should make allowances for the fact that the trial Court has had the advantage of hearing and seeing the witness….."**

10. Further to the above, even though the State has conceded to the appeal herein, this Court has the duty to put the evidence to a fresh scrutiny and arrive at its own conclusion. In **Odhiambo –vs- Republic [2005] KLR 565 the Court said "the Court is not under any obligation to allow an appeal simply because the State is not opposed to the appeal. The Court has a duty to ensure it subjects the entire evidence tendered before the trial Court to a clear and fresh scrutiny and re-assess it and reach its own determination based on evidence."**

Prosecution Case

11. The Prosecution called three (3) witnesses. Geoffrey Kibii (PW1) a night watchman testified that on the night of 21/5/2012 at 11p.m he heard noise behind Reha Store where he was keeping watch. He went to check and found the door had been broken. Inside the store he found one boy Peter Muchina who he arrested. He called his boss and the Chairman of the market. The Chairman called the Police who responded by sending policemen to the scene. He took the boy to Butali and while at the Police station the boy told the Police that he was in the company of the three (3) other boys who had gone for other weapons that would enable them break the middle door.

12. With this information PW1 stated that the Police went back to the store where they met three (3) other boys who were armed with a panga and torch near the store and arrested them. He identified the appellant and his two co-accused in the dock and added that the young boy he caught in the store was convicted and sentenced after he admitted the charges.

13. On cross examination by the appellant he explained that he met the appellant at 2a.m near the store following the information he received from PETER MUCHINA. He also explained that he only found one panga and one torch and that PETER MUCHINA was the one who he arrested with an iron rod. PW1 was re-examined and he told the trial Court that the 1st accused had the torch whereas the 2nd accused had a panga. PW1 did not say what weapon the appellant was armed with.

14. PW2 No.2007126792 SIMON NJOGU from Butali A.P Post testified that on 21/3/12 at 1.00 a.m. he received one suspect who was taken to him by PW1 who found him having broken and entered inside a store. He placed the suspect in the cells and interrogated him and the suspect told him that he was not acting alone but he was with three others.

15. At 2.00a.m PW2 called his colleague Kennedy Ahanda who went to Butali market with PW1 and found three (3) people standing next to the store that had been broken into. One of them was called Wakula Thomas Wakhungu and the other one was Victor Busaka who had a panga and a torch. He asked them what they were doing at the market at that time but they did not give him an answer. He arrested them and in the morning took them to Kabras Police station. He showed the Court the panga "PMF 1 – 1".

16. On cross examination PW2 reiterated his earlier testimony and added that he could not have arrested the accused persons if they had given a good explanation of their presence at the market at 2.00a.m. especially when they were not employed as watchmen.

17. PW3 No.64121 PC Nicholas Ndirangu from kabras police station Investigations Department testified that on the 21/3/12 at 9.20a.m. PW2 and PW1 who was guarding the store of Lilian Mukaisi took three (3) suspects before him together with Peter Muchina. He explained that he charged Peter Muchina with store breaking in criminal No.973/19/12 Court file No.204/12. During plea, Peter Muchina admitted the charge before the Court. He added that the three (3) accused persons who were before Court were found on the night of 20th March 2012 at 2a.m. They had with them a panga and a torch at Butali Market standing near a store, and that was why he charged them with the offence before Court. He produced the panga and the torch which were marked as PExh 1 and 2 respectively.

18. On cross examination PW3 explained that the appellant and his co-accused were found on the 21/3/12 at 2a.m. while Peter Muchina was found having entered into the store of Lilian by PW1 at 11.00p.m. and was taken to Butali AP post and after he was interrogated he mentioned the others. It was PW3's testimony that he concluded that the accused persons in the lower court had wanted to commit an offence because their homes were 6kms from Butali Market and further that it was at night and shops were closed and they never gave any reason why they were at the market at night yet they were not watchmen.

19. The Prosecution closed its case at this juncture. After carefully considering the evidence on record, the trial Court was satisfied that the Prosecution had made out a prima facie case against the accused persons and accordingly placed them on their defence.

Defence Case

20. The provisions of Section 211 CPC were complied with and explained to the accused persons. The 1st and 2nd accused persons gave unsworn statement and called two witnesses each whereas the 3rd accused who is the appellant herein opted to give sworn testimony and had no witness. On the 10/9/12 when the defence case was to be heard the appellant herein was absent. The case was adjourned and warrants of arrest were issued against him.

21. On the 25/9/12 the case came up again for the defence hearing. The 1st and 2nd accused persons were present but the appellant was absent. The trial Court decided to take the defence witnesses testimony in the absence of the appellant herein.

Judgment of the Trial Court

22. Two paragraphs in the judgment of the learned trial Court will suffice for purposes of this judgment. Regarding the case against the accused persons the learned trial Magistrate stated the following:-

> **"I have carefully considered the evidence before me and find the Prosecution failed to prove that the 1st and 2nd accused persons were preparing to commit a felony as even though they were found near a store in Butali market which had been partly broken into with a panga (a dangerous weapon) and torch at 2am they gave a reasonable and believable explanation of what they were doing at the market with a panga and torch at 2am which was that they were going to cut firewood which was infront of the market where they were burning bricks for DW3.**
>
> **However I find the Prosecution proved that the 3rd accused person was preparing to commit a felony as was found near a store which had been broken into at 2a.m and he never gave an explanation of what he was doing near the shop broken at that time as when he was put on his defence he absconded and the matter proceeded in his absence and this left the evidence against him by the Prosecution unchallenged and unshaken."**

23. Following the above findings the 1st and 2nd accused persons were acquitted of the offence while the appellant was found guilty, convicted and sentenced to seven (7) years imprisonment.

