



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
OF KISII**

Criminal Appeal 111 & 112 of 2007

(Being an appeal from original conviction and sentence of the SRM's Court at Ogembo in criminal case No. 801 of 2007)

HARON OMayio Nyagwencha

PETER OGARO PIUS.....APPELLANTS

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT.

The appellants were charged with the offence of preparation to commit a felony contrary to **Section 308 (1)** of the **Penal Code**. They also faced another charge of going armed in public contrary to **Section 88** of the **Penal Code**. The particulars of the offence were that on 10th April 2006, at Magena Market in Gucha District the appellants were found armed with dangerous weapons namely Masai sword and an iron bar in circumstances that indicated that they were so armed with intent to commit a felony. In respect of the other count the appellants were alleged to have been found armed with aforesaid items in such a manner as to cause terror to public members. After a full trial the appellants were convicted and sentenced to four years imprisonment. They were aggrieved by the said conviction and sentence and each preferred an appeal to this court.

The brief facts of the case were that on the material day at about 8.30 p.m. police officers at Nyangusu police station received the information that suspicious people were walking around Magena market.

Police Constable Benson Nduva, PW1, and Police Constable Jack Wafula, PW2, were sent by the Acting Officer Commanding the said police station to Magena market. When they got there, members of the public pointed to them two people whom they claimed to be strangers in the area and who were known to be armed at the time. The two police officers stopped the appellants and searched them. They recovered a sword stick in the waist band on the left side of the first appellant while his colleague had an iron bar hidden in the same position. The appellants did not give a reasonable explanation to the police as to why they were so armed. The appellants were arrested and driven to Nyangusu police station and were later charged with the aforesaid offences.

The first appellant defended himself by stating that on the material day he had attended a funeral and on his way back he got to Magena market and went to a bar where he took some beer upto about 8.00 p.m. As he left the bar on his way home he met police officers who arrested him.

The second appellant stated that on the material day he had come from a tea buying center and was going home. He met police officers who arrested him and took him to Nyangusu police station.

Mr. Angima for the appellants and Mr. Mutai, Senior State Counsel, made brief submissions which I have taken into consideration.

None of the appellants specifically denied that they were not armed with the weapons as stated in the charge sheet. The two police officers gave uncontradicted evidence. There was no reason for them to frame up the appellants. In my view the appellants were properly convicted and I dismiss the appeal against conviction.

As regards the appeal against sentence, the appellants were sentenced to four years' imprisonment. They were first offenders. The appellants have been in prison since 31st July 2007. Considering the nature of the offence committed by the appellants, I am of the view that the sentence that was meted out by the trial court was rather harsh. I allow the appeal against sentence and reduce the same to the period already served. The appellants are set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED ON 11th DAY OF JUNE, 2009.

D. MUSINGA

JUDGE

11/6/2009

Before D. Musinga. J

Mobisa –C.c

Mr. Mutai for state

Mr. Minda and Mr. K. Ondieki for the accused.

Court: Judgment delivered in open court on 11th June, 2009.

D. MUSINGA

JUDGE