**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA**
**AT MOMBASA**

**Criminal Appeal 160 of 2005**

**Furaha Kahindi Karisa……APPLICANT**

**Versus**

**Republic……..RESPONDENT**

**Consolidated with**

**Criminal Appeal No 147 of 2005**

**STEPHEN MUOKI PHILIP……..……...….APPLICANT**

**VERSUS**

**REPUBLIC…….…….RESPONDENT**

**Crimninal Appeal No 126 of 2006**

**KENNEDY ALIAS OCHIENG OPIYO……...…….....APPLICANT**

**VERSUS**

**REPUBLIC……..……RESPONDENT**

**Criminal Appeal No 155 of 2005**

**FRANCIS KITSAO MWAMUNDA……....…….APPLICANT**

**VERSUS**

**REPUBLIC……..RESPONDENT**

**Criminal Appeal No 156 of 2005**

**FURAHA KAHINDI KARISA**

**STEPHEN MUOKI PHILIP**

**KENNEDY ALIAS OCHIENG OPIYO**

**FRANCIS KITSAO MWAMUNDA…….....…….APPLICANT**

**VERSUS**

**REPUBLIC……...……..RESPONDENT**

**JUDGMENT**

The 1st,2ndd, 3rd and 4th appellants herein namely Furaha Kahidi Karisa, Stephen Muoki Philip, Kennedy Elias Ochieng Opiyo and Francis Kitsao Mwamunda were jointly tried on a charge in Count 1 of preparation to commit a felony contrary to Section 308(a) of the Penal Code. The particulars of the charge are that on the 13th day of February 2005 at about 5.30 am Vuvu Rawimbi village, Kaloleni location in Kilifi district of Coast Province jointly were found armed with swords and a knife with intent to commit a felony namely robbery. Furaha Kahindi Karisa, the4th appellant faced a separate charge in count II of being in possession of Narcotic Drugs contrary to Section 3(1) as read with Section 3(2)a of the Narcotic Drugs and Psychotropic substances Control Act of 1994. It is said that on the 13th day of February 2005 at Kaloleni Police Station Kaloleni Location in Kilifi District of Coast Province was found being in possession of Narcotic Drugs (bhang) to wit 12 rolls.

After undergoing a full trial, all the appellants were convicted on Count 1 and each sentenced to serve 10 years imprisonment. The 1st appellant was also convicted on Count II and sentenced to serve 5 years imprisonment.

Being dissatisfied with the decision, each of the appellants filed an appeal. The appeals were ordered consolidated by an order of this court of 9th May 2006 upon the application of Mr Mondah the learned state Counsel.

After a careful perusal of the grounds raised on appeal, it is apparent that all the appellants raised the following three main grounds.

(a) That the appellants were tried on a defective charged in that the offence was based on a non-existent section of the law and that the charge did not state the essential ingredients of the offence.

(b) That the evidence tendered did not prove the charge the appellants were convicted for.

(c) That the sentence slapped on the appellant was harsh and excessive.

When this appeal came up for hearing, Mr Mutisya Advocate appeared for the 2nd Appellant. The 1st, 3rd and 4rh appellants who appeared in person were allowed to rely on written submissions. Mr Mondah Learned State Counsel conceded to the appeal on the grounds largely set out by the appellants.

The facts leading to this appeal are short and straightforward. At about 6.00 on the 13th day of February 2005, Mackenzie Charo Taura (P W 1) came out of his shop and upon reaching at the verandah of his shop he saw four people standing in front of this shop‘s door as though they were preparing to break into the said premises. P W 1 said the quartet were armed with pangas which were hidden. PW 1 said he saw the 4th appellant his neighbour to be among them. PW 1 further told the trial court that the 1st appellant told him that he was the one they were searching for. At this juncture P W1 said he got scared and was prompted to rush back to the house to inform his brothers Ruwa Kahindi (PW 2) and Milton Shida (PW 3). The duo came out to check on the quartet. When the quartet saw P W 1 and his two brothers, they ran away. The trio screamed for help from the neighbourhood while they gave a chase. Shortly, the 1st and 2nd appellants were arrested. 2 pangas in a nylon paper bag were recovered from the 1st appellant. The 1st and 2nd appellant plus the two pangas which were also referred to as swords were handed over to the Kaloleni Police Station. Twelve rolls of bhang were recovered from a bag in possession of the 1st appellant. The rolls of bhang were taken for examination and found to be bhang according to the

definition given on the Narcotic Drugs and Psychotropic Substances Control Act. The 1st appellant led the police to the home of Kitsao Mwamunda (4th Appellant) where the 3rd appellant was found and arrested. The appellants were thereafter arraigned before court and subsequently convicted and sentenced hence this appeal.

Each of the appellants denied committing the offence. They all gave unsworn testimonies when called upon to defend themselves. The 1st appellant said he had gone to visit his friend, the 4th appellant on 12th February 2005 where he spent the night. While on his way back home he was intercepted by people on the way alleging he was a thug. He said the crowd took him to the police station where he explained his story upon which the police requested him to take them to the 4th appellant's homestead where he was then arrested. The 2nd appellant said he was on his way back home from visiting a herbalist when he was arrested by a group of youths who were armed with clubs and rungus claiming they were security vigilantes looking for visitors who had come to their village the previous day. The 2nd appellant said he was set upon by the group and in the process he received a thorough beating before being taken to the police station. The 3rd appellant said he was arrested on the date he went to take money to the 4th appellant to enable him buy coconut for him.

He said as he was leaving police officers led by the 1st appellant arrived and searched them before arresting them. The 4th appellant gave a near similar account of story.

