



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

**Criminal Appeal No. 763 764 765 & 790 of 2003**

**PAUL NGUGI NG'ANG'A..... APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**CONSOLIDATED WITH**

**CRIMINAL APPEAL NO. 764 OF 2003**

**JOHN KARIUKI IGOGO .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**CONSOLIDATED WITH**

**CRIMINAL APPEAL NO. 765 OF 2003**

**FRANCIS NGOBE GATHICI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**CONSOLIDATED WITH**

**CRIMINAL APPEAL NO. 790 OF 2003**

**JAMES WACHAGA NDUNG'U.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

The four Appellants, **PAUL NGUGI NG'ANG'A, JOHN KARIUKI IGOGO, FRANCIS NGOBE GATHICI**, and **JAMES WACHAGA NDUNG'U** (hereinafter referred to as the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Appellants respectively) were initially jointly charged with three counts of robbery with violence contrary to Section 1296 (2) of the penal Code. They also jointly faced one count of preparation to commit a felony contrary to Section 308 (1) of the Penal Code. The 1<sup>st</sup> Appellant separately faced two more counts of being in possession of Firearm and ammunition contrary to Section 4 (2) of the Firearms Act. The 3<sup>rd</sup> Appellant was also separately charged with being in possession of Narcotic Drugs contrary to Section 3 (1) of the Narcotic Drugs and Psychotropic substances Control Act.

Following a full trial in which the Prosecution lined up eleven witnesses all the Appellants were acquitted on the three counts of robbery with violence. However they were all convicted on the offence of preparing to commit a felony. 1<sup>st</sup> Appellant was also convicted for the offence of being in possession of ammunition and Firearm just as the 3<sup>rd</sup> Appellant was also convicted for the offence of being in possession of narcotic Drugs.

Upon conviction all the Appellant were each sentenced to ten years imprisonment with hard labour in respect of the offence of preparing to commit a felony. On firearm and ammunition related offences, 1<sup>st</sup> Appellant was sentenced to five years imprisonment with 10 strokes of the cane. As for being in possession of narcotic Drugs, the 3<sup>rd</sup> Appellant was sentenced to 24 months imprisonment. The sentences in respect of 1<sup>st</sup> and 3<sup>rd</sup> Appellants were ordered to run concurrently.

All the Appellants were aggrieved by the conviction and sentence. They each separately lodged appeals which have been consolidated for ease of hearing. The Appellants have all raised similar grounds in their petitions of Appeal. They faulted their conviction by the trial Court on the grounds:-

- (i). **THAT** the trial Magistrate erred in law and in fact in finding the Appellants guilty of the offence of preparation to commit a felony when all the essential ingredients of the offence were not proved.
- (ii). **THAT** the Learned trial Magistrate erred in law and in fact in convicting the Appellants for the offence of preparation to commit a felony when they were not found in possession of any dangerous or offensive weapon or circumstances that indicated they were so armed to commit a felony.
- (ii). **THAT** the Learned trial Magistrate erred in law and in fact in convicting the Appellants of the offence of preparation to commit a felony when there was no evidence adduced to prove that they were acting in concert and that they were preparing or intending to commit a felony.
- (iv). **THAT** the Learned trial Magistrate erred in law and in fact in failing to take into account the Appellants' defences.
- (v). **THAT** sentence imposed was excessive, harsh and unjustified.

The Prosecution case simply put was that on 23<sup>rd</sup> December, 2002 PW6 was ferrying passengers from Nairobi to Njabini. On the way, some passenger called aside the conductor (PW7) and informed him that 4 of the passengers in the motor vehicle looked suspicious. PW7 then informed PW6, the driver and they drove to Mugumo Police Station where all the passengers in the motor vehicle were ordered out and a search conducted by PW4. In the process a gun with 6 rounds of ammunition were recovered in one bag which according to PW7 belonged to one of the 4 suspicious characters. Apparently the person who had the bag was the 1<sup>st</sup> Appellant. He entered the motor vehicle with the bag in Nairobi. It was also alleged that he also paid the bus fare for all the other three Appellants. All the Appellants were then arrested and subsequently charged with the offence in the charge sheet.

