



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

**Criminal Appeal 336 of 2004**

**CHARLES KYALO KIVUNZA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

The Appellant **CHARLES KYALO KIVUNZA** is charged with **PREPARATION TO COMMIT A FELONY** contrary to **Section 308(2)** of the **Penal Code**. The particulars of the charge were: -

*On 28<sup>th</sup> March 2004 at Nairobi West, Muthaiti/Mai Mahiu road, Langata within the Nairobi Province jointly with another not before court, and not being at the place of abode, were found with an article for use in connection with burglary namely a metal cutter.”*

The evidence of the Prosecution was that PW1 was a guard of business premises at Mai Mahiu in Nairobi West. He said he noticed two people walk past the area three times. He decided to wake up the business people in the area and he woke up PW2. It was 1.00 a.m. That shortly later PW1 and PW2 saw three people come and touch the padlock of the hardware shop at the centre. The two chased them and managed to apprehend the Appellant. They took him to Nyayo Police Post from where PW3 collected him at 5.00 a.m. the same morning.

In his unsworn defence, the Appellant stated that he was a painter who also sold polythene bags. That he met people at 9.00 a.m. who arrested and detained him. That they took his money and beat him up before taking him to Nyayo Police Station, where the Police declined to re-arrest him. They called Langata Police Station who sent a person to arrest him. He denied the charge.

In the Appellant’s petition of appeal he raises only two grounds: -

**One, that the charge was not proved as required.**

**Two, that the prosecution failed to summon four members of public whose statements were recorded.**

The Appeal was opposed. **MR. MAKURA** learned counsel for the State submitted that the prosecution adduced overwhelming evidence against the Appellant. That the evidence of PW1, that the Appellant was arrested with a metal cutter at 1.30 a.m. was corroborated by PW2.

I have carefully analyzed the evidence adduced before the trial court and re-evaluated the same, bearing in mind that I neither saw nor heard the witnesses and giving due allowance. See **OKENO vs.**

## **REPUBLIC EA 32.**

In order to sustain a conviction for the offence of **Preparation to commit a felony**, contrary to **Section 308(2)** of the **Penal Code**, the prosecution must prove the following essential ingredients.

- 1. That the Appellant was not at his place of abode.**
- 2. That he was found with an article.**
- 3. That the article was for use in the course of or in connection with any burglary, theft of cheating.**

See **MUIRURI vs. REPUBLIC 1983 KLR 205.**

The learned trial magistrate had to make a finding whether the article that the Appellant was found with, the metal cutter, was made or adopted for use in committing burglary, theft or cheating. The learned trial magistrate, after summarizing the evidence adduced before him clearly shifted the burden of proof from the prosecution to the defence. The learned trial magistrate stated that the Appellant could not have been arrested at 9.00 p.m. as he claimed because;

***“It could not have been possible for accused to be arrested without the members of public noticing the same. The only inference left out is that accused was arrested in the wee hours of the night 1.30 a.m. as the prosecution witnesses place it. Secondly accused said that the 2 people who were also detained in the house paid Kshs.2,000 and they were released. Accused said he gave his assailants Kshs.5,303/-. I wonder why he was not released when 2 people were released on payment of Kshs.2000/-. It is even interesting that accused did not talk of the bicycle or money at cross-examination by PW1 and PW2 who handled him that night. I am convinced the accused’s defence is an afterthought and I proceed to dismiss the same. Court find (sic) accused guilty and convict him accordingly.”***

No where did the learned trial magistrate analyze the evidence adduced by the prosecution at all or vis-à-vis that adduced by the defence. The issues for determination and the decision on the issues were not stated in this Judgment. The learned trial magistrate misapprehended the ingredients of the offence before him and consequently failed to direct himself on the issues for determination. There was therefore no finding whether the metal cutter that was produced in court as an exhibit, and which the prosecution said was in the Appellant’s possession at the time of arrest, was made or adopted for use in committing the offences mentioned.

I have re-analyzed the evidence adduced before the trial magistrate. PW1, the guard who saw people passing several times by the business premises he was guarding did not claim to anyone that those he saw passing earlier were the same as the Appellant and his group. The road next to the premises that PW1 was guarding was a public road. Any person was free to pass there. PW1 and PW2 said they saw the Appellant and his group touch a hardware shop. They then shouted at them and chased them before apprehending the Appellant. The metal cutter was retrieved from the Appellant’s jacket pocket. It is clear that no attempt had been made by the Appellant to use the metal cutter at the time of his arrest. The trial court ought to have made a specific finding on the metal cutter. The court made no mention of the said article and since it is not before this court, I am unable to know whether absence of the specific finding that the metal cutter the Appellant was found carrying in his pocket could be adopted or be used in burglary or stealing, the charge against the Appellant could not stand.

I agree with the Appellant that the prosecution failed to prove the charge as required in law. The conviction was therefore unsafe. I allow this appeal, quash the conviction and set aside the sentence. The Appellant should be set free unless he is otherwise lawfully held.

Dated at Nairobi this 15<sup>th</sup> day of March 2006.

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**LESIIT, J.**

**JUDGE**

Read, signed and delivered in the presence of;

Appellant in person – present

Mr. Makura for the State

CC: Huka

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**LESIIT, J.**

**JUDGE**