

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT BUNGOMA

Criminal Appeal 55 of 2009

(Appeal from original BGM CM CR. NO. 114 of 2008)

ANDREW WEKESA BARASA.....APPELLANT

~VRS~

REPUBLIC.....REPODENT

JUDGMENT

Andrew Wekesa Barasa was convicted by Bungoma Resident Magistrate of the offence of preparation to commit a felony contrary to section 308 (1) of the Penal Code and sentenced to two years imprisonment. Being aggrieved of both the conviction and sentence, the appellant lodged this appeal.

The grounds of appeal as contained in the petition are as follows

- a) That the language of the trial court was not understood by the Appellants;
- b) That the Appellant's mental status as to fitness for trial was not ascertained;
- c) That identification was not established;
- d) That the evidence was contradictory; and
- e) That the sentence imposed was harsh and excessive

Mr. Luchivia argued the grounds of appeal explaining the issues based on the evidence on record. He submitted that the court did not inquire as to the language the Appellant understood thus contravening section 77 of the Constitution. He brought out the contradictions in the evidence of the witnesses as to how the Appellant was dressed at the time of offence. The evidence on recovery of the exhibit was wanting according to the Appellant.

The state conceded to the appeal. Mrs. Leting, State Counsel submitted that the language used was not indicated and that the answer by the accused to the charge was not recorded.

On perusal of the appeal record and the original file, there are errors apparent on the face of the record. They typed proceedings show that the appellant was arraigned in court on 4/3/2008 and that no plea was taken. The original file shows that the accused appeared in court for plea on 29/1/2008. The language used during plea taking was not indicated. The court did not make any inquiries from the appellant as to what language he understands. The answer to the charge is not indicated. What is on record is some scribbling of some illegible word like "**PNGE**" coming before the fixing of a hearing date. The plea was therefore not taken according to the principles as by law established. The language used in court on the 29/01/2008 is not

indicated. This contravenes section 77 (2) (b) of the Constitution which requires that the accused be informed of the charge in the language that he understands.

The contradictions in the evidence of PW1 and PW2 was negligible in that both agreed on material particulars touching on the ingredients of the charge. However the manner in which the exhibit was recovered was not clear. PW 1 said the Appellant attempted to throw away the panga. PW1 then took it with him to his house while the members of public arrested the Appellant and took him to the village elder. PW1 did not explain the reason for remaining behind with the panga as the Appellant was handed over to the relevant authority. The exhibit ought to have been taken to the village elder together with the suspect. This raises doubt whether the Appellant was armed during the commission of the offence.

PW2 said the Appellant was at the cattle shed and wanted to steal the cows. Her evidence does not support the charge of preparation to commit a felony. It is also out of character with the evidence of PW1 who was with PW2 at the material time.

Having found that the plea was not taken properly and that the language during the trial was not indicated, I hereby declare the proceedings null and void. The evidence presented is not capable of resulting to a conviction even if retrial was to be ordered.

For these reasons, I set aside the conviction and sentence which were based on null and void proceedings. The Appellant is hereby set at liberty unless otherwise lawfully held.

F.

N.

MUCHEMI

JUDGE

Judgment dated and delivered on the 14th day of July, 2010 in the presence of the Appellant, the State Counsel Mrs. Leting and Mr. Onchiri for Luchivia for Appellant.

**F. N. MUCHEMI
JUDGE**