In support of the Appeal, Mrs. Muhuhu, Learned Counsel for the Appellants submitted that the charge sheet did not reflect the evidence given as regards the descriptions of the weapon and ammunitions. That the firearm referred to in the charge sheet was serial No. BN 996 and the ammunition was described as

7.63mm calibre. However the evidence given by the firearms examiner contradicted this. For he stated in his evidence that he received sub-machine gun bearing serial number 996 and 6 rounds of ammunitions of 7.62mm.

Counsel further submitted that there was no prove that the Appellants were found jointly with the rifle and ammunitions. Counsel pointed out that no common intention was proved by the Prosecution. Nor was there prove of ownership of the bag that was found in the boot of the matatu. Learned Counsel further submitted that there were contradictions as to who kept the bag in the boot. Whereas PW4 stated that he was told by PW7 that it was the 4<sup>th</sup> Appellant who kept the bag in the boot, PW7 in his own evidence however stated that it was the 1<sup>st</sup> Appellant who kept the bag in the boot of the motor vehicle. Counsel submitted that there was no direct and independent evidence adduced during the trial linking the Appellants to the crime. That PW6 and PW7 testified that they were given information about the suspicious nature of the Appellants by the passengers who were never called to testify. There was no proof that any of the Appellants intended to commit a felony. The finding of the weapon is not enough in the absence of an overt act to show that the Appellant intended to commit a felony. Counsel further complained that the Learned trial Magistrate failed to consider the defences advanced by the Appellants. The trial Magistrate merely dismissed the defences. On sentence Counsel submitted that the sentence of 10 years imprisonment imposed on all the Appellants was harsh and excessive. Counsel further commented that the Appellants' mitigation was not considered. Counsel reiterated that the gun being found the boot of the motor vehicle was not conclusive evidence of possession or intent to commit a felony. On the issue of possession Counsel referred the Court to the following authorities:-

**(i). CR. APP. No. 20 of 1985 ALI OKUMU ODIMA VS REPUBLIC**

**(ii). CR. APP. NO. 68 OF 2000 – ALI AHMED ALI & ANOR VS REPUBLIC**

**(iii). CR. APP. NO. 83 OF 2003 – MOHAMED OMAR CHEPT VS REPUBLIC**

On the conviction of the 1<sup>st</sup> Appellant for being in possession of a firearm and ammunition, Counsel submitted that the conviction was unsafe as there were no fingerprints lifted from the firearm. Regarding the conviction of the 3<sup>rd</sup> Appellant on the offence of being in possession of Narcotic Drugs, Learned Counsel submitted, the conviction was unsafe as well since the Narcotic Drugs were not exhibited in Court. That PW5, the Government analyst only produced the report. That the witness who claimed to have recovered the Narcotic Drugs from the 3<sup>rd</sup> Appellant was never called to testify.

Mrs. Obuo, Learned State Counsel opposed the Appeal. She submitted with regard to the 3<sup>rd</sup> Appellant that it was the evidence of PW4 that they recovered bhang from the pocket of the Appellant's trousers. So the submission by Counsel for the Appellant that the person who recovered bhang from the 3<sup>rd</sup> Appellant was not called to testify does not reflect the true position. Counsel further submitted that there was evidence by PW5 that the bhang was infact produced in Court as in an exhibit. As to the failure to call the Police officer who prepared the memo to the Government analyst to testify, the Learned State Counsel submitted that there was sufficient evidence on record to sustain a conviction even without the evidence of the memo officer.

As to the claim that the bhang was planted on the 3<sup>rd</sup> Appellant Counsel posed the question. Why would the Police plant the bhang on the 3<sup>rd</sup> Appellant and not the rest. Regarding possession of forearm and ammunition, Learned State Counsel submitted that there was evidence that the 4 Appellants were found in possession of the gun. On the variance of the description of the gun in the charge sheet and evidence, Counsel submitted that the Appellant were not prejudiced in any way. In any event the error is curable under section 382 of the Criminal Procedure Code.

