REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

CONSOLIDATED CRIMINAL APPEALS 141 & 142 OF 2014

PETER MURIHIA NGURU.....1ST APPELLANT

HENRY KURIA MUCHIRI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Consolidated appeals from the original conviction and sentence

by B. N. Kituyi, Acting Principal Magistrate, dated 29th

October 2014 in Murang'a Criminal Case No. 250 of 2012]

JUDGMENT

1. The appellants were convicted for *preparing to commit a felony* contrary to section 308 (1) of the Penal Code. They were sentenced to *seven years imprisonment.*

2. The particulars of the charge read as follows-

> *"On the 3rd night of March 2012 at 00:10 at Mukuyu Estate of Murang'a County, jointly with another not before court, were found armed with dangerous weapons namely pangas in circumstances that indicated that they [were] so armed with intent to commit a felony namely robbery."*

3. The appellants filed separate appeals. On 21st November 2017 the two petitions were consolidated.

4. There are six principal grounds of appeal. First that the prosecution failed to prove the charge beyond reasonable doubt. Secondly, that the "dangerous weapons" or *pangas* were not produced. Thirdly, that the witnesses contradicted each other regarding the date and time of the alleged offence. Fourthly, that the sworn defence by the appellants was not taken into account. Fifthly, that the learned trial magistrate failed to consider that the charges were driven by a grudge between PW2 and the 2nd appellant; and, sixthly, that the sentence disregarded the period the appellants had spent in custody.

5. The State contests the appeal. The learned Prosecution Counsel, *Mr. Mutinda*, submitted that all the key ingredients of the offence were proved beyond reasonable doubt. He said that the two appellants were positively identified; and, that the evidence placed them at the *locus in quo*. He opined that there was no material inconsistency in the evidence. He submitted that the *panga* was produced by PW1 as exhibit 1. Learned counsel submitted further that the claim of a grudge was an afterthought. Finally, he submitted that the defences proffered by the appellants were unbelievable.

6. These are *first* appeals to the High Court. I am required to re-evaluate all the evidence on record and to draw independent conclusions. In doing so, I have been careful because I have neither seen nor heard the witnesses. See *Pandya v Republic* [1957] E.A 336, *Ruwalla v Republic* [1957] E.A 570, *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190.

7. I will dispose of two matters first. The first relates to the *date* and *time* of the arrest. I am satisfied from the evidence that the appellants were arrested on the *night* of 3rd March 2012. PW1 clarified it was at around *1:00 a.m.* There were other unrelated arrests at 10:00 p.m. which may explain the discrepancies in the time and dates stated in the charge sheet and the evidence. I find that the incongruities are *not*

material and may be cured under Section 382 of the Criminal Procedure Code.

8. The second matter is the allegation that the charges were *trumped up*. The 2nd appellant submitted in this appeal that there was a grudge between him and PW2. That is a red herring. True, he raised the issue of a grudge in his defence. But he never elaborated on its nature. In this appeal, he tried to lead evidence that the dispute was over a woman. Having not led such evidence in the lower court, I declined to entertain it in the appeal.

9. I will now return to other material evidence. The trial started *de novo* before *B. N. Kituyi*, Acting Principal Magistrate, on 3rd April 2013. PW1 was Police Corporal Ngula. He was the investigating officer. On the material night he was on patrol with police officers Okoth and Liru (PW2 and PW3 respectively). He testified as follows-

> *"We reached Mukuyu Maguna Andu Stores. We were told by the guard there were three people hiding in a corner ahead near Kwa John Building…..I told Okoth to remain behind and I went ahead. I saw someone moving ahead and told us…..he had just managed to run away from thugs. So we released him. I went ahead and reached the place. Three men came ahead [sic] of me. One came towards me and the other two on the side. 1st accused was ahead of me. He took [sic] a panga and I removed [sic] a gun and pointed it to [him]. 2nd accused came beside me and was arrested by PC Okoth. I searched 1st accused and found a panga in his jacket. The panga is in court."*

10. At page 21 of the record, the prosecutor told the court *"none mentioned as Ex-1 [sic]"*. The learned prosecution counsel, *Mr. Mutinda*, said the phrase must mean that the *panga* was produced as *exhibit 1*. I have cross-checked the record against the *handwritten* transcript. The phrase appears in the same terms: *"none mentioned as Ex-1 [sic]"*. The judgment of the lower court states the *panga* was produced as an exhibit. The *panga* is not listed in the schedule of exhibits. But I have reached the conclusion that a *panga* was produced in court.

11. The evidence of PW1 states that the 1st accused (the 2nd appellant) was brandishing a *panga*. PW1 contradicted himself by saying he searched the 1st accused (the 2nd appellant) and recovered a *panga* from his jacket. PW2 on the other hand stated that when he arrested the 2nd appellant, he *"felt something inside his coat. I told Ngula to check and he removed a panga from inside him [sic]"*.

12. No weapon or *panga* was recovered from the 1st appellant (2nd accused). PW2, Corporal Charles Liru, created further controversy. He testified that PW1 and PW2 called him for reinforcement. They told him they *"had arrested two men who were chasing a member of the public and one had a panga"*.

13. There is more doubt about the alleged *panga*. In his defence, the 2nd appellant said-

> *"I didn't have the weapon because it can't be carried in my pocket as alleged earlier in Court 4. The panga was having [sic] a black handle. The one produced in this court has a brown handle. PW2 did not bring the same panga." [Emphasis added].*

14. From my re-appraisal of the evidence, significant *doubt* has been created about the *panga* recovered from the 2nd appellant and the one produced in court; and, the circumstances under which it was recovered. When I weigh the proffered defence against the evidence of PW1 and PW3, I *cannot* state with confidence that the 2nd appellant was wielding a *panga* or had concealed it in his jacket.

15. Like I stated earlier, no weapon or *panga* was recovered from the 1st appellant (2nd accused). I am thus *not* satisfied that any of the appellants was armed with a *panga* or any other *dangerous weapon* as alleged by the police.

16. When the appellants were placed on their defence, they conceded they were arrested on the material night but at a different hour from that alleged by the police. They said they were walking home. They were arrested with other people and walked with the police for some time before being ferried in a lorry to the station. They denied preparing to commit a felony. Neither the guard who alerted PW1 about some thugs hiding in a corner; nor, the person who warned PW1 and PW2 about some thugs testified at the trial.

17. Considering all those circumstances, the police rightly concluded that the appellants' conduct was *suspicious*: But the evidence does not support the theory that the appellants *were preparing to commit a felony*. The key ingredients for the offence of *preparation to commit a felony* under section 308 (1) of the Penal Code are missing. See *Manuel Legasiani & others v Republic*, Mombasa, Court of Appeal, Criminal Appeal 59 of 2000 [2000] eKLR.

18. The burden of proof fell squarely on the shoulders of the prosecution. It never shifted to the appellants. *Kiarie v Republic* [1984] KLR 739, *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332 at 334, *Abdalla Bin Wendo and another v Republic* (1953) EACA 166.

19. I have said enough to dispose of this appeal. In the end, I am *not* satisfied that the prosecution proved *all* the ingredients of the offence beyond reasonable doubt. It follows as a corollary that the conviction was *unsafe*.

20. The upshot is that the consolidated appeals are allowed. The conviction and sentence are *set aside*. Both appellants shall be released *forthwith* unless otherwise lawfully held.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **MURANG'A** this 3rd day of July 2018.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

1st and 2nd appellants (in person).

Mr. Mutinda for the Republic.

Ms. Dorcas and Mr. Kiberenge, Court Clerks.