



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 51 OF 2012

(From original conviction and sentence in Criminal Case No. 2133 of 2011 of the Principal Magistrate's Court at Nyahururu)

CHARLES MUCHIRI MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant was charged and on the evidence convicted and sentenced to seven (7) years imprisonment for the offence of preparation to commit a felony contrary to Section 308(1) of the Penal Code, (*Cap. 63, Laws of Kenya*). Aggrieved with his conviction he came to this court on appeal and set out seven (7) grounds in the Petition of Appeal filed through the Prison Authorities on 12th March 2012, which may be summarized into -

1. ***that there was no evidence to sustain his conviction,***
2. ***that his defence was not taken into account by the learned trial magistrate.***

and consequently prayed that his appeal be allowed.

The Appellant reiterated his grounds in his written submissions, submitted to the court during the hearing of the appeal.

The State however conceded to the appeal on the principal ground that the prosecution did not prove the case against the appellant beyond reasonable doubt, that one key witness was not summoned to testify, and the court in its judgment shifted the burden of proof against the appellant, that the appellant failed to explain why he had a panga in his jacket. Learned State Counsel also observed that there was contradictory evidence as to whether the accused had the panga or not, or whether indeed he was ever searched.

Notwithstanding the fact that the State conceded the appeal, it is still the duty of this court as the first appellate court to re-evaluate the evidence before the lower court, always keeping in mind that it did not have the benefit of seeing and observing any of the witnesses.

The evidence of PW1 and PWII shows that they were part of a Community Policing Group. Group 1 was led by PW1 and Group II was led by PW2. The Appellant had walked away from his place of duty P.C.E.A. Church where was a watchman, towards the ACK church, about 500 metres away. On his way he met Group 1 of the Community Policing Group armed with torches and whistles. They sat him down and questioned him, and escorted him to the PCEA Church where his colleague confirmed that he was indeed

a watchman but was not on duty at that time.

PW2, who was in the Group II, acceded to the call by Group I that they had arrested someone and the second group rushed to the scene where the appellant had been arrested and taken to the P.C.E.A. Church where his colleague was. Neither PW1 nor PW2 heeded the Appellant's cries that he was a watchman on his way home. They handed him to PW3 who received him at 3.00 a.m., with members of the public alleging that he was carrying "a panga and a rungu". These were the exhibits 1 & 2 which were produced by PW4.

When put to his defence, the Appellant gave sworn testimony. He confirmed that he was a watchman with a security firm called CLOSER Security Guards. He had disagreed with his colleague at work, and had decided to go home early instead of arguing with his colleague. He met the complainants (PW1 and PW2) barely about 100 metres from his place of work, he did not know them, they did not know him. They suspected him of being involved in thuggery which PW4 testified had engulfed the area. They sat him down and assaulted him, and to prove his innocence he asked them to take him to his work station. His co-worker refused to testify because he had differed with him and that the weapons were planted on him, and asked for the courts forgiveness.

Section 308 (1) of the Penal Code provides -

"308(1) 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."

The critical criteria in the offence of preparing to commit a felony therefore are -

- (a) being armed with any dangerous or offensive weapon,***
- (b) in circumstances that he was so armed with intent to commit a felony.***

Commenting on Section 8(2) of the Penal Code in the case of **MUIRURI VS. REPUBLIC [1983] KLR 205**, the court said *inter alia* - ***"an accused person is not obliged to adduce any evidence to support his defence"***. The learned trial magistrate's comment that ***"the Appellant did not tell the court of his disagreement with the accused to warrant my belief in the same"*** was shifting the burden of proof on the appellant.

Further, and quite to the contrary, the learned trial magistrate's comment, that ***"the court will take judicial notice that night guards in Kenya set up are in most cases armed with machetes or not armed at all"*** right guards in Kenya are armed with all manner of crude weapons, clubs, (*rungus*), arrows, machettes, axes, pangas whatever the practice is in particular localities. The court would not in the circumstances indict a watchman accused of an offence for carrying a "panga" It may be his tool of work as a watchman, usually for self-defence, and not offensive operation.

There was also no evidence whatsoever of the circumstances showing intent to commit a felony. The Appellant was not near any building, any private dwelling, or shop and found prying in circumstances that suggest he was preparing to commit a felony.

In the circumstances, I agree with learned State Prosecuting Counsel that sustaining the conviction of the Appellant is unsafe. I therefore quash the Appellant's conviction and set aside the sentence thereof.

I direct that unless otherwise lawfully held, the Appellant be set free forthwith.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 7th day of June, 2013

M. J. ANYARA EMUKULE

JUDGE