24. The issue that arises for determination is whether the appellant in this case was given a fair hearing in keeping with the provisions of Article 50 of the Constitution. Secondly, was there sufficient evidence placed before the trial Court upon which it could convict if the appellant said nothing at all in his defence? The latter question is pertinent because an accused person has a right to remain silent after the close of the Prosecution case and let the Court decide the case on the evidence that is before Court.

Analysis and Findings

25. Regarding the first issue, Article 50(1) of the Constitution provides that any dispute before the Court is to be resolved by the application of law in a fair and public hearing. Sub-article 2 provides that every accused person has the right to fair trial which includes inter alia, to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed. Sub-article 2(1) also provides that an accused person has the right to remain silent and not to testify during the proceedings.

26. In the instant case, the record shows that on 03/08/2012 the trial Court put the appellant and his co-accused on their defences and fixed the defence hearing for 10/09/2012. The appellant did after he was found to have a case to answer inform the trial Court that he was going to give sworn testimony but would call no witnesses. When the case came up for defence hearing on 10/09/2012, the appellant was absent. The Court issued a warrant of arrest for the appellant and set the defence hearing on 25/09/2012. The appellant was again absent when the case came up for defence hearing on 25/09/2015. The Court noted that the appellant was pending arrest. The Court decided to proceed with the case for the 1st and

2nd accused persons.

27. There is no record after 25/09/2012 how the appellant came to be in Court again for the judgment. There is no record whether the appellant was ever asked by the Court whether he still wished to give his sworn testimony in defence of himself. Infact after judgment was delivered on 29/10/2012, the Prosecution told the Court that the appellant could be treated as a first offender. There is no record of any mitigation. For all the above reasons I am satisfied tht the appellant herein was not accorded a fair trial. The appeal therefore succeeds on this ground because the rules of natural justice were violated when the trial Court did not give the appellant the opportunity to be heard in his defence. In my considered view the best that the trial Court would have done was to proceed with the case of the 1st and 2nd accused and keep the appellant's case in abeyance pending his arrest since there was a warrant of arrest in force.

28. The second issue for determination is whether there was before the trial Court sufficient evidence on which the appellant could be convicted of the offence of preparation to commit a felony. In the case of **Lagat–vs- Republic [1982] 1 KAR 906**, the appellant pleaded guilty to being armed with a dangerous weapon namely an iron bar, with intent to break and enter a shop and was sentenced to the statutory minimum sentence under the law. The admitted facts showed that he was found near the complainant's shop at 5.30pm with the iron bar and that he ran away on seeing the complainant. The first appeal to the High Court turned on the issue of whether or not the appellant's initial reply to the charge "I admit the charge" amounted to an unequivocal plea of guilty. Being satisfied that the plea was unequivocal the High Court dismissed the appeal. On second appeal to the Court of Appeal it was held, inter alia, that "**Following Mungai –vs- Republic Cr. App 94 of 1983, an iron bar was not per se a dangerous weapon such as a cosh, a flick-knife or a revolver, and that in the absence that the appellant was intending to use it to inflict injury to the person the offence under sub section (1) was not made out."**

29. In the instant case, the evidence against the appellant was according to PW1 as follows:- "as we went and we reached near the store we met other 3 boys with panga and torch and they were arrested and brought to Butali. The one arrested in the store came to Court and admitted offence he was sentenced to 2 years imprisonment ……" The rest of the evidence against the appellant came from an alleged accomplice, John Muchina, who testified as DW4. That evidence by DW4 does not support the Prosecution contention nor the trial Court's finding that the appellant intended to break into the store from which DW4 had been found and arrested by PW1.

30. The testimony of PW2, No.AP 2007126792 Simon Njogu stated that **"……..and got three people near that store broken one was called Wakula Thomas Wakhungu and Victor Hakuku. Those two people had panga and torch and I asked them and they never told me what they were doing in the market at that time and I arrested them…"** From the above evidence it is not stated clearly that the appellant was armed with the panga and torch. During cross examination by the appellant PW2 stated, in part" "we got the three of you people standing very near the crime scene (the store) like 20 metres from the crime scene." PW3 told the Court that the appellant was arrested because he was found at the market which was some 6kms away from the appellant's home.

31. Taking the totality of the evidence on record, and it not being clear whether the appellant was found with a panga and a torch and it not being clear from the evidence that the appellant intended to break into Mukaizi's store, I hold and find that the Prosecution did not prove its case against the appellant beyond any reasonable doubt.

Conclusion

32. For the above stated reasons, I find that there is merit in this appeal. The same is allowed. The conviction is quashed and sentence of seven (7) years imprisonment set aside. Unless otherwise lawfully held, the appellant is to be released from prison custody forthwith.

33. Orders accordingly.

Judgment delivered, dated and signed in open Court at Kakamega this 30th day of November 2015.

RUTH N. SITATI

J U D G E

In the presence of:

Present in Court for Appellant

Mr. Omwenga (present) for Respondent

Mr. Lagat - Court Assistant