

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 10 of 2006

From Original Conviction and Sentence in Criminal Case No. 8235 of 2004 of the Senior Principal Magistrate's Court at Kibera)

GENARO MWANGI NG'ANG'A.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant GENARO MWANGI NG'ANG'A was convicted in the subordinate court with the offence of preparation to commit a felony contrary to section 308(2) of the Penal Code. The particulars of the offence were that on 12th October 2004 at Palace bar-Kangemi in Nairobi within Nairobi area, not being at his place of abode had with him articles for use in the course of, or in connection with burglary namely a sword and a torch. On conviction he was sentenced to serve ten (10) years imprisonment.

Being dissatisfied with the decision of the learned trial magistrate he has come to this court on appeal, challenging both conviction and sentence.

At the hearing of the appeal, learned State Counsel Mr. Makura conceded to appeal on the ground that the elements of the charge were not proved. The appellant was found with a panga and a torch which could not support the charge. In addition, counsel contended that, the evidence of PW1 and PW2 was contradictory. Counsel also contended that at page J.2 of the judgment, the learned trial magistrate shifted the burden of proof. On sentence, counsel contended that the sentence of 10 years imprisonment for a first offender was harsh and excessive.

I have re-evaluated the evidence on record, as I am required to do on a first appeal. Indeed, the charge and the evidence is that the appellant was found with a sword and a torch outside the subject bar. The allegation is that he had those items in connection with an intended burglary. Clearly, a sword and a torch cannot be said to be items meant for the purpose of burglary. I agree with the submission of the learned State Counsel that there was no evidence to support or prove the charge leveled against the appellant. I will allow the appeal on that account.

The sentence meted against the appellant was ten (10) years imprisonment. The appellant was a first offender. Indeed, as submitted by the learned State Counsel, the maximum sentence for the offence is ten (10) years imprisonment. The sentence meted by the learned trial magistrate in the circumstances was clearly harsh and excessive. However, as I have allowed the appeal on conviction, I will set aside the whole sentence.

The upshot is that I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty, unless otherwise lawfully held.

Dated at Nairobi this 4th day of July 2007.

George Dulu

Judge

In the presence of –

Appellant

Mr. Makura for State - absent

Eric – Court Clerk