REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 55 OF 2018

REBECCA WAMBUI GITONGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the conviction and sentence in Othaya Senior Resident Magistrates Court

Criminal Case No. 262 of 2016 (Hon. Ekhubi, B.M. Senior Resident Magistrate)

dated 28 November2018)

JUDGMENT

This judgment is delivered in rather unfamiliar and unprecedented circumstances. The entire world has been hit by a respiratory disease known as COVID-19 or corona virus. It is viral in nature spreading mainly through human contact although, lately, it has been suggested that it could be airborne as well. So far, it has no known cure but its spread can be contained if human contact or interactions can be restricted. Measures have been taken the world over towards this end in what is now popularly referred to as 'social distancing'. It is for this reason that this judgment is delivered via skype communication or video conferencing.

The appellant was among three accused charged in the magistrates' court with the offence of preparing to commit a felony contrary to section 308 (2) of the Penal Code, cap. 63. They also faced a second count of possession of papers for forgery contrary to section 367 (a) of the Penal Code.

The particulars in the first count were that on the 1st day of April 2016 at Othaya township in Nyeri South subcounty, Nyeri County within the republic of Kenya jointly with others before court not being at the place of their abode had with them articles for use in the course of cheating namely three bottles containing unknown liquid substances, one syringe, cotton wool, three pairs of surgical gloves, one scissor and silk papers.

In the second count it was alleged that on the 1st day of April 2016 at Othaya township in Nyeri south sub county, Nyeri county within the republic of Kenya jointly with others before court without lawful authority had in their possession three papers one with serial number DV851477 and two without serial numbers intended to resemble and pass as special papers such as is provided and used as Kenya currency note of one thousand denominations each.

The accused pleaded not guilty to each of the counts and so it fell upon the state to prove its case against them. Upon hearing seven state witnesses and the unsworn evidence of the 1st and 2nd accused, the trial court concluded that the state had proved its case against the appellant and so she was convicted on both counts; she was sentenced to three years imprisonment on each of the counts with the sentences running concurrently.

The 2nd accused absconded and for this reason, charges against him were withdrawn under section 87 (a) of the Criminal Procedure Code, cap. 75. The 3rd accused was acquitted of all the charges.

The appellant now appeals to this court against both the conviction and sentence on the following grounds:

1. The learned magistrate erred in law and in fact in holding that the prosecution had discharged the burden of proof beyond all reasonable doubt that the appellant had prepared to commit a felony;

2. All the ingredients of the offence of preparation to commit a felony were not proved;

3. There were grave inconsistencies in the prosecution evidence that the learned magistrate ought to have considered;

4. There were doubts in the prosecution case for which the appellant ought to have been resolved in favour of the appellant; and,

5. The sentence meted out against the appellant was manifestly harsh, excessive and against the weight of evidence on record.

This being the first appellate court, it is necessary, at this stage, to look at the evidence afresh, analyse it and come to conclusions independent of those arrived at by the trial court but always bearing in mind that the trial court had the advantage, which this honourable court does not have, of seeing and hearing the witness. See the case of **Dinkerrai Ramkrishan Pandya versus Republic (1957) E.A. 336** that of **Okeno versus Republic (1972) EA 32** where at **page 36** the court said:

> ***"An appellant 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's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can 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."***

The first prosecution witness was one Samwel Chege (PW1) whose testimony was to the effect that he was a proprietor of a car hire firm trading as Sammy Safaris and Hire. The 3rd accused called him on 30 May 2016 at about 7.00 PM wanting to hire a motor-vehicle. Apparently, they agreed and he came for it the following day and was given motor-vehicle registration number KBR 309 J.

He knew the 3rd accused before; as matter of fact, he was his neighbour and they had been doing business together for a long time.

On 1 June 2016 the 3rd accused called him, telling him that, the appellant had been arrested at Othaya town with the motor vehicle. He did not know who the appellant was but in answer to a question put to him by the appellant during cross-examination, he said that he first met her with the 3rd accused on 30 April 2016 when she introduced herself to him as Wairimu.

