REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

Criminal Appeal 53 of 2009

HAGGAI OMALAKANI MAKOKHA……APPELLANT

VERSUS

REPUBLIC……..……..……..RESPONDENT

(An Appeal from the Judgment and Conviction of Principal Magistrate's Court in Siaya Criminal Case no. 611 of 2008)

J U D G E M E N T

The appellant, **Haggai Omalakani Makokha**, appeared before the Resident Magistrate at Siaya charged with the offence of preparation to commit a felony contrary to section 308 (1) of penal code, in that on the 13th September 2008 at Ndere sub-location Siaya District, was found while armed with dangerous or offensive weapons namely a panga and a torch in circumstances that indicated that he was so armed with intent to commit a felony.

After pleading not guilty of the charge, the appellant was tried, convicted and sentenced to a term of seven (7) years imprisonment. Thereafter, he preferred the present appeal on the basis of the grounds contained in the petition of appeal filed herein on the 2nd April 2009. The grounds are as follows:-

(i) That his Constitutional rights were violated by being held in police custody for more than the prescribed twenty four (24) hours.

(ii) That his right to be informed of the charge in a manner and language understood by himself was violated.

(iii) That the sentence imposed is too harsh and on the higher side.

The appellant appeared in person and chose to respond to the submissions by the learned Senior Principal State Counsel, **Mr**. **Musau** who opposed the appeal on behalf of the respondent.

The learned State Counsel contended that the appeal is without merit as there was no violation of the appellant's constitutional rights under section 72 (2) and section 77 (2) of the Constitution and that the sentence imposed was lawful.

On the alleged violation of the appellant's constitutional rights, the learned State Counsel argued that the appellant was arrested on a Saturday at 10.00 p.m. and could not be produced in court on a Sunday which is not normally a working day. Therefore, since time started running on the following Monday, the appellant was produced in court on the following Tuesday.

As to the language used during the trial, the learned State Counsel argued that three languages were used i.e. Kiswahili, Dholuo and English and nowhere in the record is it shown that the appellant never understood any of the said languages.

On sentence, the learned State Counsel stated that section 308 (1) of the penal code provides for a sentence of not less that seven (7) years imprisonment and not more that fifteen (15) years imprisonment. Therefore the sentence imposed against the appellant was lawful and adequate.

The appellant on his part contended that he was held in police custody for more that the prescribed twenty four hours since the time started running from the day of his arrest. He further contended that he did not understand the languages used during the trial because he was informed of two charges i.e. preparation to commit a felony and theft of a cow. He however conceded that he testified in a language understood by him i.e. Kiswahili.

With regard to the sentence, the appellant contended that he did not know what he was sentenced for and that in any event, the sentence was harsh.

The duty of this court at this point is to reconsider the evidence afresh and arrive at its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses. This was clearly stated by the Court of Appeal in the case of **Okeno –VS- Republic [1972] EA 32 and** that of **Achira – VS- Republic [2003] KLR 707.**

The prosecution case was based on the evidence of three witnesses i.e. a retired teacher (PW1), an Assistant Chief (PW2) and a police officer (PW3).

The retired teacher **James Otieno Swaga (PW1)** said that on the material night at about 10.00 p.m. he heard footsteps outside his house and on peeping through a window saw a person attempting to open his cow shed while three other people stood by. He (PW1) moved to another room and made a phone call to the Assistant Chief who advised that the house door should not be opened until he arrived near the scene.

James (PW1) further said that there was moonlight and this made it possible for him to see the person at the cowshed. He noted that the person was wearing a stripped coat.

He said that on arrival of the assistant chief the intruders ran away in different directions but were pursued by himself and the assistant chief resulting in the apprehension of the appellant who was the person seen opening the cowshed. The appellant was then set upon by members of the public but he (PW1) came to his rescue and took him to the chief's office before reporting to the police on the following day. He (PW1) said that the appellant was found with a panga (machete), a torch and an identification card.

The Assistant Chief **Kennedy Ohenda Amire (PW2)** confirmed that he received a phone call from the retired teacher who told him that there were people at his (teacher's) cowshed.

The assistant chief thereafter proceeded to the teacher's homestead but did not find the intruders. He was informed that they had ran away. He was also informed by the teacher that one of the intruders wearing a stripped jacket was identified. He instructed members of the public to go in different directions in search of the intruders but was later called and informed that a suspect had been apprehended.