As to whether the gun was found in possession of the Appellants, Counsel submitted that the issue was proved beyond reasonable doubt. There was the evidence of PW7 who testified that the 4 Appellants boarded the matatu together at about 7 p. m. and it was the 1<sup>st</sup> Appellant who paid the fare for all of

them. Counsel further submitted that it was the 1<sup>st</sup> Appellant who was holding the bag in which the gun was recovered. PW4 testified that the bag was recovered in the boot. Counsel submitted that PW7 being an eye witness gave independent evidence. According to the Learned State Counsel, all the Appellants knew that there was a gun in the bag.

As to whether there was common intention Counsel submitted that it was at night and 4 Appellants were together. The only inference one can draw is that they were preparing to commit an offence.

On the authorities cited Counsel submitted that none of them applies to the circumstances of this case. They were distinguishable.

The Court of Appeal in the case of **GABRIEL NJOROGE VS REPUBLIC (1982 - 88) 1 KAR 1134** described the role of the first Appellate Court on an Appeal from the subordinate Court in the following terms:-

***“...As this Court has constantly explained, it is the duty of the first Appellate Court to remember that the parties to the Court are entitled, as well on the question of fact as on the question of law to demand a decision of the Court of the first Appeal, and as the Court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and to make due allowance in this respect.....”***

I will endeavor to discharge this burden in this Appeal. The Appellants were convicted on the basis of the evidence tendered by PW4, PW5, PW6, PW7, PW9 and PW10. It would appear that an offence of preparation to commit a felony is committed where:-

***“.....Any person is found armed with any dangerous or offensive weapon in circumstances that indicate that he was so armed with intent to commit any felony.....”***

So that and as was stated in the case of **ALI OKUMU ODIMA (supra)**, for a conviction to result under Section 308 (1) it must be proved beyond reasonable doubt that the person had been found armed with a dangerous or offensive weapon in circumstances that indicate that he was also armed with intention to commit a felony.

In the instant case none of the Appellants were found armed with dangerous or offensive weapon. The evidence on record clearly shows that the alleged gun was found in a boot of a vehicle in a bag. Although PW7 stated that he had seen the 1<sup>st</sup> Appellant holding the bag in which the gun was allegedly found, it is not clear how the said bag eventually found itself in the boot. Further one would imagine, that if indeed the Appellants were bent on committing a felony, it would not have been necessary for them to lock away the gun in the boot of the vehicle. If they were desirous of committing the felony to my mind, they would have retained the gun within their easy reach. In any event which felony were they contemplating on staging. No evidence at all was led on this aspect of the matter. The Appellants had not acted in such a way as to arouse any suspicion that they were about to commit felony. As correctly pointed out by the Learned Counsel for the Appellants there was no overt act by the Appellants or any of one of them showing that they were bent on committing a felony or any other mischief. They could have been gun runners. Appellants were driven to the Police on mere suspicion that they were not good people. The basis of the suspicion was not disclosed. Further the person who set the alarm bells ringing was not even called to testify so as to bring to fore the basis of his suspicion.

I do not agree with the submission of the Learned State Counsel that because the Appellants were together and it was at night the irresistible inferences to be drawn must be that they were intent on committing a felony. The offence of preparation to commit a felony is a serious offence which carries a minimum jail term of seven (7) years. Being a serious offence, it behooves the prosecution to lead such evidence as would prove beyond reasonable doubt each and every ingredient of the offence. Unfortunately this was not done in the instant case here.

The evidence tendered did not also show common intention. The mere fact that the 1<sup>st</sup> Appellant paid the fares for the other Appellants cannot be the basis of concluding as the trial Magistrate did that they had common intention. The prosecution was bound to bring forth evidence that was suggestive of common intention among the Appellants to commit a felony. People pay fares for others all the time. Yes the Appellants might have been together when they entered the motor vehicle or might even having been traveling together. But that in itself does not mean that they had formed common intention to commit a crime. People travel in groups all the time.

