REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.175 OF 2018

(As consolidated with Criminal Appeal Nos.36, 35 & 34 of 2020)

(An Appeal arising out of the conviction and sentence of Hon. J. Kamau (RM) delivered on 21st September 2018 in Kibera Criminal Case No.2255 of 2015)

ERICK MAINA MBUGUA.....1ST APPELLANT

JESEE MWENDA MKIUNGU.....2ND APPELLANT

SIMON KANATI NJENGA.....3RD APPELLANT

EVANS WANJALA JUMA.....4TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The four Appellants were charged with the offence of **preparation to commit a felony** contrary to **Section 308(1)** of the **Penal Code**. The particulars of the offence were that on 22nd May 2016 at Kibera Laini Saba within Nairobi County, the Appellants were jointly found armed with dangerous weapons namely two knives (daggers) and one handcuff Serial No.00879 in circumstances that indicated they intended to commit a felony, namely robbery. The 2nd Appellant, Jesse Mwenda Mkiungu was further charged with **being in possession of government stores** contrary to **Section 324(2)** as read with **Section 36** of the **Penal Code**. The particulars of the offence were that on the same day and in the same place, the 2nd Appellant had in his possession public stores namely a pair of handcuffs Serial No.00879, the property of National Police Service such property being reasonably suspected to have been stolen or unlawfully obtained.

When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charge. After full trial, they were convicted as charged. In respect of the first count, the Appellants were sentenced to serve seven (7) years imprisonment. In respect of the second count, the 2nd Appellant was sentenced to serve two (2) years imprisonment. Each Appellant was aggrieved by his conviction and sentence. Each Appellant filed a separate appeal challenging their conviction and sentence.

In their respective petitions of appeal, the Appellants raised more or less similar grounds of appeal. They were aggrieved that they had been convicted in the absence of cogent evidence which was supposed to establish their guilt to the required standard of proof. They faulted the trial magistrate for failing to take into consideration the fact that crucial witnesses were not produced in court to give their testimony by the prosecution. This fact, they alleged prejudiced their trial. The Appellants faulted the trial magistrate for relying on inconsistent and uncorroborated evidence of the prosecution to convict them. In particular, they were irked that they were convicted on the basis of exhibits that had been marked for identification but had not been formally produced. In that regard, they were of the view that the trial court erred in connecting them with the said exhibits in the absence of their formal production. They were aggrieved that their respective defences were not taken into consideration before the trial court reached the impugned decision. In the premises therefore, the Appellants urged the court to allow their respective appeals, quash their convictions and set aside the custodial sentences that were imposed on them.

During the hearing of their appeal, the four separate appeals were consolidated. This is because the said appeals arose from the same proceedings before the trial court. The Appellants presented to court written submission in support of their respective appeals. They urged the court to allow their appeals. Mr. Momanyi for the State conceded to the appeals. He submitted that the prosecution failed to establish, to the required standard of proof, that the Appellants were indeed found in possession of dangerous weapons in circumstances that indicated that they intended to commit a felony. The weapons that were allegedly found in their possession, though marked for identification, were not produced into evidence. In the absence of such exhibits, the prosecution could not prove that indeed the Appellants had in their possession

the said dangerous weapons. Further, the circumstances of the Appellants' arrest did not indicate that they were arrested in circumstances that pointed to the fact that they intended to commit a crime. The fact that there was general insecurity in the area, should not have been visited on the Appellants. In the premises, learned prosecutor submitted that the prosecution had failed to establish the charges brought against the Appellants to the required standard of proof beyond any reasonable doubt.

Before giving reasons for its verdict, it is imperative that the facts of the case be set out, albeit briefly. On 22nd May 2016 at about 5.30 p.m., PW1 APC Samuel Manyindo, then attached to the Administration Police Post at Golf Course in Nairobi received information from an informer that there were four young men seated outside California Bar in Kibera Laini Saba in circumstances that were suspicious. PW1 testified that the area that the four young men were said to be hanging out was known for being insecure. Crime was prevalent there.

PW1 accompanied by another administration police officer went to the scene. He found the Appellants. He arrested them. Upon conducting a search on their persons, he recovered two daggers and a handcuff Serial No.00879 from the Appellants. He also recovered two rolls of bang from two of the Appellants. The handcuffs were recovered from the 2nd Appellant. PW1 then escorted the Appellants to Capital Hill Police Station were the Appellants were received by PW2 Corporal Godfrey Muhia. The case was assigned to another police officer to investigate the same. After conclusion of investigations, the Appellants were charged with the offences that they were convicted. Unfortunately, the investigating officer did not testify during trial. The exhibits which were marked for identification when PW1 and PW2 testified, were not produced into evidence. While considering this failure by the prosecution to produce the exhibits, the learned trial magistrate had this to say:

