



251/2014

**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 95 OF 2011**

**JONATHAN MUTUA KITAKA.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(Being an appeal from the original conviction and sentence in Makindu Principal Magistrate's Court Criminal Case No. 1224 of 2010 by Hon. P. Wabugu Mutai, DMII PROF. RM on 4/5/2011)*

**JUDGMENT**

1. The appellant was charged with the offence of preparation to commit a felony contrary to **Section 308(1)** of the **Penal Code**. The particulars thereof being that on the **25<sup>th</sup>** day of **September, 2010** at **Mwangani Village, Musala Location** in **Makueni District** within **Eastern Province** jointly with another not before court were found armed with offensive weapons namely an iron bar and a metal cutter in circumstances that indicated they were armed to commit a felony namely stealing.
2. The appellant was tried, convicted and sentenced to serve **seven (7)** years imprisonment. Being aggrieved by conviction and sentence he now appeals on the basis that:
  - i. The learned trial magistrate erred in both law and fact by convicting the appellant when the prosecution failed to prove the act of preparation to commit the crime, place him at the scene of the crime and to appreciate that the prosecution's evidence was contradictory.
  - ii. The learned magistrate failed to observe that the evidence of exhibit adduced was full of suspicion and there was non-disclosure.
  - iii. The learned magistrate failed to note that the charge sheet was defective and **Section 198(4)** of the **Criminal Procedure Code** was not complied with.
3. The facts of the case were that on **25/11/2011** at **10.30 pm** there was a power outage at the residence of **Professor Kibwana**. PW3, **APC No. 2008053007 Edward Kisyo** who was on duty went to check on the transformer. He saw two (2) men running. He arrested one of them, the appellant. He had a metal cutter and iron bar. He escorted him to the police station.
4. The Kenya Power Lighting Company Personnel were notified of some interference with the transformer at **Professor Kivutha Kibwana's** compound. They moved to the scene. A wire on the transformer had been cut. The case was investigated and the appellant was charged.
5. In his defence the appellant stated that he travelled to **Makueni -Wote** to visit his sick relative. He boarded a motor-vehicle at 7.00pm. It developed mechanical problems. He decided to walk to **Emali**. As he walked he saw some two (2) people rush towards him. They stopped him and asked him to identify himself. He did not have an identification document. He was arrested and

- caused to carry some items to the police station.
6. The appellant filed written submissions. The appeal was opposed by the state. **Mrs Abuga** counsel for the State opposed the appeal. She stated that the appellant was found with offensive weapon, an iron bar and perforated metal rods in circumstances that indicated that he was armed to commit a felony of stealing. She dismissed the appellant's defence as a mere afterthought.
  7. This being a first appeal the court is required to reconsider the evidence adduced at the trial with a view to arriving at its own conclusion, bearing in mind that the trial court had the advantage of seeing and hearing witnesses ( see **Okeno versus Republic [1972] E.A. 32**).
  8. The appellant is said to have been found preparing to commit a felony. The question posed is what exactly he was doing at the point of being arrested.
  9. The particulars of the offence stated that he was found armed with offensive weapons namely an iron bar and a metal cutter in circumstances that indicated that he was so armed to commit a felony namely stealing. PW3 said the appellant was found in possession of **"a metal cutter, taribo, rope and a piece of iron, manila bags."**
  10. PW4 the Investigating Officer produced in court what he called:-

- **" a pair of cutting metals,**
- **a small metal bar T9**
- **a rope**
- **sacks"**

11. The appellant was found within the compound running -after there was a blackout. However, it was argued by the appellant that he was found alongside the road and he was not carrying anything.
12. The Court of Appeal dealt with the issue of "preparation" as envisaged in **Section 308 (1)** of the **Penal Code** in the case of **Manuel Legasiani & Others versus Republic Criminal Appeal No. 59/2000** where it stated thus ;-

***"The word 'preparation' is not 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 the 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."***

13. It is then important also to consider what an offensive weapon is. It is stated that the appellant was armed with an offensive weapon. In the case of **Mwaura and Others versus Republic [1973] E.A. 373** it was held –

***"Although there is no definition of a dangerous or offensive weapon; specifically applicable to Section 308(1) of the Penal Code it ought to be shown that the weapon was one that could have caused injury"***.

14. In this case the items the appellant was alleged to have been found with were according to the prosecution intended to be used in the commission of theft or stealing. PW3 was made to have such a belief because there was a power outage within the homestead he was guarding after a sound emanated from the transformer. PW1 on being summoned went to the scene and found a wire cut which they rectified. PW2 went to the scene after the wire had been rectified and electricity restored. None of the witnesses from KPLC told the court what caused the blackout. No investigation was carried out to establish that fact. Therefore an inference cannot be drawn that the appellant had cut a wire alleged to have been cut and rectified.
15. In his testimony PW3 said he was in company of his colleague, **APC Patrick Mwangi** when they effected arrest. While testifying the court remarked and reduced into writing that his demeanour was wanting.

***The question to be posed is whether his evidence could be accepted without any question being raised.***

16. According to **Section 143** of the **Evidence Act, Cap 80 Laws** of Kenya no particular number of witnesses is required to prove a particular fact. However, it is trite law that a trial court should not readily rely on the evidence of a single witness. In such a case the court must apply the cautionary rule. ( See ***Kiarie versus Republic 1984] KLR 739***).
17. This is a case where the trial magistrate found the demeanour of the single witness to the fact wanting. No reason was given by the prosecution why **APC Patrick Mwangi** was not called as a witness to testify. Can it be interpreted that his evidence could have been adverse to the prosecution's case? ( See ***Bukenya and Others versus Uganda [1972] E.A. 549***).
18. All these are issues that should have made the trial magistrate reach a different verdict from the one he returned.
19. I also wish to point out that looking at the facts as presented, if it were true that the appellant was found in possession of the said items. He was not at his place of abode. The items, he is alleged to have possessed could cause some injury/damage and if adapted could easily be used in commission of an offence of theft. In the premises he could have been charged pursuant to the provisions of **Section 308(2)** of the **Penal Code**.
20. From the foregoing it is apparent that the court misdirected itself materially by reaching a finding that the prosecution had proved its case beyond doubt. The appeal is allowed, the conviction quashed and sentence set aside. The appellant shall be set at liberty unless otherwise lawfully held.

**DATED, SIGNED and DELIVERED at MACHAKOS this 3<sup>RD</sup> day of APRIL, 2014.**

**L.N. MUTENDE**

**JUDGE**