REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(Coram: Ojwang, J.)

CRIMINAL APPEAL NOs.290A OF 2006, 291 OF 2006 & 313 OF 2006

(CONSOLIDATED)

BETWEEN

ABDI ISAAC OSMAN ……..……. 1ST APPELLANT

MOHAMMED DIIS MURSAL ……..…. 2ND APPELLANT

ABDI MOHAMMED HASSAN ……...…3RD APPELLANT

-AND-

REPUBLIC ……. RESPONDENT

(An appeal from the Judgment of Resident Magistrate D.A. Orimba dated 8th June, 2006 in Criminal Case No.1102 of 2005 at the Garissa Law Courts)

JUDGMENT

The appellants were jointly charged with the offence of preparing to commit a felony contrary to s.308(1) of the Penal Code (Cap.63, Laws of Kenya). The particulars were that the appellants, on 1st November, 2005 at Garissa Township in Garissa District, within North-Eastern Province, were found armed with dangerous weapons, namely Somali knives, in circumstances indicating that they were so armed with the intent to commit a felony, namely robbery.

PW1, Police Force No. 77589 ***P.C. Christopher Macharia***, testified that he was attached to Garissa Police Station, in the Crime Branch. He was on duty with his colleague-officers on 1st November, 2005 when they met three young men of Somali ethnicity. The Police officers thought the three young men to be "looking suspicious," especially as two of them had entered a nearby garage. They arrested and did a search on the three young men, recovering two Somali knives.

On cross-examination, PW1 said he and his colleagues had been on patrol when they met the appellants herein, and they arrested the appellants because the appellants were *found along a road where thefts had in the past been reported to have taken place.* A further reason for the arrests was that the appellants had endeavoured to escape when they saw the Police officers approaching. PW1 said he was in the company of three other officers at the material time, and the time was *5.00 p.m.*

PW2, Police Force No.77555 ***P.C. Peter Macharia*** testified that he is attached to the Crime Branch at the Garissa Police Station, and was on patrol within Garissa Town, on the material date. While in the company of Police-colleagues, PW2 spotted "three Somali boys who looked suspicious." Two of these boys, upon noticing PW2 and his colleagues, entered a corridor; the Police officers arrested them, and conducted a search upon them, recovering Somali swords – one from 1st appellant, and the other from 2nd appellant.

On cross-examination, PW2 said the Crime Branch of the Police Station "had received complaints from members of the public about boys [who were] disturbing them." PW2 said he had not found 3rd appellant with a sword, and this appellant had not attempted to flee when PW2 and his colleagues came along; but that 3rd appellant was in the company of his armed colleagues.

PW3, Police Force No.77267 ***P.C. Simon Muriithi*** testified that he was attached to the Crime Branch at Garissa Police Station. He was with his colleagues on patrol, on 1st November, 2005 at 5.00 p.m. when he met three boys of Somali ethnicity, the appellants herein. On noticing the Police officers, two of the boys entered a corridor, but one was left behind just standing. PW3 testified: "We suspected them, followed them and they were arrested." Upon searching the three, two knives were recovered, one from 1st appellant, and the second from 2nd appellant.

On cross-examination, PW3 said he and his colleagues were acting on reports that along the street where the arrests were made, "boys [were] disturbing members of the public."

PW4, Police Force No. 75966 ***P.C Kennedy Kobia*** testified that he was attached to the Crime Branch at Garissa Police Station and, on 1st November, 2005 at 5.00 p.m. he and his colleagues were on patrol in Garissa Town. PW4 and his colleagues, while at Kambi Moto in Garissa, on the material date, saw three men who attempted to run away when they noticed the Police officers. PW4 and his colleagues arrested the three men and upon searching them, recovered two knives; and the three are the appellants herein.

On cross-examination, PW4 said the 1st appellant had attempted to hide when he saw the Police officers, and he had been found with a knife which he hid in his waist-dressing. PW4 said the Kambi Moto area of Garissa Town, where the arrests took place, "is known for crime."

PW5, Police Force No.81158 ***P.C. Daniel Lemiso*** testified that he had been attached to Garissa Police Station and he was at the Crime Stand-by Desk on the material date, when one ***Cpl. Kimwele*** (not called as a witness) brought in two suspects and held them in the cells. PW5 conducted investigations and preferred charges against the two suspects, and against a third suspect – and these suspects were the appellants herein.

The 1st appellant herein made an unsworn statement in which he said he was a mini-bus conductor, and when arrested he was waiting for his mini-bus to be brought along from the garage. One of the Police officers who came along and arrested 1st appellant was known to him, as they had earlier met, on unfriendly terms, at the Police Station. 1st appellant said he had once had an argument with the officer who arrested him, in respect of the availability of a seat in the said mini-bus. 1st appellant said it was after his arrest, that the 2nd appellant was pursued and arrested in the street. Subsequently, the 3rd appellant who was walking from the show-ground, was also arrested – and all the three were then charged jointly.

The 3rd appellant, in his unsworn statement, said he works as a watchman at the Youth Polytechnic; and he was going to his place of work when he met two Police officers. These officers arrested him and conducted a search on him, but recovered nothing. The Police officers took him to the Police station; and on the way they met the 2nd appellant who was coming from the show-ground, and the 2nd appellant was also arrested and taken to the Police station.

The 2nd appellant in his unsworn statement, said he works at the show-ground; and he had been walking

home from work, when he met Policemen at Kambi Moto and they arrested him. He denied the charge.

