REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 295 of 2006

ANTHONY WAMBUGU GIKERA……………..…APPELLANT

VERSUS

REPUBLIC ……………………….….….….….…RESPONDENT

(*From original conviction and sentence in Criminal Case No. 401 of 2005 of the Chief Magistrate's Court at Kebera – Mrs Mwangi SPM*)

J U D G M E N T

ANTHONY WAMBUGU, the appellant, was charged before the subordinate court with preparation to commit a felony contrary to section 308(2) of the Penal Code. The particulars of offence were that on 13th December, 2004 along Ngotho road in Riruta within Nairobi Area Province jointly with others not before court not being in their place of abode had an article for use in the course of or in connection with burglary namely a panga. After a full trial, he was convicted and sentenced to serve 5 years imprisonment. Being dissatisfied with the decision of the subordinate court he has appealed to this court challenging both conviction and sentence. At the hearing of appeal he relied on grounds of appeal.

The learned State Counsel, Mr. Makura, opposed the appeal against conviction. Counsel contended that there was sufficient evidence to sustain the conviction as the two prosecution witnesses PW1 and PW2, both police officers, challenged the appellant and others late at night to stop but they ran away. In the process, the appellant fell down and he was arrested. On being searched, he was found to be in possession of a panga, which was evidence that he was preparing to commit a felony. On sentence, counsel submitted that the sentence appeared to be excessive as the magistrate meted out the maximum sentence, while the appellant was a first offender.

This is a first appeal and I am duty bound to re-evaluate all the evidence on record and come to my own conclusions and inferences ? see OKENO –VS- REPUBLIC [1972] EA 32.

I have evaluated the evidence on record PW1 and PW2, who were police officers, met the appellant walking with others. It was at night. They challenged them to stop and instead they ran away. However, the appellant fell down and was arrested. He was found with a panga. All that is not disputed by the appellant. The dispute arises where the appellant stated that the time was about 8 pm to 9 pm at night, while the two prosecution witnesses stated that it was after mid night. The other dispute was that the prosecution witnesses alleged that he was preparing to commit a burglary, while the appellant claimed

that he was making home from an assignment of cutting grass at Hurlingham, and he was late because of transport problems.

The appellant was charged with an offence under section 308(2) of the Penal Code, which provides ?

308 (2) Any person who, when not in his place of abode has with him any article for use in the course of or in connection with any burglary, theft or cheating is guilty of a felony, and where any person is charged with an offence under this subsection proof that he had any article made or adapted for use in committing a burglary, theft or cheating shall be evidence that he had it with him for such use.”

It is trite that in criminal cases the burden is always on the prosecution to prove its case against an accused person beyond any reasonable doubt. That burden does not shift to an accused person – see **MUIRURI –VS- REPUBLIC [1983] KLR 205.**

The prosecution was duty bound to prove all the ingredients of the offence beyond any reasonable doubt. In our present case the prosecution proved beyond reasonable doubt that the appellant was not at his place of abode. That was one element of the offence. They alleged that the panga which was found in the possession of the appellant was for commission of burglary.

In my view, in terms of section 308(2), in order to prove preparation to commit burglary, above the prosecution had to prove either of two elements. Firstly, that the article (panga) was an item that was ordinarily for use in the commission of burglaries. Alternatively, they had to prove that it was adopted for committing a burglary. There is no evidence of proof of either of these two elements of the offence. In my view, a panga is not an article that is ordinarily used for burglary. It might be a weapon, but that is not the same as being an article that can be used in a burglary. Secondly, there is no description given of the scene where the appellant was ordered to stop and where he was arrested. Such a description could give support the prosecution that in the circumstances, the appellant and his companions would be presumed to have been preparing to commit a burglary or an offence. The impression given from the prosecution evidence is that the appellant and the others were merely walking and when they were ordered to stop they started running away. In my view, that did not prove that they were preparing to commit any offence, let alone a burglary. In my view, the evidence of the prosecution was not adequate to prove the elements of the offence for which he was charged.

I will also have to state that, in requiring the appellant to call or contact the person who had given him a job of cutting grass, the learned magistrate was shifting the burden of proof to the appellant which was an error. It was the same as requiring him to prove his innocence. It was for the prosecution to prove all the elements of the charge. If they failed to do so, the appellant could be penalised for not calling witnesses, as he is legally entitled even to keep quiet, under our criminal justice system. The sentence is on the higher side, but I will set it aside because I will allow the appeal on conviction.

For the above reasons, I allow the appeal quash the conviction and set aside the sentence of the imposed by the learned magistrate. I order that the appellant be let at liberty unless otherwise lawfully held.

Dated and delivered at Nairobi this 25th day of February 2008.

George Dulu

Judge

In the presence of ?

Appellant in person

Ms. Gakobo for State - absent

Mwangi – court clerk