REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 108 OF 2017

BETWEEN

DESTRIOUS MATASWA OTUNGA..... APPELLANT

AND

REPUBLIC..... RESPONDENT

(Being an appeal from original conviction and sentence by Hon. Eric Kidali Malesi, Senior Resident Magistrate dated 6/9/2017 in Kakamega CMC. Criminal Case No. 1223 of 2016)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Introduction

On the 6/9/2017, the appellant herein was found guilty, convicted and sentenced to seven years imprisonment for the offence of preparation to **commit a felony** contrary to **Section 308 (1) of the Penal Code**. The particulars of the offence are that on the 4th of April, 2016 at Mukumu area in Kakamega East sub-county within Kakamega County jointly with others not before court were found armed with a dangerous weapon namely a panga in circumstances that indicated that he was so armed with the intent to commit a felony, namely robbery.

The appellant was also found guilty and convicted of the offence of **wearing uniform without authority** contrary to **Section 184 (1) of the Penal Code** and fined Kshs 600/= (six hundred only) in default to serve one month in prison. The sentences were to run concurrently in Count II, it was alleged that on the 4th of April, 2016 at Mukumu area in Kakamega East sub-county within Kakamega County not being a person serving in the National Police Service [and] without the permission of the Minister for Interior and Coordination of National Government wore the uniform having the appearance of the uniform of the National Police Service.

The appellant pleaded not guilty to both counts, but after hearing the evidence of three prosecution witnesses, and also after considering the appellants sworn evidence and that of this witness, the trial court was satisfied that the prosecution had proved both charges against the appellant beyond any reasonable hence the conviction and sentence on both counts.

The Appeal

The appellant felt aggrieved by the whole of the trial court's judgment and filed this appeal on 13/9/2017. The Petition of Appeal sets out the following grounds:-

1. THAT the learned trial magistrate erred and/or gravely misdirected himself in law and facts in taking the appellant through trial without compliance to Article 50 (2) (g) (h) and (j) of the constitution.

2. THAT the learned trial magistrate failed to consider my mitigation when handing an extremely harsh sentence.

3. THAT the learned trial magistrate gravely erred in law and facts when he failed to consider the time spent in custody before conviction and sentence.

4. THAT the learned trial magistrate failed to observe that the intended effect of sentence could be achieved even with a less severe sentence having been considered.

5. THAT the learned trial magistrate did not exercise his discretion when imposing the sentence.

6. THAT may the Honourable Court re-consider my mitigation and impact of sentence on my dependents.

On the 21/5/2019, the appellant filed amended grounds of appeal as follows:-

1. THAT the learned trial magistrate grossly erred in law and facts by recording a conviction and imposing sentences in a trial that did not meet the constitutional threshold of a fair trial as set under Article 50 (2) (g) (h) (c) and (j) of the constitution.

2. THAT the learned trial magistrate grossly erred in law and facts by failing to consider that the prosecution evidence was flimsy, inadequate, doubtful and fabricated evidence.

3. THAT the learned trial magistrate grossly erred or he misdirected himself in law in convicting me on mere allegations without observing that no photographic evidence pursuant to Section 78 of the Evidence Act and finger dusting evidence was ever tendered to prove that the appellant was in possession of the alleged panga and smoky jacket.

4. THAT the learned trial magistrate erred in law by convicting the appellant herein without considering that no inventory was tendered to prove that the appellant was armed with a panga to prove preparation to commit a felony.

5. THAT the learned trial magistrate erred in law by rejecting my defence without proper evaluation.

From the original grounds, the appellant's appeal is basically against sentence which he terms harsh and excessive and which he says was passed without due consideration of the mitigating factors he put forth. The appellant also alleges the learned trial court failed to consider the time the appellant had spent in custody and also failed to comply with the provisions of ***Article 50 (2) (g) (h) and (j) of the Constitution 2010.***

Article 50 (2) stipulates that ***"Every accused person has the right to a fair trial which includes the right:-***

……..

a.

b. ……..

c. ……..

d. ……..

e. ……..

f. ……..

g. to choose, and be represented by an advocate and to be informed of his right promptly;

h. to have an advocate assigned to the accused person at the state expense if substantial injustice could otherwise result and be informed of this right promptly.

i. …….

j. to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.

I shall return to these constitutional provisions later in this judgment.

In the amended grounds of appeal, the appellant further contends that the evidence adduced by the prosecution fell below the required standard of proof, especially with regard to the provisions of ***Section 78 of the Evidence Act*** and the failure by the prosecution to produce the inventory showing that the panga that was produced in evidence was indeed recovered from the appellant.

This appeal is a first appeal and in this regard I am guided by the principles laid down in such cases as **Okeno -vs- Republic [1972] EA 32** requiring me to reconsider and evaluate afresh the evidence on record with a view to reaching my own conclusions in the matter, only remembering and making allowance for the fact that I have no opportunity of seeing and hearing the witnesses who testified during the trial.

