



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

Criminal Appeal 138 of 2004

(From Original Conviction (s) and Sentence(s) in Criminal Case No. 339 of 2002 of the Principal Magistrate’s Court at KITUI (M.N. GICHERU –SPM) on 27.7.2004)

NAFTALI SAIGURAN OLE KASARO.....
APPELLANT

VERSUS

REPUBLIC
RESPONDENT

JUDGEMENT

NAFTARI SAINGULANI OLE KASORO alias **MASAI** was charged with **PREPARATION TO COMMIT A FELONY** contrary to section 308(2) of the Penal Code. He was convicted after a full trial and sentenced to four years imprisonment. He appeals against both these conviction and sentence.

The brief facts of the prosecution case was that the two arresting officers PW1 and PW2 P.C.Kisero and P.C.Mutinda respectively were on night foot patrol duties on the night in question. That at around midnight, while at Bondeni area of Kitui, they heard two people walking. They ordered them to stop but instead of obliging they ran away. P.C. Kisero and P.C Mutinda chased and managed to arrest one of them who is the appellant in this case. P.C. Mutinda said the arrest was near a river. They searched the appellant and found a torch and sheers in his pocket. Both police officers concluded that the sheers were used to cut iron sheets and suspected the appellant was out to commit burglary due to an increase in similar incidents. The appellant was charged as before court.

The appellant denied the offence in his defence. The appellant’s grounds of appeal was that he was arrested on his way home and that he was alone. That his profession was hawking and necessitated him to walk from place to place.

Mr. O’mirera for the state submitted that the evidence adduced by the prosecution was sufficient to warrant the conviction. That the appellants defence was not plausible and having been found on the road and having run away, Section 111 and Section 119 of Evidence Act applied.

I have carefully considered this appeal together with the evidence adduced before the trial court in support of the charge. The burden is on the prosecution to prove its case against an accused beyond any reasonable doubt. The provisions of Sections 111 and 119 of Evidence Act can only be applied in appropriate cases. The burden is on the prosecution to prove that facts and circumstances existed which

form the facts and circumstances necessary to prove the offence charged under Section 308(2) of the Penal Code.

Section 308 (2) provides as follows:-

“ 308 (2) Any person who when not in 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.”

It is not denied that the appellant was not at his place of abode at the time of arrest. The appellant contests the time of arrest saying it was 11pm and not 2am as both prosecution witnesses stated in their evidence. From the evidence of P.C Kiseru, the appellant was walking along a public road and P.C. Mutinda stated that it was a public road near a river. In MUIRURI VRS REPUBLIC 1983 KLR 205 Abdallah J, held

“The essential ingredients of the offence of preparing to commit a felony under Section 308 (2) of the Penal Code are that:-

(a) The person was not at his place of abode;

(b) He was found with an article;

(c) The article was for use in the course of or in connection with a burglary, theft or cheating.”

Learned Judge went on state:-

“ In order for the against the accused to succeed, it was an essential ingredient of the offence to make a finding that the articles with which the accused was found, were made or adopted for use in committing a burglary, theft or cheating.”

In the instant case the learned trial magistrate observed concerning the torch and tin snips the appellant was found with as follows:-

“the articles that the accused had in his possession at that hour must have been for use in commission of an offence....”

That finding does not relate well with the charge against the appellant. The prosecution had in the particulars of the charge relied on the facts:-

“had with him an article for use in the cause of or in connection with burglary or theft namely tin snip (iron sheet cutter).”

The learned trial magistrate ought to have made a specific finding that the torch and sheers were for use or adapted for use in burglary or theft.

Be that as it may, the facts of the case were that the appellant was found walking on a public road and more specifically, near a river. It does not make a significant difference whether he was alone or was accompanied by another. A torch is not an article used to commit burglary or theft. A pair of sheers was not manufactured for use for burglary or theft. The prosecution needed to adduce facts which would justify the court to find that indeed the appellant’s intention in having the articles in his possession was

for committing burglary or theft.

In discussing this issue further **Trevelyn** and **Todd, JJ** in Peter Mwangi and others vrs Republic 1979 KLR 21, the Learned Judges were of the view that adaptations of articles for purposes of burglary, theft or cheating must be proved in addition to establish that the offender was near a dwelling house intended to be broken into. In the instant case both tests when applied do not succeed. The appellant was on a public road and not near any building or dwelling house. Secondly the torch and sheers he had were not articles made for use in burglary or theft and no evidence was adduced to show that they had been adopted for such use.

In the circumstances I find that the learned trial magistrate misdirected himself as to the ingredients necessary to be adduced to prove such the offence against the appellant. The conviction was unsafe and is quashed and the sentence set aside. The appellants appeal is allowed. The appellant should be set free unless he is otherwise lawfully held.

Dated at Machakos this 31st day of May, 2006.

J. Lesiit

JUDGE