



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 135 OF 2012 CONSOLIDATED WITH H.C.CR.A 133 OF 2012

REPUBLIC APPLICANT

VERSUS

- 1. NICHOLAS MUTINDA KITHUMBI**
- 2. MUSYOKA KIMANTHI KYATHA RESPONDENTS**

(Being an appeal from the conviction and acquittal of Hon. P. Wangugu Resident Magistrate delivered on 13/06/2012 in Makindu Principal Magistrate Criminal Case No. 230 of 2012)

(Before Hon. B. Thurania Jaden J)

J U D G M E N T

1. The 1st Appellant, **Nicholas Mutinda Kithumbi** and her 2nd Appellant, **Musyoka Kimanthi Kyatha** were charged with the offence of preparation to commit a felony contrary to **section 308** of the **Penal Code**.

The particulars of the offence being that on the 6th March 2013 at around 11.30 p.m. in **Makindu Township** within the **Makueni County**, jointly were found armed with dangerous weapons namely one axe, bolt/iron sheet cutter, one sharp metal rod, one hacksaw, 2 pliers, 11 spanners and a catapult in circumstances that indicated that they were so armed with intent to commit a felony namely burglary.

2. The Appellants pleaded not guilty. After a full trial, the Appellants were convicted and sentenced to seven (7) years imprisonment each.

3. The prosecution case was that at the material time, police officers at the **Makindu Police Station** received a tip off that there were two suspicious looking people at a hotel in **Makindu town**. The police officers laid an ambush and arrested Appellant 1 and 2 who were pointed out to them as the said suspicious characters. A search carried out on the bags the Appellants were carrying yielded the items mentioned in the charge sheet. The Appellants were subsequently charged with the offence herein.

4. When put on his defence the 1st Appellant who described himself as a mason denied any intention to commit a felony. The 1st Appellant further stated that he was in **Makindu town** to demand pay for work he had done for somebody. He stated that at the material time he had just met with the 2nd Appellant when he was arrested.

5. The 2nd Appellant stated that he was a mechanic. He stated that he had gone to meet the 2nd Appellant

at a hotel when they were arrested.

6. The trial magistrate found the prosecution case proved beyond reasonable doubt. The Appellants were convicted and sentenced accordingly.

7. The Appellants were aggrieved by both the conviction and sentence and appealed to this court on grounds that can be summarized as follows:-

- a. That the prosecution case was not proved beyond reasonable doubt.**
- b. That crucial witnesses were not called.**
- c. That the evidence of the two prosecution witnesses was contradictory.**
- d. That the defence evidence was not considered.**
- e. That the sentence was harsh and excessive.**

8. During the hearing of the appeal, the Appellants relied on written submissions which I have duly considered.

9. The learned counsel for the State conceded to the appeal.

10. This being a first appeal, this court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences – *See Okeno –vs- Republic (1972) EA 32.*

11. PW1 **PC Samson Mailu** and PW2 **PC Simon Ngare** the two arresting officers gave evidence that they acted on a tip off and arrested the Appellants. Their evidence establishes that the Appellants came out of a hotel, they were intercepted, found with the items in question and arrested.

12. According to the evidence of PW1 and PW2, the tip off they had received was that the Appellants' intention was to commit the offence of burglary. That taking into account the hour of the night and the lack of any explanation by the Appellants regarding the goods they were carrying they arrested them and charged them.

13. Being in possession of the items in question does not necessarily connote an intention to commit a felony. The evidence of PW1 and PW2 does not give any circumstances that pointed to the intention to commit a felony. The police informers' tip off remains as mere hearsay in the absence of any cogent evidence. My view is that the police officers moved in prematurely to effect the arrest before they observed the conduct of the Appellants to see what they were upto.

14. The Appellants gave a reasonable explanation why they had the tools in question. The prosecution failed to discharge their burden of proof. Consequently, I allow the appeal and quash the conviction. Each Appellant is at liberty unless otherwise lawfully held.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 25th day of November 2014.

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B. THURANIRA JADEN

JUDGE