REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 161 of 2005

(From original conviction (s) and Sentence(s) in Criminal Case No. 2459 of 2004 of the Senior Resident Magistrate's Court at Kiambu (D. Mulekyo - SRM)

PETER MAINA KIBORO…..…….....
……..APPELLANT

VERSUS

REPUBLIC…….....…….
……....RESPONDENT

J U D G M E N T

The Appellant was found guilty and convicted for the offence of **PREPARATION TO COMMIT A FELONY** contrary to **Section 308(1)** of the **Penal Code**. The particulars of the offence were: -

"On the 6th day of November 2004 at Karura Kanyungu in Kiambu District within Central Province, was found armed with a dangerous or offensive weapon namely panga in circumstances that indicated that he was so armed with the intent to commit a felony namely Burglary."

After a full trial the Appellant was sentenced to the minimum sentence provided in the law for this offence which is 7 years imprisonment. He now appeals to this court challenging both the conviction and sentence.

The Appellant relied on his amended grounds of appeal in which he cited three grounds of appeal. The Appellant challenged the conviction on grounds that the prosecution adduced inconclusive evidence, that he was framed for this offence and that the sentence was harsh and excessive.

The appeal is opposed.

The evidence of the prosecution was that the Complainant, PW1 and his wife PW2 were asleep at their home when they heard noises in the compound. When the voices became louder both of them went out to investigate. It was 11.00 p.m. On switching on their veranda lights, some people ran out of their compound. They were however able to apprehend one of them. PW1 grabbed one of them and both of them fell and so did a panga the intruder was having. PW2 brought a rope and they tied him up before screaming for help. The intruder turned out to be the Appellant whom they knew before.

The Appellant's defence was that the Complainant was his neighbour. That he sold him milk. That on

the material night the Complainant visited him at night to ask him how much debt he, the Complainant, owed him. He told him Kshs.2,000/-. The Complainant said he would not pay and that he smashed his radio and even struggled with him before he left. That he decided to go for treatment when the Complainant caught up with him in a vehicle into which he was bundled and taken to the Police Station.

The Appellant in his written submissions contends that PW1 should have dusted the iron sheets that the Appellant was alleged to be struggling with when the Complainant switched on the lights. The Appellant contended further that the Complainant and PW2 his wife were inconsistent as to whether he ran away from the Compound holding a panga as the Complainant said or whether the panga fell down as PW2 said. That further whether the fence was cut as the Complainant said or that the fence was intact as PW2 said. Further the Appellant urged court to disbelieve the Complainant that he could have been able to apprehend the Appellant who was holding a panga without the Appellant attempting to use it. Finally the Appellant contended that the only independent witness the prosecution could call was never called in evidence. It was one **Kamau** whom PW2 the Appellant submitted, said had gone to assist them.

Mr. Kimathi learned counsel for the State opposed the appeal. He submitted that there was strong evidence against the Appellant because he was arrested at the scene of crime. Counsel submitted that the Appellant had a panga at the time of arrest.

I have analyzed and evaluated afresh the entire evidence adduced before the lower court within the limitations spelt out in the case of **OKENO vs. REPUBLIC 1972 EA 32** and indeed various other latter cases. The evidence of the prosecution has been challenged on the basis that it was inconclusive. That challenge, in the Appellant's first ground of appeal was a very important ground except that the Appellant did not pursue it except in a general way. Was the charge a preparation to commit an offence contrary to **Section 308(1)** of the **Penal Code** proved? The prosecution needs to prove: -

1. That the accused person was armed with a dangerous or offensive weapon capable of causing injury to a person.

2. He was so armed in circumstances to suggest intention to commit a felony.

See **Muthiori vs. Republic 1981 KLR 468**. **Mwaura vs. Republic 1973 EA 373**.

It is the fact that the Appellant was armed with an offensive weapon in circumstances indicative of an intention to commit burglary as pleaded in the particulars which form the basis for the offence. The panga was the most important piece of evidence that the prosecution could have relied upon to prove this case. It is the fact that the Appellant had a panga inside the Complainant's house at night that was indicative of an intention a *mensrea*, to commit burglary in the Complainant's house. That important piece of evidence was not produced in court as evidence until after the Complainant and his wife had testified. They did not identify the panga the Appellant had at the time they claim to have seen him.

The Appellant also complains of inconsistencies in the evidence of the two key witnesses. I agree with the Appellant. There are inconsistencies of material facts which create uneasiness on my part. The variation in the evidence of the two witnesses whether the intruders cut down the wire mesh which formed their fence as the Complainant stated or that the fence was intact as PW2 said. Whether the Appellant ran 100 metres from the house before arrest after a chase as the Complainant said or in evidence in chief or whether he was still in the compound as the Complainant said under cross-examination. Also, whether help came before the Appellant's arrest as the Complainant said or after he had been tied up and after yelling for help as PW2 said. Considering the inconsistencies against the fact that the panga the two key witnesses recovered from the Appellant was never identified by them and further considering no other evidence was called, the inconsistencies become material. If the witnesses could not agree on simple factual evidence, how reliable was their evidence?.

The Appellant complained of lack of calling one 'Kamau' as a witness. The adverse inference that 'Kamau's' evidence if called may have been unfavourable to the prosecution case is fitting to be drawn in this case. See **BUKENYA vs. REPUBLIC 1972 EA**. The prosecution evidence was hardly sufficient to

sustain the charge. Kamau's evidence would have been very important as he had gone to the scene soon after the alleged offence was committed. At the every least he could have given material evidence touching on the Appellant's arrest.

The Appellant had a reasonable defence and even though he failed to put questions to the Complainant concerning their earlier encounter, the circumstances of the whole case and having regard to the inconsistencies in the prosecution evidence, that failure to cross-examine the Complainant on issues he later raised in his defence cannot be held against him. I find the Appellant's defence was reasonable.

In the whole, having considered this appeal, I find it has merit and allow it. Accordingly I quash the conviction, set aside the sentence and direct that the Appellant should be set free unless he is otherwise lawfully held.

Dated at Nairobi this 26th day of July 2006.

LESIIT, J.

JUDGE

Read, signed and delivered in the presence of;

Appellant - present

Mr. Kimathi for the State- present

Huka CC

LESIIT, J.

JUDGE