The Prosecution Case

The case for the prosecution is grounded on the evidence of 3 witnesses, all whom are police officers. PW1 was number 2008112607 APC Dennis Mabeya. He testified that on 4/4/2016 he was on night patrol duties within the Mukumu-Khayega area. He was together with his colleague number 240916 APC George Odhiambo who testified as PW2 and another officer by the name Songonye. When they got to

Mukumu Mission Hospital at about 2345 hours, they met with 3 people who immediately scattered in three different directions. The three officers pursued the 3 people and caught up with one of the 3 people and arrested him. That person was the appellant. They arrested him and took him to the station and on searching him, they found the appellant armed with a panga. The appellant was also found wearing a jungle jacket, the type normally worn by police.

On 5/4/2016, the appellant was escorted to Kakamega central police station where he was booked in. PW1 and PW2 then recorded their statements before the appellant was taken to court. PW1 stated that he had previously arrested the appellant on another occasion. In cross examination, PW1 testified that he did not take a photograph of the appellant before arraigning him in court.

PW2 gave a similar account of how he and PW1 came across the appellant and two other people outside Mukumu mission hospital and how the 3 people fled when a torch was shone at them.

PW3 was number 86272 Corporal Sophia Ibrahim of DCI Kakamega central. She investigated this case in which the appellant had been arrested by PW1 and PW2 on 4/4/2016. She produced the panga – Pexh. 1 and the smoky jungle jacket – Pexh. 2. During her investigations, PW3 recorded statements from PW1 and PW2. She further stated that from her investigations, the appellant is not a police officer and that he did not have any authority to wear the smoky jacket he was found wearing at the time of arrest.

The prosecution closed its case after PW3 testified.

The Defence Case

When put on his defence, the appellant elected to give sworn evidence. He also called one witness. He stated that the police officers arrested him from his house in the night of 3/4/2016 when he was asleep. He alleged that the police officers broke down his door after which they conducted a search in his house. He also testified that the officers took away his mobile phones, a radio, an inverter and a laptop charger. He was first taken to Khayega AP camp and later to Kakamega police station where he was charged with an offence he knew nothing about. The appellant also alleged that the smoky jungle jacket produced in court belonged to the officers themselves. During cross examination, the appellant stated that he was alone when he was arrested at his home. He also testified that the panga produced in court was not found on him at the time of arrest.

DW2 was MERCELYNE KHASANDI. She testified that the appellant was arrested from his house at around 9.00 p.m. on 3/4/2016. Her further testimony was that when the police knocked on the appellant's door, she went outside and stood at her door. The police then directed their torch lights at her and that is when she realized they were police officers. By the time she got close to the appellant's house, the police officers had already entered his house. She also entered the appellant's house and saw the officers take the inverter, two mobile phones, laptop, computer battery and a laptop charger as well as a chargeable torch. After putting the aforementioned items in a school bag, the police took the bag and the appellant with them.

Issues and Submissions

From the evidence on record, the issues for determination are whether the appellant's rights under Article 50 of the constitution were violated and secondly whether the prosecution proved its case against the appellant beyond reasonable doubt.

The appellant filed written submission in support of his appeal. I have carefully read through the same. He supported his submissions with relevant authorities.

Mr. P. O. Juma, prosecution counsel opposed the appeal and submitted that the prosecution proved its case against the appellant to the required standard, namely beyond reasonable doubt. Counsel also submitted that the conviction was safe and the sentence imposed upon the appellant was lawful. Counsel urged the court to dismiss the appeal.

Analysis and Determination

The offence of preparation to commit a felony under Section 308 (1) is proved if:-

- ***The offender is armed with any dangerous or offensive weapon.***
- ***The offender is found in circumstances that indicate that he was so armed with intent to commit any felony.***

Any person who is found guilty of the offence as described is liable to imprisonment for not less than seven years and not more than fifteen years.

After carefully reconsidering the evidence on record, I am satisfied that the prosecution proved its case against the appellant beyond reasonable doubt. In this regard, I am guided by the decision in the case of **Manuel Legasiani & Others -vs- Republic [2000] eKLR** and conclude that in being armed with a panga and standing just outside a hospital and running away on seeing the police, there is no doubt that the appellant and his two accomplices intended to commit a felony. It was 2345 hours, and the appellant must have intended to pounce upon unsuspecting patients either making their way out of or into the hospital and to rob them.

The evidence shows when the police shone their torch light at the three men whom they saw just outside the hospital, the men fled, but the police managed to arrest the appellant. In my considered view, the act of running away was in itself indicative of the fact that the appellant and his two accomplices were not in that place for a good reason. The appellant was also armed with a panga and dressed in police uniform. In my humble view wearing of a police uniform was meant to hoodwink innocent people into thinking that they were safe when in fact the

person wearing the police uniform was a wolf in sheep's clothing. Thus the appellant was truly prepared to commit a felony in terms of section 308 (1) of the Penal Code.