Inspector George Opere (PW3) testified that on 1 April 2016 at about 1.00 PM he was at Green Hut Hotel attending a farewell party of a District Commissioner when he received a call from an administration police officer and also from the subcounty administrator to the effect that there three suspicious looking people in a motor vehicle registration number KBR 309 J which was then parked at the front of Exco café Hotel. He proceeded to the scene together with his colleague Inspector Karima (PW7).

He found the 2nd accused in front of the vehicle. When they enquired from him who the owner of the vehicle was, he directed them to the appellant who was then taking tea at the hotel. When they asked the appellant whether she was the owner of the vehicle, she denied that the vehicle belonged to her. He, however, noticed car ignition keys on the same table where the appellant was sitting; they led the appellant to the vehicle and using the ignition keys she had, they opened the vehicle.

With the same keys, they were able to start the vehicle and drive it to the police station. A search of the vehicle was conducted at the station. They recovered one syringe, three pairs of surgical gloves, three bottles containing a coloured substance, a pair of scissors wrapped in a silk paper and three notes of Kshs. 1000; of these notes, one was genuine while the other two were faded. He prepared an inventory of all these items.

Inspector Kirima (PW7) confirmed in his evidence that indeed he was with inspector Opere when the appellant and the 2nd accused were arrested and even when the search of the vehicle was conducted at the police station.

Corporal Abraham Koech (PW4) testified that motor-vehicle registration number KBR 309 J was driven to the police station on 1 April 2016 and amongst its occupants were the appellant and the 2nd accused. He confirmed having conducted a search in the vehicle and recovered the items inspector Opere (PW3) made reference to in his testimony except that the three notes were in a silk paper. He is the one who prepared the exhibit memo and forwarded the items for analysis at the government laboratory.

Corporal Koech testified further that he called a scenes of crime officer who took photographs of the vehicle. Indeed, the scenes of crimes officer inspector John Mugo (PW6) testified that on 28 June 2016 he took photographs of the motor vehicle from different angles, a first aid kit and other items which included cotton wool, surgical gloves, a syringe and a pair of scissors. Other items were 3 notes of Kshs. 1000 note wrapped in a paper foil. All these photographs were taken at Othaya police station

A document examiner, Inspector Bernard Cheruiyot (PW2) testified that on 12 April 2016 he received three exhibits of Kshs. 1000 notes. The first was serialised as No. DVA51477 and the other two were faint images of the Kshs. 1000 note. He examined the exhibits and came to the conclusion that the serialised note was a genuine denomination or legal tender but the other two notes were counterfeits; they were ordinary pieces of paper intended to make Kshs. 1000 notes.

The Government chemist, Catherine Murambi (PW5) testified that she received the exhibits in the three bottles from corporal Koech; she analysed them and confirmed that they were engine oil, iodine and sodium thiosulphate. In her opinion, the last two substances are used in forgery related incidents. Iodine, according to her evidence, has the characteristic of turning white paper to black while thiosulphate reverses it to colourless.

The appellant opted to give unsworn statement in her defence. She stated that she resided at Githurai in Nairobi but on 1 April 2016 she was at Othaya. While taking tea at a hotel she met inspector Karimi (PW7) whom she described as a friend together with inspector Opere (PW3). The two arrested her and took her to Othaya police station. She confirmed that the vehicle belonged Chege (PW1). Later she said that the vehicle was in fact not taken to the police station; according to her, a water tank in the background of the photographs could not possibly be found at a police station. It was her position that the charges were made up against her because there was a disagreement between her and Karimi (PW7). The owner of the car, according to her, ought to have been charged.

The third accused, also opted to give unsworn statement; he denied having hired the car from the Chege (PW1). On the contrary, so he alleged, it was Chege who called him and told him to bail him out because his car had been detained by police officers at Nyeri. Chege wanted him to, apparently, sign some sort of a car hire agreement but he declined the request. He was initially arrested but later released for lack of evidence. He was later arrested and taken to Othaya police station from where he was subsequently charged.

