



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL APPEAL NO.85 OF 2017

VINCENT MURIUKI NTUI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original Conviction and Sentence in Nanyuki CM Criminal Case No 1049 of 2014 – E Ngigi, SRM)

J U D G M E N T

1. The Appellant herein, **VINCENT MURIUKI NTUI** (1st accused before trial court) was convicted in Count II in the substituted charge sheet of **preparation to commit a felony** contrary to **section 308(1)** of the **Penal Code**. It was alleged in the particulars of the offence that on 21/08/2014 at Laikipia Airforce Base, Southern Gate in Laikipia County, jointly with others not before, he was found with motor vehicle registration No KBS 103 B, make Toyota Townace, parked with its lights off and loaded with 71 empty jericans, in circumstances that suggested that he intended to commit a felony, namely, theft.

2. The Appellant was also convicted in Count III of **entering a protected area** contrary to **section 3(1)** as read with **section 9(1)** of the **Protected Areas Act, Cap 204**. The particulars were that on 21/08/2014 in Nanyuki Town within Laikipia County, jointly with others not before court, he entered a protected area, namely Laikipia Airforce Base, without authority from the Base Commander, Laikipia.

3. The Appellant was acquitted of the charge in Count I. His co-accused was acquitted of all the charges.

4. On 18/08/2017 the Appellant was sentenced to 7 years imprisonment in Count II. For Count III he was sentenced to a fine of KShs 3,000/00 and in default to serve 30 days imprisonment. He has appealed against both conviction and sentence.

5. The Appellant was represented by counsel in this appeal. The petition of appeal disclosed the following grounds of appeal –

- (a) That the convictions were based upon circumstantial evidence that did not meet the requisite legal threshold.
- (b) That the trial court shifted the burden of proof to the Appellant contrary to law.
- (c) That the trial court failed to properly consider the Appellant's defence and did not give cogent reasons for dismissing it.
- (d) That the charges were not proved to the required standard.
- (e) That the sentences meted out were unlawful.

Learned counsel for the Respondent supported the convictions.

6. I have read through the record of the trial court in order to evaluate the evidence and arrive at my own conclusions regarding the same. This is my duty as the first appellate court. I have however borne in mind that I neither saw nor heard the witnesses testify, and I have given due allowance for that fact.

7. I have also considered the submissions of the learned counsels appearing. I must state that those submissions (of both counsels) were misleading in that they were based upon the original charge sheet in the trial court. That charge sheet had in Count III the offence of **trespass upon private land** contrary to **section 3(1)** of the **Trespass Act, Cap 294**. However, a fresh charge sheet was substituted on 08/10/2015 which had in Count III the offence of **entering a protected area** contrary to **section 3(1)** as read with **section 9(1)** of the **Protected Areas Act**.

8. The point was taken, though not pleaded in the petition of appeal, that the charge in Count II was incurably defective in that the particulars thereof did not disclose the offence charged. The offence in section 308(1) of the Penal Code is stated as follows –

“Any person found armed with any dangerous or offensive weapon in circumstances that indicate that he was so armed with intent to commit a felony is guilty of a felony and is liable to imprisonment of not less than seven years and not more than fifteen years.”

There are thus two main ingredients of this offence –

(a) The accused must be found armed with a dangerous or offensive weapon.

(b) He must be so found in circumstances that indicate that he intended to commit a felony.

9. The particulars of the offence in Count II did not allege that the Appellant was armed with any dangerous or offensive weapon. It was merely alleged that he was found -

“...with motor vehicle registration number KBS 103 B ...parked with its lights off and loaded with 71 empty jericans...”

So, what was the dangerous or offensive weapon here? Was it the car, or the empty jericans, or the fact that the car was parked with its lights off? Would it have made any difference if its lights had been on? Ordinarily neither a car nor empty jericans can be said to be dangerous or offensive weapons. They are not like guns or pangas or axes or knives or rungas or such!

10. Clearly the particulars did not disclose the offence charged in Count II. The charge was incurably defective and the conviction upon it is bad and must be quashed.

11. As for Count III, the Appellant was convicted upon good circumstantial evidence. That circumstantial evidence was that the motor vehicle in issue, KBS 103 B, had been hired out to him by its owner, PW10. It was subsequently found parked within the Laikipia Airforce Base in the circumstances constituting the offence charged in Count III. The car could not have driven itself there. It could only have been driven there by the Appellant, unless he offered a plausible explanation otherwise. That would not be shifting the burden of proof to him. He offered no plausible explanation and his defence was properly rejected. His conviction for the offence in Count III is safe.

12. In the result, the Appellant’s appeal against conviction and sentence in Count II is allowed in its entirety. The conviction is hereby quashed and the sentence set aside. His appeal against conviction in Count III is dismissed. He has long served the default sentence for that count.

13. The Appellant shall therefore be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 7TH DAY OF JULY 2021

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 8TH DAY OF JULY 2021