



IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL NO. 117 OF 2014

consolidated with

CRIMINAL APPEAL NO. 118 OF 2014

(FORMERLY KISII HCCRA NOS. 120 & 121 OF 2012)

BETWEEN

DENNIS OCHIENG OGUTU 1ST APPELLANT

JOHN CLINTON ABOGE 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from the original conviction and sentence in Criminal Case No. 641 of 2011 at the Principal Magistrates Court at Rongo, Hon. P.K. Rugut, RM, dated 30th April 2012)

JUDGMENT

1. The appellants **DENNIS OCHIENG OGUTU** and **JOHN CLINTON ABOGE** were convicted of the offence of preparation to commit a felony contrary to **section 308(1)** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. The particulars of the charge were that on 27th November 2011 at Rongo Township, Central Kamagambo Location within Migori County, they were jointly found armed with dangerous weapons namely a panga and a rungu in circumstances that indicate that they were armed with the intent to commit a felony namely theft from a person.

2. The learned magistrate was convinced that the offence had been proved and convicted and sentenced to 7 years imprisonment. The issue in this appeal is whether the prosecution proved its case against the appellants. Mr Oluoch, learned counsel for the State, supports the conviction and sentence on the ground that there was sufficient evidence and that the sentence is within the law.

3. In considering the matter, I am alive to the duty of the first appellate court to review and appraise the evidence and come to an independent conclusion making an allowance for fact that it neither saw no heard the witnesses testify.

4. The offence of preparation to commit a felony is it to be found at **section 308 (1)** of the ***Penal Code*** which provides that:

Any person found armed with any dangerous or offensive weapon in circumstances that indicate that he was so armed with intent to commit any felony is guilty of a felony and is liable to imprisonment of not less than seven years and not more than fifteen years.

5. In **Manuel Legasiani & Others v Republic MSA CA Criminal Appeal No. 59 of 2000 [2000]eKLR**, the Court of Appeal dealt with the issue of “preparation” envisaged in **section 308(1)** of the **Penal Code**. It observed as follows:-

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.

6. The issue here is whether there was an overt act implicating the accused. The prosecution called two witnesses. Only one prosecution witness gave direct evidence, PW 1, PC John Chemweno of Kamagambo Police Station. PW 2, PC Choge, was the investigating officer. The prosecution case was that the accused were in Rongo Town at night where they were seen stopping passersby. In his testimony, PW 1 stated, in part, as follows;

While there we saw the accused walk towards Bistro. They pretended to be drunk when they saw passer-bys, they walked zigzadly and commanded passersby to stop. We saw they were not good people, we emerged from our hideout, we pounced on the two, after searching them we found, the 1st accused in possession of a panga hidden in on the left side We recovered a rungu from the 2nd accused.”

7. The learned magistrate concluded that the prosecution had established its case and that the accused were unable to give a reasonable explanation as to why they were carrying offensive weapons.

8. I find that this evidence was far from sufficient to prove an overt act of preparation or intent to commit a felony. Though the appellants were in possession of dangerous weapons, they did not do anything with those weapons that would imply that they intended to commit a felony. In the **Manuel Legasiani Case (supra)**, the court considered a case where one of the accused, who had stopped the complainant was found with accused was found with in possession of a home-made firearm, a torch and a knife. The court on the aspect of preparation had this to say, “*The mere act of flagging down a vehicle does not, per se, denote an overt act of preparing to commit a felony. On that score alone this appeal ought to be allowed; but there is the other issue posed by us.*”

9. Likewise, I find that the mere stopping of passers-by does not disclose an offence under **section 308(1)** of the **Penal Code**. The witness did not state that the accused did anything with the weapons in order to prove the necessary ingredient of intent to commit a felony. PW 1’s testimony seemed to suggest the many passersby were stopped by the appellants. Did PW 1 see the accused use their weapons, were the passersby threatened in any way? These questions leave a lot of doubt in the prosecution case.

10. In the circumstances, the conviction is unsafe and cannot be allowed to stand. The appeal is allowed and the conviction and sentence quashed. The appellants are set free unless otherwise lawfully held.

DATED and DELIVERED at HOMA BAY this 28th day of November 2014

D.S. MAJANJA

JUDGE

Appellants in person.

Mr Oluoch, Senior Deputy Director of Public Prosecutions, instructed by the Officer of Director of Public Prosecutions for the respondent.