The appellant was charged under Section 308 (2) in count one; as the heading to section 308 suggests, it generally deals with the offences related to preparations to commit a felony; subsection (1) specifically deals with the aspect of being armed with a dangerous or offensive weapon with intent to commit a felony. Subsection (2) on the other hand deals with not just being in possession of certain items that may be employed to commit certain crimes but goes further to state which of these crimes one may be suspected of if he is found in possession of any of those items. As much as subsection (2) is self-explanatory and capable of interpretation independent of any other provision in that section, it is better understood in the context of the entire section 308; that section reads as follows:

> ***308. Preparations to commit felony***
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> ***(1) 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.***
>
> ***(2) Any person who, when not at his place of abode, has with him any article for use in the course of or in connexion with any burglary, theft or cheating is guilty of a felony, and where any person is charged with an offence under this subsection proof that he had with him any article made or adapted for use in committing a burglary, theft or cheating shall be evidence that he had it with him for such use.***
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> ***(3) Any person who is found—***
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> ***(a) having his face masked or blackened, or being otherwise disguised, with intent to commit a felony; or***
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> ***(b) in any building whatever by night with intent to commit a felony therein; or***
>
> ***(c) in any building whatever by day with intent to commit a felony therein, having taken precautions to conceal his presence, is guilty of a felony.***
>
> ***(4) Any person guilty of a felony under subsection (2) or (3) is liable to imprisonment with hard labour for five years or, if he has previously been convicted of a felony relating to property, to such imprisonment for ten years.***

The common thread that runs through subsections (1), (2) and (3) is the act of preparation, hence the intent to commit a felony; the only difference is the means of preparation and, in certain instances, the felony intended to be committed.

What amounts to 'preparation' was explained by the Court of Appeal in **Criminal Appeal No. 59 of 2000 Manuel Legasiani & 3 Others versus Republic (2000) eKLR.** Although the specific section that was in focus was section 308(1), the court's understanding of what 'preparation' entails is as much applicable to the rest of the subsections including subsection (2) which is of concern in the present appeal. The court said 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 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. If the offence is a lethal weapon and is held without a licence another offence may be indicated.***

Turning back to the appellant's case, preparation would involve first, whether the appellant was in possession of or, if I may borrow the language of the statute, 'had with her' certain items, and secondly, whether those items are, in the context of section 308(2), offensive items; and, finally, whether the appellant was out to cheat as alleged.

Resolution of the question whether the appellant 'had with her' the offensive items was necessary not just because the appellant disputed it but also because the burden was always on the prosecution to prove its case beyond reasonable doubt. The evidence of inspector Opere (PW3), corporal Koech (PW4) and inspector John Kirima (PW7) was crucial in this regard.

Inspector Opere's testimony was that the vehicle in which the illegal items were found was parked outside a hotel where the appellant was taking tea. The 2nd accused led him and his colleague inspector Kirima to the appellant as the vehicle's owner. The appellant, however, denied being the owner of the vehicle when the two officers confronted her. However, though she denied ownership of the vehicle, there was an ignition key at the table where she was seated; it is this key that opened the car and started it.

The evidence of Opere was corroborated by the testimony of Inspector Kirima. Their evidence was consistent that they, together with the appellant and the 2nd accused, drove in the same vehicle to the police station from where it was searched and found to contain the offensive items.

The vehicle was positively identified as motor vehicle registration number KBR 309 J. A search conducted on its registration revealed it was owned by Chege (PW1) who testified that at the material time, he had hired out the car to the 3rd accused.

The appellant admitted that she was at the hotel taking tea and that was arrested by inspector Opere and inspector Kirima on 1 April 2016. Although she denied ownership of the vehicle, and indeed there was evidence that she was not the owner, she did not deny that she was in possession of the vehicle or was in its control at the time she was arrested at the hotel.