I also note that it is PW7 who claimed that the 1<sup>st</sup> Appellant was the owner of the bag in which the gun was found. However this witness did not point out what was so special or specific regarding the bag that made him connect it to the 1<sup>st</sup> Appellant. It should not be forgotten that all this happened at night. There were over eighteen passengers in the motor vehicle. There were also several bags in the motor vehicle. The possibility that the said bag belonged to another passenger cannot be ruled out. It is also important to note that at the police station nobody claimed ownership of the bag. Further the way the search was conducted at the police station left a lot to be desired. All the passengers were ordered out of the motor vehicle and into the office where the inspection was done. It would have been desirable if each passenger with a bag was ordered of the motor vehicle carrying his or her bag.

Was the ownership of the bag in which the gun was allegedly found established. I do not think so. According to PW7, he saw the bag with the 1<sup>st</sup> Appellant. However PW4 testified that PW7 had told him that it was the 4<sup>th</sup> Appellant who was in possession of the bag. Although the Learned State Counsel dismissed this discrepancy, as minor and of no consequence, I do not agree. There was also discrepancy noted regarding the Firearm serial number and the ammunition calibre. What was stated in the charge sheet and in evidence is at variance. If indeed the police recovered the gun in the bag belonging to one of the Appellants as claimed, then why should there be discrepancies in the testimony of the witnesses. When one considers these discrepancies alongside the defences advanced by each of the Appellants, a doubt is created as to whether the bag recovered with the gun inside belonged to them.

Regarding the words “**being in possession of**” Learned State Counsel invited this Court to consider the definition given to the words in the penal Code. I have carefully considered the definition. To me the prosecution in order to prove that the Appellants were in possession of the gun, they ought to have led evidence to show that the bag and or gun were in the personal possession of any of the Appellants, or that the Appellants and each one of them knew that the gun was in the possession of one of them. The Prosecution in my view as unable to discharge this obligation. The circumstances under which the gun was recovered did not irresistibly show that the Appellants or any one of them knew that they were in possession of the gun or that any one of them had exclusive possession and control of the same.

In my view therefore the conviction of the Appellants on the joint charge of preparing to commit the felony was unsafe. Mere inference is not proof. The Court was duty bound to ensure that evidence was led to prove that the Appellants were together in a manner suggestive that they intended to commit a felony. As the onus of proving that the bag in which the gun was found belonged to the 1<sup>st</sup> Appellant or any of the Appellant was not discharged beyond reasonable doubt, I also find and hold that the conviction of the 1<sup>st</sup> Appellant on the counts of being in possession of a firearm and ammunition cannot be sustained.

As regards the conviction of the 3<sup>rd</sup> Appellant on one count of being in possession of narcotic drugs, I think that the conviction was safe. Contrary to the submission by the Counsel for the Appellant, PW4 testified as to how on searching the 3<sup>rd</sup> Appellant, he recovered rolls of bhang in his front pockets of the trouser. Further contrary to the submission by Learned Counsel for the 3<sup>rd</sup> Appellant that the bhang was not produced in evidence as an exhibits, it is on record that the same was produced as an exhibit by PW5. On the defence by the 3<sup>rd</sup> Appellant that the bhang was planted on him, the question posed by the Learned State Counsel is pertinent – why would the Police plant the bhang on this Appellant alone and not the rest? For the forgoing reasons I would dismiss the 3<sup>rd</sup> Appellants appeal as regards this conviction.

In conclusion, I would allow the 1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Appellants Appeal on conviction and sentence for the offence of preparing to commit a felony. Similarly I would allow the 1<sup>st</sup> Appellant's appeal on the conviction and sentence for being in possession firearm and ammunition. As for the 3<sup>rd</sup> Appellant I dismiss his Appeal on conviction and sentence on the count of being in possession of Narcotic drugs to wit bhang. However since he appears to have served the sentence imposed in full, he will be released as well.

All in all, each Appellant shall be set at liberty forthwith unless lawfully held for another cause.

Dated at Nairobi this 22<sup>nd</sup> day of March, 2006.

.....

**MAKHANDIA**

**JUDGE**