REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 26 OF 2019

ANTHONY KARIUKI NJERU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal against conviction and sentence by Hon. J.W. Gichimu

in Criminal Case No. 255 of 2019 at Runyenjes Court and

delivered on 20.09.2019).

JUDGMENT

1. The appellant herein was charged with the offence of preparation to commit a felony contrary to section 308(1) of the Penal Code. The particulars of the offence being that on 03.05.2018,at about 0345 hours at Ugweri market within Embu County, was found with offensive weapons to wit craw bar in circumstances that indicate that he was armed with intention to commit a felony namely burglary.

2. The appellant being dissatisfied with the said conviction and sentence preferred an appeal on grounds set out in his undated petition wherein he listed the following grounds that:

> ***1)*** *He pleaded not guilty to the charge.*
>
> ***2)*** *The trial magistrate erred in both matters of law and facts when he failed to consider that the crucial witnesses who alleged to have arrested the appellant and did recover the alleged crowbar were not summoned by the prosecution to give their evidence.*
>
> ***3)*** *No photograph was taken at the scene of arrest in support of the offence preferred against the appellant.*
>
> ***4)*** *No evidence was brought against the appellant to show that anyone was injured and that the appellant was in a position to committing a felony.*
>
> ***5)*** *The appellant's defense was not considered at all.*
>
> ***6)*** *The trial magistrate never considered that PW2 and PW3 could have framed up the appellant.*

3. The case proceeded for full hearing and upon considering the evidence adduced before it, the trial court convicted the appellant and sentenced him to seven (7) years in prison.

4. PW1, Joel Ndunga testified that on 03.05.2018, while with other watchmen namely Paul, Kinyua, Njuki and Kagere the Maasai who guard a petrol station informed them that he had seen three men and showed them where they headed. That they managed to arrest the appellant herein, other two ran away and had a metal craw bar which was blue in colour. That previously, a bar had been broken into and all items had been stolen; that when they approached the appellant herein, he hit one of them namely Paul using the crow bar and further that he became violent. That it is at this point that the members of public gathered and wanted to lynch the appellant but they thwarted the attempts. He proceeded to state that he interrogated the appellant herein and he said that he comes from Mwengo. It was his evidence that he knew all the people from the said village and that the ones mentioned by the appellant did not come from the said village.

5. PW 2, Paul Muriithi testified that on 03.05.2018, he received a call from a Maasai who is a fellow watchman at a petrol station. He stated

that the said watchman told him that he had seen a motor cycle come, stop at the road block and then sped away. It was his evidence that three people later came armed with pangas and crow bars and they managed to follow them but they did run away. That the appellant herein who was one of them hit his leg with the bar when they finally caught up with him in his hiding place and on blowing whistles, members of public responded by coming out and they started beating the appellant. Upon cross examination, he reiterated that the appellant seemed new in the area and that it was the members of the public who beat him up.

6. PW3, Peter Kithaka stated that he was the investigating officer in the matter and that the accused had been arrested by Sgt. Agnes and P.C. Koech.That the appellant had denied being in possession of the crow bar; he further stated that he was in company of two others who ran away with the motor cycle. That the watchmen managed to arrest the appellant who in the process, attempted to assault PW2.

7. The prosecution proceeded to close its case and vide a ruling delivered on 09.08.2019, the appellant was placed on his defence after the court found that the prosecution had established a *prima facie* case.

8. DW1, Anthony Kariuki Njeru (appellant herein) gave an unsworn statement and stated that he was a boda boda rider who worked in Embu. That on the material date, he was approached by two people who had requested him to take them to stage and so, it turned out that it was an attack and so he switched off his motor cycle and the next thing he realized was that he was at Runyenjes Hospital. It was his case that he never saw the alleged crow bar and further that he could not even identify it; he denied having committed the offence and prayed that he be acquitted of the charge.

9. The defence proceeded to close its case and the trial court via a judgment delivered on 20.09.2019 convicted and sentenced the appellant to seven in prison. It is that conviction and sentence that is the subject of appeal before this court.

10. This being a first appeal, this court has a duty to reconsider and re-evaluate the evidence to arrive at its own conclusion. In the case of **Kiilu and Another v R [2005] l KLR 174.** The court of appeal stated the principles governing the hearing of first appeals as follows:

> ***An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.***
>
> ***It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court' findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses"***

11. On evaluating the evidence, I note that the parties herein never filed any submissions despite the court's direction to do so, I have narrowed down the issue for determination to be whether the case was proved beyond reasonable doubt and whether the sentence meted out was excessive in the circumstances.

