



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CRIMINAL APPEAL NO. 23 OF 2013**

**BETWEEN**

**PATRICK MUNENE MWANIKI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From original conviction and sentence in Cr. Case No. 112 of 2012 at the Chief Magistrate's Court Embu by HON. R.O. OIGARA - SPM on 31<sup>st</sup> May 2013)*

**J U D G M E N T**

1. The appellant faced three counts in the subordinate Court as follows. The first one was for stealing where he was charged that on 30<sup>th</sup> January 2012 at Blue Valley Estate in Embu, he stole a mobile phone, the property of one Joseph Njeru Nyaga. On the second Count, he was charged with preparing to commit a felony contrary to **section 308(2)** of the **Penal Code (Chapter 63 of the Laws of Kenya)**. He was also charged with handling stolen goods contrary to **section 322(2)** of the **Penal Code** in respect of the phone.
2. After the trial, he was convicted of the alternative count of handling stolen goods and sentenced to seven (7) months in jail. He was also convicted of preparing to commit a felony and was sentenced to seven (7) years in prison.
3. The appellant, having served the entire sentence for the conviction of handling stolen goods, abandoned the appeal on that count. He challenged the conviction for the offence preparing to commit a felony. The particulars of the charges against him were that on 30<sup>th</sup> January 2013 at Matathari Village in Embu County not being his place of abode, he had an article for use in connection with theft namely a hammer.
4. As the first appellate Court, I have scrutinized the evidence as it is contained in the testimony of PW2 who testified that on 30<sup>th</sup> January 2012 at around 10.00am he found the accused in a green dust coat with a hammer. The learned Magistrate stated, "*The evidence of this witness given on oath and was not deprecated even at cross-examination; the accused denied committing the offence*". He therefore convicted the appellant.
5. In my view the evidence is woefully inadequate to support a conviction. There is no evidence of preparing to commit a felony at 10.00 am. Had the Magistrate considered the appellants unsworn statement that he was a carpenter and that he had going to a customer's place to do some work, he would have come to the conclusion that it was plausible that the appellant was preparing to go to work. I also note that the learned magistrate misdirected himself in analyzing the evidence by requiring the defence to disprove the prosecution case. It is trite law that the prosecution bears the burden of proving the offence beyond reasonable doubt. The accused need only raise a reasonable defence which the court is obliged to consider in light of the entire evidence.
6. The appeal is therefore allowed and to the extent that the conviction for the charge of preparing to commit a felony is quashed and sentence set aside. The appellant is set free unless otherwise lawfully held.

**DATED AND DELIVERED AT EMBU THIS 28<sup>TH</sup> DAY OF APRIL 2014**

**D.S. MAJANJA**

**JUDGE**

Appellant in person

Ms Ingahidzu, State Counsel, instructed by the Director of Public Prosecutions for the State