The suspect was found with an identification card, a panga and a torch and was the appellant herein. He was eventually handed to the police at Yala Police Station.

Polices Constable **John Mukanda (PW3)** of Yala Police Station investigated the case after the arrest of the appellant. He (PW3) said that the appellant was found with a torch and panga and was from Butere but could not explain why he was at the material area at the material time. He (appellant) was interrogated after being taken to hospital due to the injuries sustained by himself during his arrest. He was ultimately charged with the present offence.

In his defence, the appellant made an unsworn statement and stated that he was a fish monger and a resident of Mumias District. He denied the charge and indicated that he was at Usenge on the material date. He had fish and a bicycle. He left Usenge at 8.00 a.m. and

arrived in Siaya at about 3.00 p.m. while it was raining. He briefly sheltered himself from the rain and thereafter took off riding at a slow pace along a muddy road. He arrived at Ndere Polytechnic where he met some people who flashed a torch on his face and communicated to him in the dholuo language which he did not understand. These people ordered him to alight from his bicycle but he declined. He was then assaulted and left on the ground. He later came to his senses and found a group of people including the assistant chief standing near him. He was then taken to the A.P Camp at Mutumbu and eventually to the Yala Police Station from where he was taken to the hospital. He said that the panga and torch did not belong to him and that they were taken to the police station after his arrest.

All the foregoing evidence was considered by the learned trial magistrate who then came to the conclusion that the appellant was found in possession of a panga and torch far away from any known road during the night and without affording a satisfactory explanation for his presence at the scene.

In this court's view, the evidence by the prosecution was wanting and far from being satisfactory in establishing that the person allegedly seen at or near the material cowshed was the appellant.

James (PW1) was the only person who associated the appellant with the person seen near the cowshed. Apart from saying that the said person wore a stripped coat, James (PW1) did not actually state that he was able to visually identify the person. He (PW1) talked of the presence of moonlight. However, he did not say that the light was intense enough to offer favourable conditions for identification nor did he indicate the distance between himself and the intruder when he saw him.

So, the purported identification of the appellant by James (PW1) was not water tight and free from the possibility of mistaken identification.

It cannot therefore be said with certainty that the appellant was among the intruders who escaped when the assistant chief arrived at the scene.

The assistant chief (PW2) confirmed that he did not find the intruders at the scene. He said that he found the appellant already apprehended by other people while in possession of a panga and torch.

Neither James (PW1) nor the assistant chief (PW2) found and apprehended the appellant while in possession of the said panga and torch. None of these two witnesses (PW1 and

PW2) actually recovered the items from the appellant.

It does not escape this court's mind that the appellant contended in his defence that the items were not found with him and were taken to the police after his arrest.

Considering that the prosecution had no proper or any evidence of the recovery of the items, the foregoing contention by the appellant was not farfetched.

The prosecution ought to have called as witnesses but did not, the people who actually apprehended the appellant and allegedly recovered the panga and torch from him. There was therefore no evidence of possession of the panga and torch by the appellant.

In the absence of such evidence, the conclusions reached by the learned trial magistrate in convicting the appellant were incompatible with the evidence adduced and therefore erroneous.

Possession of a dangerous weapon in circumstances which are suspicious is a very vital component of section 308 (1) of the penal code without which the charge cannot stand. This component was not established by the evidence against the appellant. Besides, it was a misconception for the prosecution to treat a torch as a dangerous weapon or offensive weapon.

It was quite apparent from the evidence adduced by the prosecution witnesses that the appellant was arrested and charged simply because he hailed from Butere-Mumias and not where he was found. It was a case of the appellant being at the wrong place at the wrong time.

Indeed the learned trial magistrate found in his judgment that the appellant's presence at Ndere was suspicious and unexplained and that is the more reason he was convicted.

All the foregoing reasons prevails upon this court to hold that the appellant's conviction was unsafe and must be interfered with at this stage.

The appeal is meritable on the evidence alone. Otherwise, the three grounds of appeal contained in the petition lack merit in so far as this court readily agrees with the learned state counsel that there was no violation of the appellant's constitutional rights under section 72 (2) and section 77 (2) of the Constitution and that the sentence imposed was proper and lawful.

In sum, the appeal is allowed. The appellant's conviction is quashed and the sentence set aside. The appellant shall be released forthwith unless otherwise lawfully held.

Delivered and signed this 28th day of January 2010.

J.R. Karanja

JUDGE

JRK/va