



**Ochieng v Republic (Criminal Appeal E033 of 2024)  
[2025] KEHC 9861 (KLR) (4 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 9861 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
CRIMINAL APPEAL E033 OF 2024**

**WM MUSYOKA, J**

**JULY 4, 2025**

**BETWEEN**

**BENARD OCHIENG ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from judgement by Hon. SC Tirop, Resident Magistrate, RM, in Port Victoria SRMCRC No. E066 of 2024, delivered on 17th September 2024)*

**JUDGMENT**

1. The appeal herein arises from a conviction for the offence of preparation to commit a felony, contrary to section 308(1) of the *Penal Code*, Cap 63, Laws of Kenya. The allegation was that the appellant was found armed with dangerous weapons, on 19<sup>th</sup> February 2024, at 21.00 hours, at Port Victoria. The weapons were said to be a hacksaw blade, wooden axe and two knives. The intent was said to be to steal.
2. A trial was conducted. Five witnesses testified for the prosecution.
3. PW1 was called to the scene after the appellant had been cornered by a mob. He saw him with two knives. There was a security light that the appellant was alleged to have destroyed. A bicycle and a cement sack/bag, with hacksaw and an axe, were found behind the house. PW2 found a crowd saying they had seen a person who had destroyed a security light of his house. He saw the appellant on the ground. PW3 saw the person hitting the security light. He alerted security personnel and caught the appellant as he tried to escape. He said he wanted to cut the billboard and to sell it. He was found with knives.
4. PW4 also saw the appellant interfering with the security light, at the home of his neighbour. She shouted and people came to the scene. The appellant tried to run but was caught by PW3. She saw the appellant pull out a knife and throw it away. He was searched. A bicycle, with a bag, was also found. It had two knives, an axe and a rope. He said he wanted to steal a signpost. PW5 was the investigating



- officer. He arrested the appellant, at the scene where he was being beaten. He found him with a hacksaw holder, an axe and two knives.
5. The appellant was put on his defence, on 27<sup>th</sup> June 2024. He gave a sworn statement, on 18<sup>th</sup> July 2024. He explained, that on the material day, at 8.30 PM, he found people standing somewhere, and he joined them. Then some people in the crowd began to question him, and eventually attacked him, saying that people from his area had killed a woman. He said that he had a bicycle and a shopping-bag. One of the persons hit a security light, at a nearby house, and it became dark. He said he was rescued and taken to the police station.
  6. In the judgment, of 8<sup>th</sup> August 2024, the trial court found the appellant guilty of the offence charged. The trial court analysed the ingredients of the offence charged, citing relevant case law, and concluded that all the elements of the offence had been positively proved. There was possession of the weapons, which were offensive and dangerous, namely knives. There was conduct which suggested preparation or readiness to commit a theft. The appellant was seen by PW3 and PW4 hitting a security light, to create an ideal environment to commit the offence intended. He attempted to flee, when he realized that he had been found out. He expressed what he had intended to do to PW3 and PW 4, that is cutting a signpost or billboard, to remove it for sale. He had a bicycle, to ferry the stolen items, or to effect his escape. Upon his conviction, he was sentenced, on 17<sup>th</sup> September 2024, to seven years imprisonment, to be effective from 12<sup>th</sup> February 2024.
  7. He was aggrieved, hence the instant appeal. He argues that the investigations were shoddy, the evidence was insufficient, and his trial rights were violated.
  8. The appellant submitted in writing. He argues that the ownership of the house, whose bulb was allegedly destroyed, was not proven. He further submits that there was bias, arising from the murder in his area.
  9. The only issue is whether it was established beyond reasonable doubt that the appellant committed the offence that he stood charged of.
  10. There was ample evidence that the appellant was at the scene. There were witnesses who placed him there. He himself conceded to being at the scene. The issue would be whether he was found in the circumstances alleged, of being in possession of weapons, in a manner pointing to preparation to commit a crime.
  11. With respect to weapons, all the witnesses testified to him being in possession of the knives when he was cornered. A knife is a dangerous weapon, depending on how it is used. It can cause death, or a grievous or dangerous harm.
  12. With respect to preparation to commit a crime, there were several factors. One, the fact of possessing the offensive knives. Two, the fact of destroying the security light, as testified by PW3 and PW4. Three, the act of trying to escape or flee from the scene, as testified by PW3 and PW4. Four, the appellant told those present, according to PW3 and PW4, that he intended to steal a signpost or billboard. Those facts were adequate for the trial court to make a finding that there was proof of a possession of dangerous or offensive weapons, and proof of a preparation to commit a felony.
  13. The appellant raises the issue of ownership of the house, whose security bulb he was said have destroyed or attempted to destroy. This was a matter without a complainant. The appellant was not charged with preparing to steal from anyone, but of being found in possession of weapons, in preparation to commit some offence. The ownership of property referred to in the proceedings was irrelevant in the circumstances.



14. On the bias arising from a recent murder by individuals from his area, only he raised that issue. The prosecution witnesses did not testify on it, and there was nothing to establish that that came up, and that it was that issue that propelled the crowd to turn against him.
15. The appellant did not submit on the other issues raised in his grounds of appeal. However, this appeal largely turns on the prosecution not marshalling adequate evidence, to prove the case against him. I have already concluded that there was adequate proof, beyond a shadow of doubt, that he was cornered in circumstances that suggested that he was up to no good, and he was armed at the material time with implements that were dangerous and offensive.
16. I am not persuaded that the appellant was convicted on flimsy evidence.
17. In his revised grounds, he does mention something about his sentence. The petition is not elegantly done, but I am alive to the fact that this appeal is by a lay person.
18. He was sentenced to seven years imprisonment. He had not yet committed the felony intended. Other than the light that was allegedly damaged, there was no other loss or damage to property. No one was hurt. The sentence of seven years is excessive in the circumstances.
19. I believe that the appellant has learnt his lesson, from the trial, the period that he spent in pre-trial remand custody and the time he has spent in prison after conviction and sentence. I believe the time he has spent in custody has been adequate punishment. Consequently, I shall reduce his sentence to the time spent in remand and in prison. The result shall be that he shall be released from prison custody forthwith, unless he is otherwise lawfully held.
20. The appeal is disposed of in terms of paragraph 15, 18 and 19 hereabove. This file shall be closed. Orders accordingly.

**DELIVERED, DATED AND SIGNED, IN OPEN COURT AT BUSIA ON THIS 4<sup>TH</sup> DAY OF JULY 2025.**

**WM MUSYOKA**

**JUDGE**

Mr. Arthur Etyang, Court Assistant.

Mr. Benard Ochieng, the appellant. in person.

Advocates

Mr. Antony Onanda, instructed by the Director of Public Prosecutions, for the respondent.

