



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**Criminal Appeal 195,196,201,202,203 & 204 of 2007**

1. PETER KIOKO WAMBUA
  2. MOSES MUTUKU NDAMBUKI
  3. ALEX KIMANZI MUKUU
  4. JAIRUS KITHEKA MUNYOKI
  5. MUNGUE MUTISO
  6. STEPHEN MUTUA NDONYI..... APPELLANTS
- VERSUS
- REPUBLIC ..... RESPONDENT

**JUDGMENT**

The six appellants in this appeal are **PETER KIOKO WAMBUA** (hereinafter referred to as 1<sup>st</sup> Appellant), **MOSES MUTUKU NDAMBUKI** (hereinafter referred to as 2<sup>nd</sup> Appellant), **ALEX KIMANTHI MUKUU** (hereinafter referred to as 3<sup>rd</sup> Appellant), **JAIRUS KITHEKA MUNYOKI** (hereinafter referred to as 4<sup>th</sup> Appellant) **MUNGUE MUTISO** (hereinafter referred to as 5<sup>th</sup> Appellant) and **STEPHEN MUTUA NDONYI** (hereinafter referred to as 6<sup>TH</sup> Appellant). All six had been charged before the subordinate court with the offence of **PREPARATION TO COMIT A FELONY CONTRARY TO SECTION 308 (2) OF THE PENAL CODE**. The particulars of the charge read as follows:-

*“On the 4<sup>th</sup> day of October 2006 at Msambweni road block along Likoni Lunga Lunga road in Kwale District within Coast Province, jointly not being at their place of abode, had with them articles for use in the course of or connected with theft namely three sharpened metal, one blunt metal, four arrows, two spot lights, four sharp pangas and one hammer.”*

The prosecution called a total of four witnesses in support of their case. The brief facts of the prosecution case were that police acting on a tip-off from an informer stopped a matatu registration No. KAR 744V Nissan matatu at the Msambweni Road Block. They ordered the driver to drive the vehicle to Likoni Police Station. **PW1 AMIR MAYANDA** who was the driver readily complied.

At the police station, the police ordered the passengers inside the matatu to alight. Their luggage was searched and in various bags police recovered the following items:-

- Three (3) pangas
  
- Small navy blue bag

- Hammer
- Two torches
- Three iron bars
- One woolen mafia cap
- One bottle of vodka
- One big blue and red bag
- Five jackets
- Woolen cap
- Panga
- Black polythene bag
- Four arrows
- Four arrow heads

The six accused who were said to be in possession of these items were then arrested and charged. At the close of the prosecution case all six appellants were ruled to have a case to answer and were put to their defence. They each denied the charge. On 1/11/2007, the learned trial magistrate delivered his judgment in which he convicted all six accused and sentenced them to serve a prison term of four (4) years each.

I have carefully perused the record of the trial before the lower court. The Appellants were charged with the offence of preparation to commit a felony. Nowhere in the record is it indicated just what manner of felony they were out to commit or where. The prosecution relied heavily on the fact that the Appellant were found in possession of certain items which the **PW3** and **PW4** claim are commonly used by criminals to conduct their nefarious activities. However, the items found in possession of the Appellants are not exclusively used to commit felonies. There are common household tools easily found in many homes in Kenya. Pangas, iron bars, hammers and torches are common items which have very many uses. The other items like woolen caps, bags, jackets, polythene bags in my view have no connection whatsoever with the commission of crimes. Further more it is not an offence for a citizen of Kenya to have in his possession any of the items recovered. The only items which raise eyebrows may be the arrows and arrow-heads. But the Appellants ought to have been charged with the appropriate charge which is the possession of offensive weapons.

The Appellants were arrested traveling in a matatu which is a common mode of transport for the public and once again it is not an offence to travel in a matatu with these items. The Appellants paid the fare which was demanded of them and they did not commit any sinister or suspicious move inside the matatu. The driver **PW1** and his conductor **PW2** had no complaint against these passengers.

I have read the judgment of the learned trial magistrate and in my view he did misdirect himself in several respects. Page 5 line 3 he states:-

*“under the sub-section, once it is proved that the accused had with him such article made or adapted for use in committing a burglary, theft or cheating, it shall be sufficient proof that he had it with him for such use”*

Firstly no evidence was adduced by any witness that any of the items found on the Appellants had been '**adapted**' in any manner whatsoever. Secondly the mere facts of possession of items like pangas, iron roads, torches etc cannot be said to amount to proof of intend to use the same to commit a felony. The trial magistrate misapplied the law in so holding.

Further at page 7 line 18 of his judgment, the learned trial magistrate states

*“There was a common intention as between  
joint possession of the offensive items”*

*the accused persons and I find that they had*

I find no evidence to prove or even show that the Appellants were acting with a common intention. The mere fact that they boarded the same matatu and that one of them paid the fare for the others is simply not enough. Joint possession of the recovered items also has not been proved since the items were recovered in the possession of different individuals. Here again I do find that the trial magistrate misdirected himself.

Lastly again at page 7 line 14 the learned trial magistrate finds as follows:-

***“I have no doubt in my mind that the accused persons must have been preparing to commit a felony namely, theft by breaking into premises at the intended destination. I so find”***

With respect to the trial magistrate this is simply a preposterous finding! There is absolutely no basis for such a finding. What was the intended destination of the Appellants? Nowhere is it stated in the proceedings. Secondly on what basis did the magistrate conclude that they intended to commit a felony upon their arrival at the unstated destination, as opposed to at any point along the journey. I find that the learned trial magistrate seriously misdirected himself by arriving at this finding – it has no basis in fact.

Apart from these misdirections I have noted several contradictions and inconsistencies in the prosecution evidence under cross-examination by the 2<sup>nd</sup> Appellant at page 13 line 11 **PW2** states:-

***“You sat in front. You had the yellow polythene bag in front. I did not see you entering the vehicle with a bag but at the police station you came out with a yellow polythene bag which had the pangas. I cannot tell what you were arrested with”***

After insisting that the 2<sup>nd</sup> Appellant was in possession of a yellow polythene bag containing pangas **PW2** again says that he did not see the 2<sup>nd</sup> Appellant enter the vehicle carrying any item and finally states that he does not know what the 2<sup>nd</sup> Appellant was arrested with. His evidence is so inconsistent as to be totally unreliable. At page 14 the same witnesses state at line 32.

***“It is true that the case has taken long and I am bound to forget”***

It is clear that PW2 was not too sure of the events of that day. He was an unreliable witness.

Based on the foregoing it is my considered opinion that the conviction rendered against the six Appellants was extremely unsafe it was not based on fact or evidence. As such I do hereby quash the same. The attendant sentences are hereby set aside. The appeal succeeds. All six Appellants to be set at liberty forthwith unless they are otherwise lawfully held.

**Dated and Delivered in**

Mombasa this 5<sup>th</sup> day of July 2010.

**M. ODERO**

**JUDGE**

Read in open court in the presence of:

Mr. Onserio for state

Appellant in person

**M. ODERO**

**JUDGE**

**5<sup>th</sup> July 2010**