REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 107 OF 2016

STANLEY WAINAINA NGARU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Milimani in Cr. Case No. 21 of 2015 delivered by Hon. K. Cheruiyot (PM) on 2nd December 2015).

JUDGMENT

1. The Appellant, **Stanley Wainaina Ngaru** was jointly charged with one Dickson Macharia Ndemi (hereinafter "the Appellant's co-accused") 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 the 6th day of January 2015 at around 1320hours along Latema Road within Nairobi county the Appellant and his co-accused were jointly found armed with dangerous weapons namely a knife and a pair of handcuffs respectively in circumstances that indicated they were so armed with intent to commit a felony. They both pleaded not guilty to the charge. Upon trial, they were both found guilty and sentenced to serve seven (7) years imprisonment each. The appeal of the Appellant's co-accused filed earlier against his own conviction and sentence was successful. The Appellant has now preferred the instant appeal against both his conviction and sentence.

2. The Appellant raised six (6) grounds of Appeal in his Petition of Appeal filed on 29th July 2016. He challenged the trial for being a nullity. He was aggrieved that he was convicted on the basis of a defective charge sheet. Further, he complained that the evidence adduced by the prosecution was overly contradictory, inconsistent and uncorroborated. He was also aggrieved that the case was not proved to the required standard. Finally, he was of the view that his defence was not given any consideration.

Summary of Evidence

3. It is now the duty of the court to reconsider and re-evaluate the evidence adduced and come up with its own independent findings. In doing so, the court must have regard to the fact that it has neither nor heard the witnesses and give due regard for that. (See **Okeno v Republic (1972) EA 32).**

4. The Prosecution's case can be is that **PW1, PC Solomon Makau** of Central Police Station on 6th January 2015, on patrol with Sergeant Mohamed Ali, **PW2 CPL Agnes Ndwiga**, CPL Musau and PC Kioko along Latema road in Nairobi CBD near Tom Mboya when they came across three young men who looked suspicious as they were communicating in sign language. The Appellant was one of them. They stopped them and conducted an official search whereupon he recovered a pair of handcuffs from the Appellant's co-accused whereas Sergeant Mohammed recovered a knife from the Appellant herein hidden in his socks. PW2 on her part stated that Sergeant Mohamed recovered a dagger from the Appellant herein and PC Makau recovered a pair of handcuffs from the Appellant's co-accused. The two young men could not explain why they were in possession of those items. PW2 stated that the Appellant and his co-accused intended to use the items to commit a felony. The case was investigated by **PW3, CPL Charles Liru.** He adduced the exhibits recovered as evidence. He added that upon interrogating the suspects, he discovered that they were operating as part of a group known as Tsunami and were preparing to commit a felony within the city.

5. The Appellant gave a sworn statement in his defence in which he denied committing the offence. He testified that he works at Latema road smoking zone where he sells cigarettes. He stated that the hawkers near the smoking zone would normally contribute some money and give him to hand over to Sergeant Ali Mohammed every Monday. However, on 6th January, 2015 he did not give him any money since no contributions had been made. Sergeant Mohamed called other police officers on him claiming that he had taken his money. He was then escorted to Central Police station where his finger prints were taken. He was later charged with the current offence.

Analysis and determination

6. This Appeal was canvassed by oral submissions. The Appellant appeared in person whilst the Respondent was represented by learned State Counsel, Ms. Nyauncho. Upon carefully reevaluating the evidence on record and considering the parties' respective submissions, I find that the only issues arising for determination are whether the prosecution proved its case beyond a reasonable doubt and whether the sentence meted was proper.

7. The Appellant submitted that the prosecution failed to prove that he committed the offence. Ms. Nyauncho conceded that the prosecution did not prove the offence since there was no overt act to show that a felony was about to be committed. She also submitted that mere possession of a knife was not a sufficient indicator of the offence. In her view therefore, the Appellant's conviction was not safe. However, she urged the court to exercise its discretion and find the Appellant guilty of a lesser offence under **Section 308(2)** of the **Penal Code.**

8. Section 308 (1) of the **Penal Code** provides 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 any felony is guilty of a felony and is liable to imprisonment of not less than seven years and not more than fifteen years."***

9. The Court of Appeal in the case of **Manuel Legasiani & 3 others v Republic [2000] eKLR** observed as follows regarding the issue of "preparation" envisaged in the above provision:

> ***"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."***

10. It is imperative for the prosecution to adduce evidence that shows the the overt act that the Appellant was preparing to commit in order to establish the offence. This may be deduced from the circumstances under which the Appellant is arrested. In the present appeal however, the felony which the Appellant was allegedly preparing to commit could not be deduced from the evidence adduced in court.

11. In this case, the circumstances surrounding the Appellant's arrest are not very clear. PW1 testified that they stopped the Appellant and two other men after observing them communicating in sign language which they found suspicious while PW2 stated that they were informed about suspicious persons by an informant leading them to the arrest of the Appellant and his co-accused. The conflicting accounts given by the two witnesses created doubt as to whether there was a reasonable cause to arrest and charge the Appellant. It is perturbing that the use of sign language would constitute a probable cause to occasion an arrest.

12. Further, apart from the knife allegedly recovered from the Appellant which was produced in court, there is no other evidence that linked him with preparation to commit a felony. The learned trial magistrate held the view that the knife was a dangerous weapon which could be used to commit a felony. In **Manuel Legasiani & 3 Others v Republic (supra)** the court stated thus:

> ***"it was held in the case of Mwaura & Others v Republic [1973] EA 373 that although there is no definition of "dangerous and offensive weapon" specifically applicable to Section 308 (1) of the Penal Code it ought to be shown that the weapon was one which could have caused injury. With respect, we agree with that decision."***

13. In the **Mwaura & Others v Republic (supra) at page 375**, the court held that:

> ***"In our view, "dangerous or offensive weapons" mean any articles made or adapted for use for causing injury to the person…; or any articles intended, by the person being found with them, for use in causing injury to the person. In regard to the latter, that is intent, see Woodward v Koessler (1958) 1 WLR 1255 and R v Powell (1963) Crim. L.R. 511"***

14. From the above definition, it is clear that a knife may indeed be used to occasion injury on a person. However, the prosecution did not adduce evidence on the circumstances obtaining at the time that raised reasonable apprehension that the Appellant was so armed with intent to commit a felony. The officers who testified did not allude to the fact that he used the knife or did anything with it to suggest that he was about to commit any crime. The trial magistrate held that the fact that the Appellant was found in possession of a dangerous weapon coupled and being part of a gang calling itself Tsunami showed that they were preparing to commit an offence. However, no evidence was tendered in court to prove that the Appellant and his co-accused were part indeed part of the said gang. In the premises, I find that the offence was not established to the required standard. The Appellant's conviction was not safe and sentence was not lawful.

15. In the end, the appeal succeeds. I quash the conviction and set aside the sentence. I order that the Appellant be set free forthwith unless otherwise lawfully held. It is so ordered.

Dated and delivered at Nairobi This 20th Day of May, 2019.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of;

1. *Appellant in person.*

2. *Ms Nyauncho for the Respondent.*