The evidence that she was found with ignition keys that were used to open and start the car was not disputed.

It was reasonable to conclude, and here I agree with the learned magistrate, that she was in custody of, at least, the vehicle at the material time.

The next question whose answer was crucial to the determination of the first count against the appellant was whether the offensive items were found in the vehicle. Going back to the evidence of inspector Opere (PW3), the vehicle was searched at the police station. As a result of the search, one syringe, three pairs of surgical gloves and three bottles contained certain substances were found. Other items found in the vehicle were a pair of scissors and three currency notes, two of which turned out to be counterfeit. An inventory of the items was prepared.

Opere's evidence that the search was conducted by corporal Koech was corroborated by corporal Koech himself; he testified that indeed he conducted the search of the vehicle and recovered the stated items. He produced an inventory of the items also. It was his evidence that he prepared and exhibit memo and forwarded some of them to the Government laboratory for analysis.

My reservation about these recoveries lies in the circumstances in which the search was conducted particularly its timing. According to Inspector Opere and Inspector Karimi, they proceeded to the hotel in which the appellant was because they were informed not only that suspicious looking people were there but also that they had with them a specific car. If that is the case, no reason was given why they could not secure the car, as a crime scene, and search it from where it was found. Driving the car all the way to the police station before the search was conducted would create an impression that the alleged recovered items were possibly planted on the appellant, at the police station.

It is true that corporal Koech testified that he personally searched the vehicle and on the same date he conducted the search, he called the scenes of crime officer to take photographs of the vehicle and its contents. These photographs ought to have been taken at the scene where the vehicle was found.

The evidence of the scenes of crime officer did not help matters. Contrary to corporal Koech's evidence, the officer testified that he visited Othaya police station where the motor vehicle was stationed and took photographs of the vehicle and the items on 28 June 2016; this was almost three months after the said recoveries. Several unanswered questions arise from this: why did corporal Koech tell the court that he called the scenes of crime the same day the appellant and the 2nd accused were arrested when there is clear evidence to the contrary. Secondly, if it is true that the scenes of crime officer took the photographs on 28 June 2016, why did it take almost three months for the photographs to be taken.

Equally puzzling is the fact that the exhibit memos prepared to forward the exhibits to different government agencies show that the exhibits were delivered to these agencies on 12 April, 2016. If this is the case, one wonders how the same exhibits were at the station, in the car, on 28 June 2016. In fact, according to the government chemist, it was not until 31 January 2017 that the report on the contents of the three bottles was made. This begs the question how the exhibits could possibly be found at the station on 28 June 2016 when there were supposed to be in the government laboratory.

The document examiner, on the other hand, did his examination of the documents on 20 April 2016. This implies that the photographs of the currency, the subject of his examination, were purportedly taken at the crime scene, after they had been examined.

It must be remembered that the case against the appellant, to a greater extent, was hinged on the appellant's possession of these exhibits and it was incumbent upon the state to prove beyond all reasonable doubt that the appellant, as it were, 'had with her' the offensive items; however, the questionable timing and, generally, the circumstances under which the vehicle was searched and the photographs taken raised reasonable doubt whether indeed the appellant was found with the alleged offensive items. This doubt can only be resolved in her favour.

Having found as I have that the appellant did not have the items alleged, it is unnecessary to delve into the question whether those items could possibly be employed to perpetuate the alleged offence of cheating.

The second count also ought to have fallen with the first considering that it also revolved around whether the appellant was found in possession of the papers alleged to be papers of forgery. That count could not hold for the same reasons that the first count ought to have fallen.

In the final analysis, I agree with Ms. Ndungu the learned counsel for the state who conceded the appeal and Mr. Gikonyo, the learned counsel for the appellant that the state did not prove its case beyond all reasonable doubt. The appellant's appeal is therefor allowed; her conviction on both counts is quashed and the sentences set aside. She is set at liberty unless she is lawfully held.

Dated, signed and delivered this 9th day of April, 2020

Ngaah Jairus

JUDGE