The issues raised on appeal were raised before the trial magistrate. On the first ground of appeal, it is argued that the appellants were tried on a defective charge sheet in that the section quoted did not exist and that the ingredients of the offence were not stated. The Learned Resident Magistrate considered the issues and came to the conclusion that the defect was a mere irregularity which did not cause any miscarriage of justice. I have reconsidered the arguments over this issue. It is conceded by the state that the defects pointed out were fatal hence a conviction should not have been reached. The truth of the matter is that Section 308(a) does not exist in the penal code. The drafters of the charge must have intended to prefer a charge under Section 308(1) of the penal code. The responsibility of drafting the charge is always that of the prosecution. It is however the primary duty of the trial magistrate to satisfy himself that the section of the penal code under which an accused person is charged is correct before assuming jurisdiction to try the case. In this case the Learned Resident Magistrate noted the defect but found it to be a merely irregularity which did not cause a failure of justice on the part of the appellants. After a careful reconsideration of the matter, I am satisfied that the appellants in this case were in no way prejudiced by the defect. I am also convinced that the appellants understood the substance and the essence of the charges against them.

The second limb of the defect pointed out in the charge is that the swords and knife were not indicated to be dangerous and offensive. This aspect was also considered by the learned Resident Magistrate. The learned Resident Magistrate acknowledged the fact that the words 'dangerous" and 'offensive' were not mentioned. He said there was evidence that the swords and the knife were dangerous and offensive, so that whether or not the aforesaid ingredients were mentioned in the charge sheet, it did not matter. I have reconsidered the submissions of the parties vis avis the reasoning of the learned Resident Magistrate. With great respect, the learned Resident Magistrate misinterpreted the decision of the court of Appeal in the case of Nyadenga =vs= [1989] KLR 514. In one of its holding, the court of Appeal said:

"The omission of that ingredient plus the failure to lead evidence to show that those weapons were either dangerous or offensive made the charge totally defective" it would appear the learned Resident Magistrate was of the view that so long as the prosecution led evidence to establish that the swords and knife were dangerous or offensive, a conviction will be sustained despite the fact that the ingredients are not specified. The position taken by the learned Resident Magistrate obviously flies on the face of the same decision. The ingredients must be specified. The charge will be fatally defective for want of such ingredients. It suffices to reproduce the whole holding of the court of Appeal in the aforesaid case of Nyadenga =vs= Republic (supra) as follows:-

(i) an accused person commits the offence of preparation to commit a felony under section 308(1) of

the penal code if he is found first to be armed with a dangerous offensive weapon and secondly in circumstances indicating that he was so armed with the intention of committing a felony.

(ii) These gradients of the offence under S 308(1) of the penal code must be specified. Any omission of any one of the these ingredients will render the charge for such offence defective to the extent that it discloses no offence.

(iii) If such charge is not sufficiently amended, on appeal, a conviction thereon will be quashed.

(iv) The words "dangerous or offensive weapon" contemplates the weapon being used to cause peril or intended for or used in attack.

(v) A panga and a rungu are not per se dangerous weapons but can be used to inflict injuries on people. The failure to indicate in the particulars of the offence that the panga and rungu were either dangerous or offensive weapons amounted to an omission of one of the ingredients of the offence.

(vi) The omission of the ingredient plus the failure to lead evidence to show that those weapons were either dangerous or offensive made the charge totally defective. The charge disclosed no offensive and conviction arising from it could not stand.

It is clear beyond peradventure that the failure to indicate the ingredients of the offence in the charge renders the charge fatally defective. The evidence tendered by the prosecution proved particulars of an offence which were not specified in the charge sheet.

This ground sufficiently disposes of the whole appeal in respect of Count I hence I do not need to belabour considering the other grounds.

The offence in Count II faced Furaha Kahindi Karisa, the 1st appellant herein. He was convicted and sentenced to serve 5 years imprisonment. Mr Mondah, the Learned State Counsel conceded that there was no evidence to establish the type of drugs found with the appellant hence the second II was not proved. The 1st appellant did not address this court in respect of the appeal as against the decision on Count II. The evidence of P C Daniel Ndiku (PW 4) sought to support the offence in count II. PW 4, said he searched a small travelling bag in possession of the 1st appellant and recovered twelve rolls of cigarettes which were later forwarded to the Government Chemists for analysis. P W 4 said he later received the Government Chemist Report showing that the cigarettes were Cannabis Sativa (bhang). I am satisfied that there was evidence proving the offence in count II beyond reasonable doubt as against the 1st appellant. The law under Section 3(2) of the Narcotic Drugs and Psychotropic Substances (Control) Act 1994requires that there must be evidence that the offender intended for his own consumption. The record show that no such evidence was tendered. In the absence of such evidence the trial court is left with no option but in infer from the amount of Cannabis Sativa recommended, whether the same was intended for sale or for own consumption. I am satisfied that the 1st appellant was correctly sentenced from an inference that the Cannabis Sativa found in his possession was for his own consumption. The sentence prescribed in such circumstances is a prison term of 10 years. In this case the 1st appellant has been sentenced to 5 years imprisonment. The sentence in my view is neither harsh nor excessive. I think the learned state counsel improperly conceded to the appeal in the second count.

For those reasons, I allow the appeal against conviction in Count 1. Consequently I quash the conviction and set aside the sentence. The appeal against conviction and sentence in Count II is dismissed. The appellants are hereby set free forthwith in respect of Count 1 save that the 1st appellant, namely Furaha Kahindi Karisa shall continue serving sentence passed in Count II.

Sergon, J

July 28, 2006