



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 163 & 164 of 2005 & 222 of 2006

RICHARD KIMANI NDIKU .....1<sup>ST</sup> APPELLANT

MATHEW MUGIRIAMA MUTIBA..... 2<sup>ND</sup> APPELLANT

JOHN MUTHOKA MUMU .....3<sup>RD</sup> APPELLANT

AND

REPUBLIC .....RESPONDENT

*(An appeal from the Judgement of Senior Resident Magistrate Ms. M. Kasera dated 14<sup>th</sup> June, 2005 in Criminal Case No. 8942 of 2004 at Kibera Law Courts)*

JUDGMENT

The three appellants herein were jointly charged with the offence of preparation to commit a felony contrary to s. 308(2) of the Penal Code (Cap. 63). The particulars were that the three, on 15<sup>th</sup> November, 2004 along Naivasha Road, at Riruta in Nairobi, were found out of their place of abode and possessed of articles for use in the course of or in connection with robberies, namely one Somali sword, one kitchen knife and one torch.

PW1, Police Force No. 67228 **Cpl. Jacob Lolngojine** from Riruta Police Station testified that on 14<sup>th</sup> November, 2004 at 6.00 p.m. he was on duty; and later that night, at 2.00 a.m. (now on 15<sup>th</sup> November, 2004) he and his fellow-officers drove out on patrol. While thus conducting patrols, PW1 and his colleagues noticed a small lorry (or canter) in front, near a timber yard. This canter sped away, and at that point, PW1 and his colleagues saw three men, the appellants herein, come from a nearby shop; they flashed their torch, which showed them the Police motor vehicle, upon noticing which the three took off and ran into a neighbouring bush. The police officers gave chase, and PW1 arrested one of the three. A second one was arrested thereafter; the third took off. It was PW1's testimony that the 1<sup>st</sup> accused whom arrested was found with a knife wrapped in a plastic bag; and the second accused was found with a kitchen knife. The 3<sup>rd</sup> accused was scared with a police gun-shot in the air, and he was then arrested, and found in possession of a torch.

On cross-examination, PW1 confirmed that a Somali sword, wrapped in a bag, had been found on 1<sup>st</sup> accused when he was arrested. PW1 said he had arrested and charged 1<sup>st</sup> accused because of the fact that at 2.00 a.m. this accused was outside and armed. Of the 2<sup>nd</sup> accused, PW1 said this accused was in the

company of the other two and was lying hidden at the material time of night. Of the 3<sup>rd</sup> accused, PW1 said he had a torch in his possession when arrested, and he was wearing more clothes than normal.

PW2, Police Force No. 77215 Police Constable **Enock Kibagendi** testified that he had been on patrol in the Riruta area, with PW1 and one **Police Constable Njogu** who was the driver of the Police motor vehicle on patrol (not called as a witness), on the material night. It was during the patrol that PW2 and his colleagues noticed the three appellants herein emerging from a dark place; and when the Police officers tried to stop them, they refused to stop; they ran into a bush next to Gitanga Road, and lay there. When the three were arrested, the 1<sup>st</sup> accused was found with a Somali sword in wrappings; and the 2<sup>nd</sup> accused was found with a kitchen knife; the 3<sup>rd</sup> accused had a torch in his possession when he was arrested.

On cross-examination by 1<sup>st</sup> appellant, PW2 denied that a frame-up charge had been brought against any of the appellants; in his words: *“I could not have framed you up, as I did not know you. You had the Somali sword on the right side of your trousers”* To the 2<sup>nd</sup> appellant’s cross-examination PW2 said: *“you had the knife on your right side tacked in your trousers.” I did not remove you from your house at 2.00 a.m. We chased you and arrested you in the bush, when you were blocked by the wire mesh”*.

The appellants herein chose to give unsworn testimony; and the 3<sup>rd</sup> appellant said he had done casual work on the material night up to 9.30 p.m. when he returned home; and at the time he was arrested he had gone out to look for vegetables. He said he knew nothing about the sword, kitchen-knife and torch which had been brought to court as exhibits.

The 2<sup>nd</sup> appellant said he had been arrested by the Police officers when he went out in the night to buy kerosene.

The 1<sup>st</sup> appellant said he was in the company of his brother, coming from the village, when he was arrested on the material night.

The learned Senior Resident Magistrate asked herself the question whether it had been shown that the appellants herein, when arrested, were preparing to commit an offence. She held that the prosecution evidence was not shaken by the cross-examination, and that the defence statements were put up “for the sake of it”. She convicted them, and sentenced them to a ten-year jail term, in each case.

In their grounds of appeal, the appellants state that the learned Magistrate had not properly evaluated the prosecution evidence; that the two witnesses had not corroborated the testimonies of each other; that the prosecution evidence was contradictory.

Learned State counsel **Mrs. Obuo** conceded to the appeal on certain points of law, in particular, on the point that the language of the Court had not been shown on the record ? and so it would not be possible to know if the appellants understood the proceedings – s. 77 (2)(b) of the Constitution of Kenya

s.198 of the Criminal Procedure Code (Cap. 75).

However, learned counsel sought a retrial of the case, on the grounds that there was overwhelming evidence on record. She urged that since this is a serious offence carrying a penalty of as much as 14 years’ imprisonment, the appellants would not be prejudiced if retrial was ordered.

Firstly, I have taken note, as learned counsel **Mrs. Obuo** states, that the trial Court record did not specify the languages spoken during the conduct of proceedings. That is a fatal omission which leads to the proceedings being declared a nullity, and I hereby declare them so to be.

The law regulating re-trials is whether there is evidence, on the basis of which a conviction could be sustained; and in this regard I agree with the trial Court, that the prosecution, through its two witnesses, brought forth specific and gripping accounts which could very well lead to conviction.

It is also true, I think, that the appellants will not be prejudiced by a new trial, considering that sentence if they are found guilty, could run to as much as fourteen years in jail, and at the moment they have been in custody for the comparably short term of three years.

I, therefore, order that a retrial shall be conducted before a Judicial Officer other than the one who conducted the trial.

This case shall be listed for mention and trial directions before the Chief Magistrate at Kibera Law Courts on 4<sup>th</sup> February, 2008.

***Orders accordingly.***

**DATED and DELIVERED** at Nairobi this 28<sup>th</sup> day of January, 2008.

**J.B. OJWANG**

**JUDGE**

**Coram: Ojwang, J.**

**Court clerk: Huka**

**For the Respondent: Mrs. Obuo**

**Appellants in person**