



REPUBLIC OF KENYA  
IN THE HIGH COURT  
AT NAIROBI  
MILIMANI LAW COURTS  
Criminal Appeal 314 of 2008

SAMUEL KAMAU MBURU ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

*(From the original conviction and sentence in Criminal Case No.940 of 2008 of the Chief Magistrate's Court at Nairobi R.C.Fundi- Resident Magistrate)*

**J U D G M E N T**

The appellant, **SAMUEL KAMAU MBURU**, was convicted for the offence of Preparation to commit a felony **contrary to Section 308 (1) of the Penal Code**. He was then sentenced to seven (7) years imprisonment.

In his appeal, he pointed out that the time of his arrest was not ascertained. He said what whilst **PW 2** and **PW 3** said that they arrested him at 8.10p.m., their colleague (**PW 1**) testified that the arrest was at 6.10p.m.

Secondly, he submitted that the prosecution failed to link the initial reports by members of the public who allegedly alerted the police officers to the presence of muggers at Jevanjee Gardens; to the arrest of the appellant. It is his contention that the said members of the public should have testified.

The failure by the prosecution to have the members of the public testify is said to give rise to a gap in the case, as there was nobody who pointed out the appellant, and his co-accused, as being a part of the gang of five (5) who had been way-laying unsuspecting members of the public.

This court was invited to disregard the evidence leading to the arrest of the appellant because the informers who initiated the information which caused the police to arrest him did not testify.

In the same vein, the appellant submitted that if the informers were to be believed, then the information they provided disclosed an offence which had already been committed, rather than the

preparation to commit an offence.

The appellant also faulted the trial court for imposing an excessive sentence.

In answer to the appeal, the respondent submitted that the evidence adduced by the prosecution was sufficient to sustain the conviction and sentence.

Ms Wang'ele, learned state counsel, submitted that the evidence proved that the appellant and his accomplices were hiding along the fence at Jevanjee Gardens, from where they would attack and rob passers-by.

The respondent also pointed out that when the appellant was arrested and searched, he was found in possession of a panga. He failed to offer a reasonable explanation for the panga.

In reply, the appellant pointed out that the police only had him charged after he demanded the return of his money which the police had taken from him when they arrested him.

Being the first appellate court, I am obliged to re-evaluate all the evidence on record, and to draw my own conclusions.

All the four (4) prosecution witnesses were police officers. Three of them had been on patrol along Muindi Mbingu Street, Nairobi, when some members of the public informed them that five (5) men were way-laying passers-by around Jevanjee Gardens.

When the police officers approached the Jevanjee Gardens, they arrested two of the five men. The appellant was one of those that were arrested.

A search on him revealed that he was wearing three (3) pairs of trousers. Secondly, a panga was recovered from him.

Thirdly, the appellant had KShs.10,100/- on him. **PW 1** testified that the money was handed over to the OCS Central Police Station, who then handed it back to the appellant.

**PW 2** corroborated the evidence of **PW 1**. When the appellant was cross-examining **PW 2**, he suggested to that witness that he had been holding a fund-raiser when he was arrested.

**PW 2** also said that the appellant was threatening members of the public, whilst his accomplice would rob them.

**PW 3** testified that the money that was recovered from the appellant was given back to the appellant by the OCS.

**PW 4** was the Investigating Officer. He was not together with the other 3 police officers at the time the appellant was arrested.

He was assigned the case by the OCS. He then perused the witness statements, and thereafter interrogated the two (2) suspects. When he was satisfied that the evidence disclosed an offence, **PW 4** caused charges to be drawn up against the appellant and his co-accused.

The record shows that **PW 1** was on patrol duties at about 6.10p.m. However, both **PW 2** and **PW 3** said that they were on patrol at about 8.10p.m. As **PW 1** was together with **PW 2** and **PW 3** when they were on patrol duties, their evidence ought to have been consistent, regarding the time when they encountered the appellant and his accomplices.

I perused the original hand-written record of the proceedings to verify whether or not the evidence was recorded as appears on the typed record.

The hand-written record shows that the hour cited by **PW 1** was either 6.10p.m. or 8.10p.m. In other words, it is not clear. The learned trial magistrate appears to have first recorded 6.10p.m, and thereafter written over it, 8.10p.m.

In his judgment, the learned trial magistrate expresses himself thus;

***“It is not as well disputed that the hour of arrest was 8.10p.m. or thereabout.”***

Clearly therefore, the trial court was fully alive to the issue of time, and that the suspects were arrested at 8.10p.m. As the trial court was so clear about the hour of arrest being 8.10p.m, I find that there is an error in the typed proceedings, where the hour is indicated as being 6.10p.m.

As regards the contention that the prosecution failed to call some essential witnesses, I note that the persons who alerted the police officers purport to have seen five (5) men who were way-laying passers-by, and robbing them. In effect, the “informers”, if they can be so called, witnessed the commission of complete offences. The offences they witnessed were probably those that constitute robbery with violence.

Had the appellant and his co-accused been charged with such offences, then the evidence of the police officers alone, may have been insufficient to found conviction.

There would then have been need for a complainant, who had been robbed.

However, the conviction in this instance was for Preparation to commit a felony. The police officers who arrested the appellant and his co-accused found the appellant wearing 3 pairs of trousers, whilst he was in possession of a panga.

In those circumstances, I find that the appellant failed to offer any reasonable explanation for his conduct. He did not explain why he was wearing 3 pairs of trousers, whilst also carrying a concealed panga.

He did not need to wear 3 pairs of trousers, and to be carrying a panga, if all that he was doing was raising funds.

In any event, it was not normal for anybody to be lawfully raising funds, outside Jeevanjee Gardens at 8.10p.m, and from persons who were simply passing by.

Had there been any truth in the appellant’s assertion, he would have had some document to show that his mother had passed away, and that he had been authorized to solicit for funds from members of the public, for the funeral expenses.

Having re-evaluated all the evidence on record, I am satisfied that the prosecution adduced sufficient evidence to prove the case against the appellant beyond any reasonable doubt. Therefore, I find no merit in the appeal.

The appeal is dismissed. I uphold both the conviction and the sentence.

**Dated, Signed and Delivered at Nairobi, this 7<sup>th</sup> day of June, 2012.**

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**FRED A. OCHIENG**

**JUDGE**