As to the identity of the appellant both PW1 and PW2 testified that after the trio scattered on being shone at with torch light, they managed to arrest the appellant without having lost sight of him even as he tried to flee. There is no doubt that the appellant was arrested in the circumstances described by PW1 and PW2.

I have carefully considered the appellant's own defence plus the testimony of DW2 and find that the said defence failed to shake the prosecution case against him. In fact when DW2 testified she mentioned some items allegedly taken from the appellant's house which the appellant himself did not mention. It is also surprising that a mere knock at a neighbours door, without more, can bring someone out of their house at 9.00 o'clock in the night. In any event if torch light was directed at DW2's eyes, it is unlikely that she was able to see anyone. I therefore find that the appellant's defence and the testimony of DW2 are mere afterthoughts.

In brief therefore, there is enough evidence to support the lower court's finding that the prosecution proved its case against the appellant on both counts beyond reasonable doubt.

The next issue for determination is whether there was breach of the appellant's constitutional rights under ***Article 50 of the Constitutio***n and in particular ***sub-article 2 (g) (h) (c) and (j)***, namely the right to have adequate time to prepare a defence, the right to choose and be represented by an advocate the right to have an advocate assigned to him by the state and at the state expense and the right to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to such evidence.

I have gone through the trial court record and find that the appellant's allegations of breach are unfounded, and dismiss them altogether. Regarding the provisions of ***Article 50 (2) (j),*** I note from the record that there is no indication as to whether or not the appellant was provided with witness statements. There is also no record to indicate whether or not the appellant asked for the same, but it is the duty of the trial court to ensure that an accused person is provided with the witness statements before the commencement of the hearing. It was held in **Thomas Gilbert Cholmeondley -vs- Republic** "that to satisfy the requirements of a fair trial guaranteed under the Constitution the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial, all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items." The sole purpose of such a step is to ensure that the accused person has sufficient time and facilities to enable him prepare his defence and challenge the prosecution evidence at the opportune time both in cross examination and in his defence. Also see **Simon Ndichu Kahoro -vs- Republic Nairobi Court of Appeal Criminal Appeal No. 69 of 2015 [2016] eKLR** in which the court quashed the conviction on the ground that the prosecution had failed to furnish the appellant with witness statements despite the appellant requesting for them.

In the instant case, and as I have already pointed out, the record is silent on this matter. However, whenever the case was to proceed, the appellant told the court he was ready to proceed with the case, and indeed did so and cross examined the witnesses. It is thus my considered view that the appellant's complaint touching on witness statements is an afterthought.

The appellant also complained that he did not have the services of an advocate as provided under ***Article 50 (2) (c) and (h)***. It is my considered view that the implementation of the Constitution is progressive, despite the enactment of the Legal Aid Act N0. 49 of 2012? My reasoning is informed by the fact that apart from murder suspects, and cases involving children, the state is still grappling with the question of assigning advocates to all persons charged with capital offences. It is also my considered view that the failure to provide the appellant with an advocate paid by the state did not result in substantial injustice to the appellant. This ground of appeal therefore fails.

On sentence, the appellant submitted that the learned trial magistrate acted injudiciously in imposing a sentence of seven (7) years imprisonment. It is trite that sentencing is a matter of discretion on the part of the trial magistrate. In the instant case, the sentence provided for is a minimum of seven years and a maximum of 15 years. Before sentencing the appellant the trial court was informed that the appellant was a repeat offender, having been convicted in **Kakamega CMC Cr. Case No. 3463 of 2016** and sentenced to serve three years imprisonment. The appellant in mitigation admitted that he was serving sentence but asked for leniency.

The question that arises for determination is whether in imposing the seven years, the trial court applied wrong sentencing principles, thereby resulting in a sentence so manifestly excessive in the circumstances of the case. In my considered view the learned trial court applied the correct principles in sentencing the appellant and meted out the lowest sentence in the scale of seven to fifteen. As was held in **Kyalo -vs- Republic 2009 KLR 325**, an appellate court would only be entitled to interfere with the exercise of the sentencing where it was shown that the court whose exercise of the discretion was impugned, had either taken into account a relevant factor or had taken into account an irrelevant factor, or that short of those two, the exercise of the discretion was plainly wrong.

In my considered view I find no fault with the learned trial magistrate in the manner she exercised her sentencing discretion. That ground of appeal also fails.

Conclusion

In light of all the above, I find no merit in the appellant's appeal on both conviction and sentence, and accordingly the appeal is dismissed in its entirety. Right of Appeal within 14 days.

It is so ordered.

Judgment written and signed at Kapenguria

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Kakamega on this 9th day of October, 2019.

WILLIAM M. MUSYOKA

JUDGE