> ***"During the prosecution's case, the court ordered the abrupt closure of the prosecution's case. This after the prosecution was warned about the consequences of failure to call witnesses. I am guided by the case Robert Mawira Njiru versus prosecution (2015) eKLR where Muchemi J. sitting in the High court at Embu stated:***
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> > ***"It is not a requirement of the law as alleged by the appellant that exhibits must be produced in a criminal case for a conviction to be sustained…..In the case of Peter Kihia Mwaniki v. Republic (2010) eKLR the court of appeal held that,***
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> ***"It would have been proper to avail the exhibits but failure to produce them was not fatal to the prosecution case".***
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> ***Although, the prosecution did not call the investigating officer, the DPP is not required to call a specific number of witnesses, to give evidence. However I note from the proceedings herein that the only items that was produced was the exhibit report by the government analyst. The rest of the exhibits were merely marked for identification. I am glad that this trial commenced and concluded under my watch and I was therefore privileged to observe all the exhibits that were marked for identification. In the circumstances I find that, and I am guided by precedent that the exhibits merely marked for identification are properly before the court and failure to produce them as exhibits does not render the prosecution case fatal. In regard to the issue at hand, therefore I find that the prosecution did the best they could in the circumstances and proved this issue of admissible evidence beyond reasonable doubt."***

When the Appellants were placed on their defence, they denied committing the offences. They each gave *alibi* defence in regard to what they were doing at the time of their arrest. In essence, they said that they were arrested and detained by the police as they were undertaking their usual legitimate business.

This being a first appeal, this Court is mandated to re-evaluate the evidence presented before the trial court afresh. The Court of Appeal in the case of **Gabriel Kamau Njoroge –vs- Republic [1987] eKLR** stated this on the duty of the first Appellate court:

> ***"It is the duty of the first Appellate court to remember that parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law and the court is required to weigh conflicting evidence and draw its own inferences and conclusions, but bearing in mind always that it has neither seen or heard the witnesses and make due allowance for this."***
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> **In the present appeal, the issue for determination is whether the prosecution established the charge of preparation to commit a felony contrary to Section 308(1) of the Penal Code and the charge of being found in possession of government stores contrary to Section 324(2) as read with Section 36 of the Penal Code (as against the 2nd Appellant) to the required standard of proof beyond any reasonable doubt.**
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> **For the prosecution to establish the charge of preparation to commit a felony, certain facts must be proved. The Court of Appeal in Nyadenga vs. Republic [1989] eKLR held thus:**
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> > ***"An accused person commits the offence of preparation to commit a felony contrary to Section 308(1) of the Penal Code if he is found "armed with any dangerous or offensive weapon in circumstance that indicate he was so armed with intent to commit any felony". Thus an accused person must be found:***
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> > 1. ***Armed with any dangerous or offensive weapon; and***
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> > 2. ***In circumstances that indicate that he was so armed with the intent to commit a felony."***

In Dishon Nyambega Munene vs. Republic [2015] eKLR, Majanja, J held thus:

"The Court of Appeal in Emmanuel Legasiani & Others vs. Republic MSA CA Criminal Appeal No.59 of 2000 [2000] eKLR dealt with the issue of "preparation" envisaged in Section 308(1) of the Penal Code and it observed 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, the 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 firearm not coupled with such an overt act is not an offence under Section 308(1) of the Penal Code."***

In the present appeal, it was clear from the facts recited above that the prosecution failed to establish to the satisfaction of the court that the Appellants were indeed found in possession of dangerous weapons in circumstances that indicated that they intended to commit a felony, namely robbery, as indicated in the charge sheet. The testimony of PW1 is clear. He found the Appellants hanging out outside California Bar in Kibera Laini Saba. The Appellants were doing nothing other than sit outside the bar. They had not done anything overt to indicate that they intended to commit a robbery. PW1's testimony was revealing. It was apparent that PW1 and PW2 had been profiled by the police as people who were likely to commit an offence. Indeed, PW1 testified that he had earlier arrested the 1st Appellant but he was later released. The testimony adduced by the Appellants in their defence that they were arrested when they were going on with their usual peaceful business is therefore not off the mark. The prosecution therefore failed to establish to the required standard of proof beyond any reasonable doubt that indeed the Appellants were found in circumstances that indicated that they intended to commit a robbery.

Another plunk of the prosecution's case which was debunked during the hearing of the appeal is the failure by the prosecution to produce the alleged dangerous weapons that were found in the Appellants' possession. As stated earlier in this judgment, the prosecution marked for identification two daggers and a pair of handcuffs. The said items were not produced into evidence when the investigating officer failed to adduce evidence in court. This court agrees with the Appellants that failure by the prosecution to produce the said exhibits into evidence fatally damaged the prosecution's case. An essential ingredient to establish the offence of preparation to commit a felony is possession of dangerous or offensive weapons. In the present appeal, the dangerous weapons were not produced into evidence. It will not do for the trial court to observe that it had seen the exhibits when they were marked for identification. The said exhibits must be produced into evidence in order for the prosecution to establish that the Appellants were indeed found with the said dangerous weapons.

It is clear from the foregoing that the appeal is for allowing. The prosecution, correctly in the view of this court, conceded to the appeal. The Appellants' respective appeals are hereby allowed. Their conviction is quashed. They are ordered set at liberty forthwith and released from prison unless otherwise lawfully held. As regard the 2nd Appellant, the prosecution was not able to establish to the required standard of proof that he was found in possession of the pair of handcuffs. He is too acquitted of the charge of being found in possession of government stores. His conviction is similarly quashed and he is ordered set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 9TH DAY OF APRIL 2020

L. KIMARU

JUDGE