12. Section 308(1) of the Penal Code provides thus;

> ***"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 of not less than seven years and not more than fifteen years."***

13. The Court of Appeal in **Manuel Legasiani & 3 others v Republic[2000] eKLR** defined the offence as follows;

> ***"The word 'Preparation' is not a term of art. In its ordinary meaning it means "the act or an instance of preparing" or "the process of being prepared". This is the meaning ascribed to the word "Preparation" in the Concise Oxford Dictionary, Eighth Edition. To prove the offence in question some overt act, to show that a felony was about to be committed, has to be shown. Mere possession of a fire-arm not coupled with such an overt act is not an offence under section 308(1) of the Penal Code."***

14. In **P v Murray (14 Cal. 159)** it was held that:

> ***"Preparation consists in devising or arranging the means or measures for the commission of the offence; the attempt is the direct movement toward the commission after the preparations are made."***

15. To proof the offence of preparation to commit a felony, there must be an overt act to show that an offence is about to be committed. A departure from this definition is given in the case of **Re. T. Munirathinam Reddi A.I.R 1955 And. Prad. 118** where it was held thus:

> ***"The distinction between preparation and attempt may be clear in some cases, but in most of the cases, the dividing line is very thin. Nonetheless, it is a real distinction. The crucial test is whether the last act, if uninterrupted and successful, would constitute a crime. If the accused intended that the natural consequence of his act should result in death but was frustrated only by extraneous circumstances, he would be guilty of an attempt to commit the offence of murder."***

16. In view of the foregoing judicial precedent, it is intrinsic that the prosecution proves the felonious intent on the part of the appellant or the preparation to execute a felony. This can be seen from the circumstances under which the appellant was arrested. The phrase "dangerous or offensive weapon" is not defined in Section 308 of the Penal Code or in Section 4 – the interpretation section of the Penal Code. Section 89(1) of the Penal Code creates the offence of possession of a firearm or other "offensive weapon" etc and Section 89(4) of the Penal Code

defines “offensive weapon” for purposes of section 89 as meaning:

> ***“any article made or adapted for use for causing injury to the person or intended by the person having it in his possession or under his control for such use”.***

17. In **Mwaura and Others v Republic [1973] EA 373** the High Court in dealing with the question whether a panga, an iron bar, a wheel spanner, a king shaft, screw driver, a stone and a chisel were “dangerous or offensive weapon” for the purposes of the offence of preparation to commit a felony under Section 308 (1) of the Penal Code held at page 375 letter F stated;

> ***“In our view “dangerous or offensive weapons” means any articles made or adapted for use for causing injury to the person such as a knuckleduster or revolver or any article intended, by the persons found with them for use in causing injury to the person”.***

18. It can therefore be argued that, although a crow bar is not made for purposes of causing injury to a person, it can suffice to be a dangerous weapon in terms of Section 308 of the Penal Code if the appellant in wielding it in the cause of burglary intend to use it for burglary or causing injury to any person.

19. PW 2 testified that ***‘ ….we managed to catch the accused at the market near the hospital. He had a crow bar blue in colour MFI -1. He was hiding it and he hit me. I jumped and it hit my leg……***

20. In the case of ***Maina and 3 others v Republic (1986) KLR 301 cited in Mugure’s case (****Supra)* the Court of Appeal dealt with a similar case and held that the prosecution must adduce evidence which proximates the possession of the dangerous weapon with the commission of a felony which can be discerned from the evidence.

21. In the above premises, the appellant managed to use the same crow bar in attacking PW2 and as such, this did act as causing injury. The appellant upon being given an opportunity to offer his defence failed to give a reasonable explanation why he was at the market place at that particular time and with a crow bar. It was also not clear why the appellant ran away if he was a genuine boda boda rider who was in the course of his business. What the appellant did was just to deny the charge and no cogent explanation was offered in that, he simply claimed that the two people who apparently ran away were his customers and they had asked him to take them to the stage when he realized that they were simply out to steal his motor cycle. I am not therefore satisfied that the crow bar which the appellant had in this case was not intended to be used to commit a felony.

22. In regard to sentencing, this is an action that is within the discretion of the trial court, and an appellate court will not interfere with the exercise of such discretion unless it is demonstrated and found that the court, in exercising its discretion, acted on a wrong principle or overlooked some material factor or imposed a sentence that was manifestly excessive. In **Shadrack Kipchoge Kogo v Republic Eldoret Court of Appeal Criminal Appeal No. 253 of 2003**, the Court of Appeal stated that:

> ***“Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred”.***

23. I note that the appellant was charged under section 308 of the Penal code and the same provides thus 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. The appellant herein was sentenced to Seven years imprisonment which is the minimum sentence for the offence he was charged with. I find this sentence to be proper and in accordance with the law since the trial court exercised its discretion.

24. The upshot is that the appeal is devoid of merit and I dismiss it.

25. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 2ND DAY OF FEBRUARY, 2022.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent