Mutune v Republic (Criminal Appeal E051 of 2022)
[2023] KEHC 17572 (KLR) (18 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17572 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL E051 OF 2022

GMA DULU, J

MAY 18, 2023

BETWEEN

ONESMUS KIOKO MUTUNE (ALIAS NGOSO) ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the conviction and sentence in Criminal Case No. E0442 of 2021 delivered on 29th March, 2022 by Hon. Otieno J (RM) in Makueni)

JUDGMENT

1. The appellant was charged with another in Makueni Magistrate's court with preparation to commit a felony contrary to section 308(2) of the *Penal Code*. The particulars of offence were that on December 23, 2021 at 00:30hours at California shop Upendo village Thwake Sub-Location in Mbooni East Sub County of Makueni County not being at their place of abode, had with them an article for use in the course of burglary namely hacksaw.

2. They both denied the charge. After a full trial, the co-accused Alex Nzangi who was 2nd accused in the trial, was acquitted of the offence. The appellant was however convicted of the offence and sentenced to five (5) years imprisonment.

3. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal on the following grounds:-

    1. That he pleaded not guilty to the charge.

    2. The trial Magistrate grossly erred in law and fact in relying on suspicions and fictitious evidence adduced before court and without noting that the appellant was subjected to duress and fear thus incriminating him.

3. The trial Magistrate erred in law and in fact by putting into consideration facts which did not disclose any overt act tending to show that a felony was about to be committed by the appellant.

4. The trial Magistrate erred by failing to observe that the ingredients of the offence of preparation to commit a felony were not proved.

5. The trial Magistrate erred in law and fact by convicting him on unsubstantiated and insufficient proof that the hacksaw blade in question was meant for preparation to commit a felony.

6. The trial Magistrate erred in shifting the burden of proof to the appellant and further ignoring the compelling defence of the appellant without proper evaluation.

7. The learned Magistrate failed to test and caution the evidence of the prosecution witnesses in due circumspection of a flimsy and inconsistent evidence.

8. The trial court erred in law and fact without (sic) observing that there was no substantive investigations by the investigating officer thereby basing the conviction on mere allegations and fabrication evidence.

9. The trial Magistrate erred in law and facts in convicting him (and) a harsh sentence which had no overwhelming evidence.

10. The trial Magistrate omitted to rule on the fate of his motor cycle registration number KMFJ 348A and his mobile phone type Nokia which are still held at Kalawa Police Station. I pray that this High Court make orders of release for the same as the prosecution failed to adduce a prove of evidential value in connecting the said property with the said fabricated offence (sic).

4. The appeal was canvassed through written submissions, and I have perused and considered the submissions filed by the appellant as well as the submissions filed by the Director of Public Prosecutions.

5. This being a first appeal, I am duty bound to consider all the evidence on record afresh, and come to my own independent conclusions and inferences – see *Okeno v Republic* [1972] EA 32.

6. In proving their case, the prosecution called three (3) witnesses. The appellant on his part tendered sworn defence testimony and did not call any additional witnesses.

7. The charge for which the appellant who was with another, was convicted is preparation to commit a felony under section 308(2) of the *Penal Code*. The section provides as follows:-

> '308 (2) 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 adopted for use in committing a burglary, theft or cheating shall be evidence that he had it with him for such use.'

8. In the present case, the appellant was seen at night with a hacksaw and motor cycle by PW1 Justus Andrew Kioko at California shop after midnight, which was not the appellant's place of abode. PW1 restrained the appellant and called a neighbour PW2 Joseph Mutuku Kimuli. Shortly thereafter, the appellant escaped leaving behind his motor cycle and hacksaw, an open shoe, phone and jumper jacket. The appellant then went to report the loss of his motor cycle the same night at Kalawa Police Station, but found PW1 already there and he was arrested and charged with this offence.

9. The learned trial Magistrate in the judgment herein, relied on the definition of the offence of preparation to commit a felony, explained in the case of *Manuel Legasiani & others v Republic* (2000) eKLR, wherein the court stated that to prove the offence, some overt act actually done by the accused had to be shown by the prosecution, to demonstrate that a felony was about to be committed.

10. In our present case therefore, the mere fact that the appellant was seen at that shop at night with a hacksaw, without more, cannot be proof of preparation to commit a felony.

11. However, the evidence of PW1 the owner of California shop is clear that the appellant was with another. The two visitors entered the unlocked kitchen. They then came out of the kitchen and the other man crouched, while the appellant stood on his back, before PW1 appeared and held the appellant, and the other visitor managed to escape.

12. From the evidence as recorded also, though the appellant was immediately led by PW1 to PW2 after being restrained, there is no evidence that the appellant tried to explain what he and his colleague were doing that night at a shop which did not belong to either of them, and instead the appellant just looked for an opportunity to escape and ran away.

13. I note that even at the police station, there is no evidence on record either from the prosecution witnesses, nor from the appellant himself that he attempted to explain what he was doing with the hacksaw at that shop that night. His defence was also contradictory in that he said in evidence in chief that his motor cycle stalled at the shop and that he escaped because he was attacked but in cross-examination, he changed the story and said that he left the motor cycle at the shop to look for a mechanic. Then again he changed his story and said that he was not at California shop that night. It follows that one cannot know which of the three versions is the factual situation.

14. Thus just like the learned trial Magistrate therefore, I find that the prosecution proved the offence of preparation to commit the offence of burglary beyond any reasonable doubt. The defence of the appellant was contradictory and amounted to untruths, which did not shake the prosecution evidence. I will thus uphold the conviction.

15. With regard to sentence, I note that the statutory sentence under section 308(4) of the *Penal Code* is imprisonment with hard labour for 5 years. The appellant had two previous convictions of stealing and in the first one he was sentenced to 8 month's imprisonment. In the second case he was sentenced to 3 years imprisonment.

16. In the present case, he was sentenced to five (5) years imprisonment taking into account his two previous convictions of the stealing. I note that under the same section 308(4) of the *Penal Code*, he could be sentenced for up to 10 years imprisonment due to his two previous convictions of theft. I find the sentence imposed herein to be justified. I will thus also uphold the sentence imposed.

17. As for the appellant's request for release of the motor cycle and the other items, the Director of Public Prosecutions submits that it was for the appellant to have asked for their release from the trial court. The Director of Public Prosecutions suggests however that the items be forfeited to the State.

18. Having not been referred to any specific legal provision relating to forfeiture of the items, in my view, the items should just be photographed and released to the appellant, as nobody else is claiming them.

19. Consequently, and for the above reasons, I dismiss the appeal and uphold both the conviction and sentence of the trial court. I however order that the items of the appellant be released to him or, as he is in prison to his nominee(s).

It is so ordered. Right of appeal within 14 days explained.

DATED, SIGNED AND DELIVERED THIS 18TH DAY OF MAY, 2023 VIRTUALLY AT VOI.

GEORGE DULU

JUDGE

In the presence of:-

Appellant

Mr. Sirima holding brief for Mr. Kazungu for state

Mr. Otolo court assistant