On the evidence as set out above, the learned Magistrate made a finding as follows:

> ***"Accused 1 and 2 were no doubt found in possession of knives which [are] dangerous [weapons by] definition. It is [the] prosecution evidence that [the] accused [on] seeing the officers tried to escape but were arrested before doing so. The question is, if they were good citizens and peace-loving [persons], then why were they escaping? In their defence they did not deny having been found with the knives.***
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> ***"The knives were found in [the] possession of accused 1 and 2 but accused 3 was in their company and whatever deal [they may have been engaged in] was a joint one. The intention was one. He [3rd accused] was therefore part and parcel of the whole plan.***
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> ***"It is also……prosecution……evidence that there [was] already [a] report from the area-residents [about] boys who were committing all kinds of crime. The [Police] patrol was therefore being done to contain the menace.***
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> ***"I have considered the entire evidence on record and I am satisfied that the prosecution have proved their case against all the accused as required by law. The accused are guilty as charged and [I] will proceed to convict them accordingly within the provisions of section of 215, CPC."***

The learned Magistrate proceeded to convict the appellants, and to sentence each to a prison term of seven years.

In the grounds of appeal, the appellants contend that they had been convicted on bare allegations that they were preparing to commit a felony, but there was no complainant-witness. The appellants challenged the process of identification which led to their being charged, tried and convicted.

The appellants contested the judicial character of the trial Court's judgment, on the basis of s.169(1) of the Criminal Procedure Code (Cap. 75, Laws of Kenya). That section and sub-section reads as follows:

> ***"Every ….. judgment [in a Criminal Court] shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the Court in the language of the Court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision ……."***

Learned counsel ***Mr. Makura*** contested the consolidated appeals, contending there had been overwhelming evidence of preparation by the appellants to commit a felony. Counsel laid emphasis on the testimony by the Police-witnesses, that the appellants had "looked suspicious" when arrested, that they had attempted to run away when the Police officers came along, and that some of them had Somali knives in their possession.

Mr. Makura also submitted that since the maximum sentence provided for by law was 14 years, the term imposed, of seven years for each appellant, was perfectly within the law and should not be disturbed.

The 1st appellant made oral submissions in addition to his written submissions. He said the reason for his arrest was that one of the arresting officers (PW1) had a grudge against him. He said he had not been found in possession of a knife; he had no ill motive against anyone; he had not been involved in crime and no complaint has ever been raised that he is a criminal; there was no basis for suspecting him of intent to commit a crime.

The 2nd appellant submitted that he had fallen victim to a general Police swoop, and he was only walking home from the show-ground where he worked. He said he had had no knife when he was arrested; and indeed, this had been admitted by some of the witnesses.

The 3rd appellant too, said he had fallen victim to a Police swoop in the course of which drunks in the street were being arrested. He also said he had not been found with a knife, and noted that PW4 in particular had acknowledged this fact.

As a basis for a just determination of this appeal, certain facts should be noted. It emerges from the statements made by the appellants that, on the material day, at abut 5.00 p.m. there were large-scale Police initiatives to arrest suspects in Garissa Town. There was a Police lorry picking up drunks and suspects from the streets; and it is in this lorry that the appellants were taken after they were arrested.

From the evidence, it is not completely certain which ones of the appellants were found with Somali knives in their possession; there is *contradictory evidence* in this regard. Some of the appellants have said the knives featuring in the prosecution case, had been planted on them.

It follows, as a matter of law, that the conclusion is to be drawn that the exact status of the said Somali knives in the charges which lead to this appeal, has *not been proved* beyond reasonable doubt; and therefore the appellants could not rightly have been convicted on the basis of the evidence turning on those Somali knives.

But the moment such a conclusion is drawn, the prosecution case, insofar as it was founded on possession of Somali knives, falls to the level of resting purely on **suspicion**: witnesses have said the Kambi Moto area of Garissa "is known for crime"; PW3 has said, "we suspected them, followed them and they were arrested"; the trial Court states, "the [Police] patrol was …… being done to contain a menace."

There may well be a menace of petty crime in Garissa Town; but the operative law would not allow loose suspicion to be the basis for arrest and prosecution of individuals. Mere suspicion does not give the dependable *evidence* which, alone, is the basis for arriving at a conviction; and the concern to suppress or eliminate a public menace, such as rampant theft and related crime – though it should call forth appropriate social, economic and administrative programmes of amelioration – bears no relation to the constancy of the requirement of proof-by-evidence, in criminal trial. The yardstick of that standard of proof abides in the classic statements of the law, in ***Woolmington v. The Director of Public Prosecutions*** [1935] A.C. 462 (at p.481 – per Viscount Sankey, L.C.):

> **"Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the *duty of the prosecution* to prove the prisoner's guilt …. If, at the end of the whole of the case there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner ……, the prosecution has not made out the case and the prisoner is entitled to an acquittal."**

I have doubts whether that high standard of proof has been met in the proceedings and judgment of the trial Court, in the instant matter. Earlier on I have set out the terms of s.169(1) of the Criminal Procedure Code (Cap.75), regarding lawful judgment issuing from a Criminal Court; *reasons* for the Court's decision have to be given which have a foundation in the *evidence*. In the instant case, there was hardly any evidence to implicate the appellants herein; and so – and with respect to the trial Court – the reasoning in support of the Court's decision didn't stand up.

I allow the appeals by the three appellants, and set aside the convictions and sentences meted out by the trial Court. Each of the appellants shall forthwith be set at liberty, unless otherwise lawfully held.

Orders accordingly.

DATED and DELIVERED at Nairobi this 6th day of February, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Respondent: Mr. Makura

Appellant in person