REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Appeal 183 of 2011

DANIEL MUCHOKI MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No. 687 of 2011 of the Principal Magistrate\'s Court at Nyahururu – A. B. Mongare, SRM)

JUDGMENT

The Appellant was charged with the offence of preparation to commit a felony contrary to Section 308(1) of the Penal Code *(Cap. 63, Laws of Kenya)*. He was on the evidence found guilty and convicted, and sentenced to seven years imprisonment.

Aggrieved with both his conviction and sentence, the appellant has come to this court on appeal, and has cited seven grounds of appeal why his conviction should be quashed, sentence set aside and he be declared a free bird to fly home.

The grounds are -

(1) the learned magistrate failed by not considering my charges during plea which was assault and instead imprisoned me of preparation to commit a felony. It was a fact that the charges could have been changed at the police station.

(2) PW1 testified that he did not note how I entered the compound which he was guarding during the material night yet he was alert.

(3) The magistrate did not consider the testimony of PW3 who said that she heard shouting for help which I made instead she found me being beaten by the security guards.

(4) The magistrate did not consider the fact that I had been assaulted by the two surety guards and I was treated at Nyahururu District Hospital Card No. 000 22975/2011 and issued with a PW3 form. My report was made at Nyahururu Police Station O.B. No. 16/29/04/2011.

(5) The exhibit brought before this court of law was a kitchen knife which was collected from a flower bed in the compound at 10.00 hrs and not recovered from me.

(6) The prosecution failed by not addressing my report at the court. I had reported my assault at the said police station the same date.

(7) The learned magistrate erred in law by passing my judgment at the court chambers at around 0500 hrs which ought to have been passed in an open court.

In his oral submissions to the court the appellant referred to loss of his NOKIA 1100, pair of shoes and Ksh 6,000/=. He also complained about the accuracy of the record, of proceedings before the lower court, that he had indicated he would give sworn testimony but the record shows he gave an unsworn statement, that dates given by PW4, for his treatment conflict with the dates he allegedly committed the offence, and believed that the case was interfered with the complainant who is an Advocate.

The appeal was however opposed by the State. The learned Assistant Director of Prosecutions Mr. Omutelema submitted that the evidence against the appellant was overwhelming. According to the evidence, the Appellant -

(1) accessed the compound guarded by PW1 without permission,

(2) he jumped over the wall at 4.00 a.m.,

(3) he was armed with a knife. He used it against PW1, the knife was recovered and produced in evidence,

(4) the issues raised in his submissions do not affect the evidence outlined above,

(5) failure of the owners of the home to testify was not fatal to the prosecution\'s case,

(6) it is correct that the appellant first had indicated to the trial court that he would give sworn testimony,

(7) the appellant however changed his mind on the hearing of the defence case, and elected to give an unsworn statement,

(8) there was no application to adduce further evidence,

(9) the appellant admits that he was found at the scene of the offence. He failed to explain what he was doing at the scene at that hour.

I have reviewed and evaluated the evidence adduced before the lower court as it is the duty of the first appellate court. I have also examined the appellant\'s unsworn statement.

The evidence of PW1, PW2 and PW3 and indeed PW4 was overwhelming and is summarized as per the submissions of learned Assistant Director of Public Prosecutions set out above.

The appellant submitted to this court that he lost a NOKIA 1100 and Ksh 6,000/= in cash, and an identity card. PW1, the watchman whom the appellant first approached to overcome armed with a knife, was categorical both in his evidence-in-chief and cross-examination. He did not see the appellant jump into his employer\'s compound, but clearly saw him as the appellant approached him armed with a knife. He cut PW1 with the knife on the right hand. PW1 screamed and PW2 came to his rescue and they were able to subdue the appellant as he tried to run and rump through the keapple fence. Hearing the commotion the landlady switched on the security lights and the appellant was seen in his attire. He was wearing a sweater, navy blue in colour and a cap. He also had a torch. These items were identified and produced before the lower court. The appellant did not have the items he alleges to have lost. PW1 called him a liar, and from the evidence, that description fits the appellant.

PW2 corroborated the evidence of PW1 and so did PW3. PW5 investigated the complaint, and confirmed the evidence of PW1, PW2 and PW3. PW4, a Clinical Officer treated both PW1 and the appellant for the injuries inflicted by the appellant on PW1, and on the appellant by thorns *(keapple fence)*.

The appellant\'s statement of defence is a made-up story. He was caught in a compound being guarded by PW1. There was no road. He carried no phone, or money. His evidence is a cock and bull story. The trial court found no credence in it, neither does this court. I reject it.

Section 308(1) creates the offence of preparation to commit a felony in these terms -

"S. 308(1) Any person found armed with any dangerous or offensive weapon in circumstances that indicate 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 not more then fifteen years."

The appellant was found in a compound guarded by PW1. The time was anywhere between 3.30 – 4.00 a.m., the appellant himself put it at 4.30 a.m. except he refers to the compound as a *"road"*. He was armed with a knife, an offensive weapon. He went straight to PW1, and cut him on his right hand. The intent was clear overcome PW1 and then be free to do other acts of burglary.

The trial court was right to find the appellant guilty of the offence of preparation to commit a felony contrary to Section 308(1) of the Penal Code. I agree with the learned trial magistrate both on the conviction, and the sentence I confirm both.

I therefore find no merit in the appellant\'s appeal and dismiss them.

Dated, signed and delivered at Nakuru this 27th day of July, 2012

M. J. ANYARA EMUKULE

JUDGE