



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA**

Criminal Appeal 21 of 2009

ODGERS NANDWA ATANDA.....APPELLANT

~VRS~

REPUBLIC..... RESPONDENT

JUDGMENT

The Appellant Rodgers Nandwa Atanda was jointly with one Charles Sifuna Juma convicted of the offence of preparation to commit a felony contrary to section 308 of the Penal Code and sentenced to serve three (3) years imprisonment. The two were acquitted of count II of handling stolen goods contrary to section 323 of the Penal Code. The Appellant appeals against both conviction and sentence.

The grounds of appeal are five and were all argued together by Mr. Areba for the Appellant. He took issue with the contradictions in the evidence of the two key witnesses and the surrounding circumstances at the time of arrest. It was also argued that the sentence was excessive.

The state opposed the appeal on grounds that the case was proved by the evidence on the record and that the sentence was not unreasonable or excessive.

The evidence of PW1 was that on the material night, he was with PW2 on patrol along Kanduyi – Bungoma road. Both witnesses were police officers stationed at Bungoma Police Station. Ahead of them, they saw five men who appeared like they were stopping passers-by. The witnesses ran after them and arrested them. The suspects led the witnesses to their houses at Kanduyi and Kibabii respectively. Some items were recovered in the house of the 1st accused which forms the basis of the charge of handling stolen goods. Nothing was recovered from the Appellant's house.

The evidence of PW2 was similar on how the Appellant and the other suspect were arrested. On the contradictions highlighted by the defence, I hereby evaluate the relevant evidence. PW1 said the five (5) men were on the side of the road in the dark. PW1 also said that he (PW1) and his colleague had torches. He did not say whether they flashed those torches at the suspects. PW2 on the other hand said that the accused persons were at a place with light outside a night club. PW2 therefore contradicts PW1 who testified that the accused persons were arrested on the side of the road at a dark place. This raises the question whether the two witnesses were together when they arrested the suspects.

The next issue is whether the evidence on record proves the offence of preparation to commit a felony. PW1 said it appeared like the suspects were stopping passers-by. He appears not to have been sure of what they were doing. PW2 said the suspects were stopping passers-by. As sure as PW2 was, the alleged passers-by who were stopped are not known. One or two of them should have recorded statements. The two witnesses are both police officers and understand criminal law well in relation to the ingredients of the crime. The officers ought to have waited at a distance and arrested the suspects as they were stopping passers-by. This would have been sound evidence to support the charge of preparation to commit a felony.

In the case of **MAINA & 3 OTHERS -VRS- REPUBLIC COURT OF APPEAL AT NAIROBI KLR [1986]** **301** the court held that the mere act of being armed is not enough to prove the offence of preparation to commit a felony and it would be unsafe to convict on such evidence. The court further said:

“(Obiter) Had the police not acted precipitately but waited and actually saw the Appellants attempt to enter the house where it was said they intended to commit a robbery, the court may well have come to the conclusion that the appellants intended to commit a felony.”

The Court of Appeal allowed the appeal in a case where the Appellants had been convicted with an offence of preparation to commit a felony contrary to section 308 of the Penal Code.

It is doubtful exactly where the Appellant was found and whether he was armed with a panga. PW2 said the panga was hidden in the Appellant's clothes. During cross-examination of PW1 and PW2 by the Appellant, The Appellant intimated that the panga was planted on him. It is not understood why the Appellant opted to keep quiet in his defence but this suggests that all was not well irrespective of the fact that it was his right to keep quiet. It is like, the appellant was protesting the prosecution against him by the police.

The defence referred the court to the case of **STEPHEN W. MACHARIA -VRS- REPUBLIC NAIROBI HIGH COURT CRIMINAL APPEAL NO.51 OF 1986** where Mbaluto J. and Bosire J. highlighted contradictions in the prosecution's evidence and reduced the maximum sentence imposed on the Appellant who was a first offender.

In the case before me, I find that the contradictions in the evidence are material and touch on the ingredients of the offence. I find that the offence of preparation to commit a felony was not proved against the Appellant. The Appellant ought to have been given the benefit of the doubt.

The appeal succeeds and I quash the conviction and set aside the sentence. The Appellant is set at liberty unless otherwise lawfully held.

**F. N. MUCHEMI
JUDGE**

Dated, Delivered and Signed at Bungoma this 28th day of April, 2010.

In the presence of the Appellant, the state counsel Mrs. Leting and Mr. Were for Mr. Areba for the Appellant.