



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Criminal Appeal 74 of 2009**

TITUS KAMAU IRUNGU .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

**JUDGMENT**

The appellant was convicted of the offence of preparation to commit a felony contrary to section 308 (2) of the Penal Code. After a full trial he was convicted and sentenced to 7 years imprisonment. This is an appeal against the said conviction and sentence.

The evidence on record is that the appellant together with others were reported to be harassing people and threatening them with dangerous weapons whereupon the Police went to where they were and arrested them. In the course of being searched the appellant who was the 3rd accused was found to be in possession of a knife, while the 1<sup>st</sup> accused was found to be in possession of a broken bottle.

In the course of the trial the appellant's co-accused absconded and the charges against them were withdrawn. The prosecution decided to proceed with the case against the 3<sup>rd</sup> accused who is the appellant herein. After the withdrawal of the case against the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> accused persons, no fresh charge sheet was drawn by the prosecution. This was a grave omission because the original charge was still in place which included all the accused persons including the appellant. At that point one prosecution witness had given evidence and thereafter one other witness gave evidence in support of the charge.

The learned trial magistrate then proceeded to put the appellant on his defence and the appellant herein gave an account of his presence at the scene where he was arrested, and further alleged that a police officer took from him Kshs. 9,220/=. The thrust of his defence is that, he was conducting business of selling men's underwear outside Wakulima Market and when he closed his business on the day of arrest he was on his way home. Along Racecourse road at a Zebra crossing he bumped into somebody unintentionally and apologized. He was arrested but did not know that the person who arrested him was a police officer. He was searched and his money taken. He was subsequently led to the police station where he was locked in for reasons he did not know.

On the following day he was arraigned in court with 4 other people who he did not know.

The police acted on information received from members of public. Those members of public were not called to give evidence in the lower court. The learned trial magistrate found that the evidence of the only two officers who gave evidence was consistent. He dismissed the defence of the appellant for reasons that he was not known to the police officers before the incident leading to the trial.

The learned trial magistrate has made some unfortunate observations in her judgment. In addressing the defence of the appellant the learned trial magistrate said as follows,

**“The accused person has therefore laid no basis to support his claim that police officers had him arraigned in court on false charges..... The third accused having not given an explanation for the presence of his knife on his person was intent on using the knife to rob members of the public of valuables”**

It is the duty of the prosecution to prove the charge against an accused person. The learned trial magistrate was therefore wrong to have required the appellant to give an explanation as to possession of the knife on his person if at all, and since no member of public was called to give evidence as to the intention of the persons arrested, it was unfortunate for the learned trial magistrate to conclude that the appellant intended to use the knife to rob members of the public of valuables.

I have already observed that the charge against the appellants co-accused having been withdrawn, a fresh charge ought to have been drawn and read over to the appellant who would then be required to plead thereto. The omission to do so rendered all the proceedings thereafter a nullity. Therefore, even without considering the evidence on record, this appeal must succeed. I note from the charge sheet that the appellant together with his co-accused were charged under Section 308 (2) of the Penal Code. That notwithstanding the learned trial magistrate proceeded to jail him for seven years.

The appellant was treated as a first offender. Therefore under Section 308 (4) of the Penal Code which provides for the penalty, he was liable to imprisonment with hard labour for five years. The sentence imposed by the learned trial magistrate was therefore un- lawful.

The appellant persistently alleged that a police officer took Kshs. 9,220 /= from him. That is an issue I am not able to address in this appeal because I have no evidence to determine the same in view of what I have said above.

The totality of my assessment of the evidence on record is that, the proceedings against the appellant were a nullity and even if I were to find to the contrary there was not sufficient evidence to justify his conviction. The end result is that this appeal is allowed, conviction quashed and sentence set aside. The appellant shall be set free forthwith unless otherwise lawfully held.

Orders accordingly.

**SIGNED DATED and DELIVERED in open court this 26<sup>th</sup> day of March, 2012.**

**A.MBOGHOLI MSAGHA  
JUDGE**