REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL 309 OF 2004

SAMUEL THABU GATHAIYA…….....…….APPELLANT

VERSUS

REPUBLIC…….....…….RESPONDENT

JUDGMENT

The appellant was charged with preparation to commit a felony contrary to Section 308 (1) of the Penal Code. The particulars of the offence were that on the night of 8th and 9th of January 2004 at Nguva Farm Subukia in Nakuru District of the Rift Valley Province, he was found armed with a dangerous and offensive weapon namely an axe in circumstances that indicated that he was so armed with intent to commit a felony namely assault.

After a full trial the appellant was convicted and sentenced to 18 months imprisonment. He was aggrieved by the said conviction and sentence and preferred an appeal to this court. The appellant was unrepresented and in his petition of appeal he stated that there was no evidence tendered before the trial court to suggest that he was armed with an axe with intent to commit any offence. This being the first appellate court it is mandated to examine and analyse the evidence that was tendered before the trial court and reach its own independent conclusion as was held in ***OKENO V REPUBLIC [1972]EA 32.***

The prosecution evidence before the trial court was that the complainant, **Margaret Wangare Ngatia (PW1),** was a neighbour to the appellant. On 8th January 2004 at about 9 p.m. the complainant was at her home and as she was going to close the door to one of her houses she found the appellant at the door pulling an axe ready to cut her. PW1 alleged that the appellant ordered her to open the door and not to scream and also abused her. She screamed and closed the door. She further alleged that her neighbours came and the appellant ran away. She said that she had a lanten lamp and was able to recognize the appellant. She then went to the police the following day and reported the incident.

PW3, Police Constable James Mule who was at the time attached to Subukia Police Station confirmed that PW1 made a report at the said police station on 9th January 2004. He said that the complainant led him to the appellant's home and he arrested him.

The only independent witness who was called by the prosecution was **Ngugi Muchiri (PW2)** who said

that he was a neighbour to PW1 and the appellant. PW2 testified that on 8th January 2004 at about 8.30 p.m. he heard screams from the home of PW1. He went out of his house and saw a person running and he told his sons to follow up that person. However, he did not identify the person who was running. He never went to the home of PW1 to find out why there were screams emanating therefrom.

In his defence the appellant denied having gone to the complainant's home on the material day and said that he was with his parents and siblings at their home. He further stated that he used to work for the complainant's mother and she refused to pay him Kshs.7,600/- and according to him, the complainant had fabricated the case so that he could not claim his money.

The trial court held that the prosecution had established its case beyond reasonable doubt and proceeded to convict and sentence the appellant.

Mr. Koech, learned state counsel, did not support the conviction and in my view rightly so, as he said the same was unsafe.

Having carefully considered the evidence that was adduced by the prosecution before the trial court, I am not satisfied that the evidence of PW1 was sufficient to form the basis of a conviction. If the complainant screamed and neighbours heard the screams and went to her home on the material night, I would have expected one of those neighbours who went to the complainant's home to have been called as a witness. That was not done. Secondly, even if the complainant had a lantern lamp on the table of her house it was not stated whether the lamp was bright enough to illuminate the door of an external house which she said she was going to open when she met the appellant. The identification evidence was totally insufficient. Thirdly, the complainant said that at the material time she was with her sister's two children. None of those children were called as witnesses.

The evidence of PW2 was not material because he said that he did not know the person whom he saw running from the complainant's house on the material night.

PW3 never carried out any independent investigations to verify the truth of the complainant's allegations. All in all I am satisfied that the appellant's conviction was unsafe as there was no evidence to connect him with the alleged offence. I therefore allow the appeal and quash the conviction. It is unfortunate that the appellant has served the full imprisonment term and therefore it would make no difference for this court to set aside the sentence.

DATED, SIGNED and DELIVERED at Nakuru on this 29th day of June, 2006.

D. MUSINGA

JUDGE

29/6/2006

Judgment delivered in open court in the presence of the appellant and Mr. Koech for the state.

D. MUSINGA

JUDGE

29/6/2006