REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI

MILIMANI LAW COURTS
CRIMINAL APPEAL NO.1062 OF 1998

CRIMINAL DIVISION

PETER MAINA GATHUA …….....……. APPELLANT

VERSUS

REPUBLIC …….. RESPONDENT

J U D G M E N T

On the 31st March, 1998 at 2.30 a.m. Police Constables Ausgustine Kipngeno Kibego (P.W.I) and William Parmore (P.W.2) based at Nyayo Police Post within Kilimani Police Division were on night patrol in Nairobi West Estate when they met with two people at the junction of Muholo Avenue/Mai Mahiu Road.

Those two people were Peter Maina Gatua (to be referred as "the appellant) and Habel Kawale Mungania (to be referred to as " Mungania"). P.W.I and P.W.2 told Court that the appellant and Mungania were walking through a residential area, which was parked with motor vehicles, and that what drew their attention to the appellant and Mungania was the sudden barking of dogs.

On being questioned where they were going to at that late hour of the night and where they lived, the appellant and Mungania allegedly told P.W.1 and P.W.2 that they live in Nairobi South B Estate and that they were looking for food. P.W.1 and P.W.2 further told the Court that they had received several reports of theft of types from vehicles from various residents of that estate and that they decided to search the appellant and Mungania. They said that the search yielded fruits because the appellant and Mungania were found to be in possession of a car jack, a wheel spanner, tyres lever, screw lever, knife and a sport-light, articles which could be used for stealing tyres from motor vehicles. The appellant and Mungania were arrested and taken to Nyayo Police Post, from where they were later transferred to Langata Police Station.

On the 2nd April, 1998 the appellant and Mungania were charged in the Senior Principal Magistrate's Court Kibera, in Criminal Case No.2439 of 1998, with the offence of preparation to commit a felony contrary to section 308(1) Penal Code. Mungania was the 1st accused while the appellant was the second accused. Particulars of the offence were that: On 31st March, 1998 at around 2.30 a.m. at Nairobi West, Langata within Nairobi Area, not being at their place of fixed abode, were jointly found with one car jack, a wheel spanner, tyre lever, slack screw lever and a sport-light adopted for use in the course of committing a felony.

The appellant and Mungania pleaded not guilty but were convicted after a trial and sentenced on 21st

August, 1998 to 15 months imprisonment with hard labour and to receive three strokes of corporal punishment. They also were placed under police supervision for fine years. Only the appellant has appealed against both conviction and sentence.

There are seven grounds of appeal, which can be reduced to an appeal against conviction and sentence on grounds that the conviction is against the weight of evidence and the sentence was harsh and manifestly excessive. When this appeal came up for hearing on 9/4/2001, the court was informed by Mrs. Nyamosi, a State Counsel, that the appellant had served his sentence and must have been released from prison.

Though the appellant and Mungania had been charged with preparation to commit a felony under section 308(1) Penal Code the particulars of the offence as stated in the charge sheet clearly showed that the charge should have been laid under section 308(2) of the Penal Code which provides:-

> "Any person who, when not at his place of abode, has with him any article for use in the course of or in connection with any burglary, theft or cheating is guilty of a felony, and where any person is charged with an offence under this sub-section 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"

Section 308 (1) of the Penal code, under which the present charge was laid provides:

> "Section 308(1) any person found armed with any dangerous or offensive weapon in circumstances that indicate that he was so armed with intent to commit any felony is guilty of a felony and is liable to imprisonment for not less than seven years and not more than fifteen years"

So that there was a misdescription of the section of the Penal Code in the charge sheet which rendered the charge defective. The issue is whether this defect was fatal to the appellant's conviction.

Dealing with the question of misdescription of the section of the Penal code, a similar situation presented itself in the reported case of **MWASYA V.R. 1967 E.A. 345** where the appellant there had been charged with being in possession of forged currency notes, but instead of citing section 367(a) of the Penal code, which was the proper section of the law on the facts presented to Court, the appellant was charged and convicted for an offence under section 367(e) of the Penal Code.

It was held that a defective charge does not necessarily render a conviction unsustainable and fatal as long as the defect is curable under section 382 of the Criminal Procedure Code i.e unless the error has occasioned a failure of justice. On the facts of that case, a failure of Justice had not been occasioned by that misdescription.

In another case AVONE V. UGANDA 1969 E.A. 129 the appellant there had, by pretending to be the Deputy Minister of Health, got a Police Patrol Car to take him from Kampala to Entebe and accommodation at an Hotel for which he did not pay. He had signed himself in the Hotel Register with the same name and description of Deputy Minister. He was charged with (a) obtaining credit by fraud contrary to section 292, instead of section 292(2), of the Penal Code (b) forgery contrary to section 326, instead of section 326(1) of the Penal Code and(c) Personation contrary to section 360 instead of either 360(1) or 360(2) of the Penal code. It was held that a misdescription in the charge had not prejudiced the appellant and his conviction would stand.

Applying that principle of law to this appeal I am satisfied that the misdescription of the charge under S.308 (1) instead of under S.308(2) of the Penal Code did not prejudice this appellant. In fact the trial magistrate was alive to this misdescription and convicted the appellant for an offence under section 308(2) of the Penal Code.

That is not, however, the end of the matter. From my reading of section 308(2) of the Penal code, I find that there are three specific felonies, which an accused who is found in possession of such articles as these

could have intended to commit i.e. burglary, theft or cheating. It was therefore imperative that the felony, which the appellant and Mungania would have committed using these articles, ought to have been stated in the particulars of the offence. This was not done. However, it is the evidence of P.W.1 and P.W.2 that the felony which the appellant and Mungania were preparing to commit was to steal tyres then go to sell them. The appellant and Mungania therefore know what particulars of the offence they were facing. This omission did not occasion a failure of Justice.

For these reasons I find no merit in this appeal which is hereby dismissed.

It is so ordered.

Dated and delivered at Nairobi at Nairobi this 30th April, 2001

A.G.A. ETYANG

JUDGE