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

Criminal Appeal 244 of 2006

SAMSON KARU GATIMU…..……...……...……..APPELLANT

VERSUS

REPUBLIC…… ……....RESPONDENT

(From original conviction (s) and Sentence(s) in Criminal Case No. 180 of 2006 of the

Chief Magistrate's Court at Makadara (Mr. Kassan - DMII)

J U D G M E N T

SAMSON KARU GATIMU was found guilty of the offence of **PREPARATION TO COMMIT A FELONY** contrary to **Section 308(2)** of the **Penal Code**. It was alleged in the particulars of the charge as follows: -

"***On the 7th day of January 2006, 2006 along Race Course road in Nairobi within Nairobi area Province, while not at his place of abode was found in possession of one T-shaped metal bar which was likely to be used in commission of a felony namely, stealing from locked motor vehicle".***

After hearing the case, **Mr. Kassan DMII**, found the Appellant guilty, convicted him and proceeded to sentence him to 2 years imprisonment. It is against the conviction and sentence that he now appeals to this court.

The Appellant raised the following grounds of appeal in his filed petition.

1. The evidence adduced in court was insufficient to sustain the charge;

2. The evidence of PW1 and PW2 was contradictory;

3. The evidence of PW2 contained hearsay evidence;

4. That justice was not done in the case.

The facts of the case were that PW1 and PW2, both Police Officers were on foot patrol duties at 8.00 when they saw 2 suspicious looking people. They decided to confront and stop them. That the two men started running away when asked to stop. They then managed to apprehend the Appellant from whom they recovered a T-shaped object exhibit 1. The two officers told the court that the T-shaped object was used to open locked cars. The Appellant was then charged with the offence.

In his sworn defence the Appellant said he was arrested with the T-shaped object which he explained he used to cut roast maize for clients. The Appellant also said that he was also carrying maize for roasting, a basin and roasting wire at the time of his arrest.

The Appellant appeared in person in this appeal, while **Miss Wafula** represented the State and opposed the appeal. The learned Counsel submitted that the Appellant was found with a T-shaped object, which could be used to break into cars. Counsel further submitted that the issue of the Appellant being found with maize did not arise during the trial.

I have carefully analyzed and evaluated afresh the evidence adduced before the lower court and have drawn my own conclusions as expected of a first appellate court.

The learned trial magistrate convicted the Appellant on the basis that he admitted that the T-shaped object was his and that when he looked at it, the learned trial magistrate formed the opinion that it was used to open and break cars. The learned trial magistrate also observed that the Appellant's defence that he was arrested with a basin and sack of maize was not supported by the prosecution case.

Section 308 (2) of the **Penal Code** provides thus;

"***308 (2) Any person who, when not at his place of abode has with him any article for use in the course of or in connexion 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 with him 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."***

The offence of **PREPARATION TO COMMIT A FELONY** under the quoted section is committed where the evidence adduced proves the following ingredients: -

1. That the accused person was not at his place of abode at the time of arrest in connection with the offence;

2. That the accused was found with an article and;

3. That the article was for use or could be adopted for use in the course of or in connection with a burglary, theft or cheating.

MUIRURI vs. REPUBLIC [1983] KLR 295 followed.

The prosecution case established that the Appellant was not at the place of abode at the time of his arrest in connection with this offence. The two arresting officers stated that the Appellant was walking near parked vehicles when they saw and suspected him. I have no doubt that the first ingredient for the offence as I have given herein above was met.

The other two ingredients go together. The prosecution had to show that the T-shaped object was in the possession of the Appellant and was an article that could be used or adopted for use to break into cars. The circumstance under which the Appellant was found was important. In the prosecution evidence, PW1 stated that the time they found and arrested the Appellant was 8.00 a.m. while PW2 contradicted it and said 8.00 p.m. PW1 did not say why they suspected the Appellant and this was important in order to enable the court assess all the circumstances to find whether the offence was committed. PW2 on the other hand stated the reason for suspecting the Appellant which he said was because he was walking near a parked car. Both witnesses also stated that the Appellant was in company with another and that both started running when they saw the police.

The circumstances leading to the Appellant's arrest could not support a finding that he was at the scene with an intention to commit an offence. The prosecution evidence was that the Appellant was walking. There is nothing wrong with walking near parked cars and neither was there anything

suspicious about that. That evidence standing on its own did not support the charge and could not sustain the conviction.

On the other hand, the Appellant's defence was reasonable. He said he was on his way carrying his tools of trade in order to set up his business of roasting maize. The Appellant was not obliged to prove his innocence and neither did he have any obligation to call additional evidence to corroborate his. To that extent, the learned trial magistrate misdirected himself when he found that the Appellant's defence was not corroborated by the prosecution case. What the learned trial magistrate should have considered is whether the Appellant's explanation was reasonable in all the circumstances of the case.

I have considered the Appellant's defence and find it quite reasonable. It ought to have been accepted by the trial court. In any event, the prosecution case could not have sustained a conviction for the offence charged and the Appellant was entitled to the benefit of doubt.

I find the conviction entered in this case was unsafe. I allow the appeal, quash the conviction and set side the sentence. The appellant should be set free unless he is otherwise lawfully held.

Dated at Nairobi this 23rd day of January 2006.

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LESIIT, J.

JUDGE

Read, signed and delivered in the presence of;

Appellant present

Miss Wafula for the State

Tabitha: CC

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LESIIT, J.

JUDGE