REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO. 3 OF 2018

VICTOR ODHIAMBO OUMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against Conviction and Sentence imposed in Criminal Case Number 130 of 2014

in the Senior Resident Magistrate's Court at Tamu

delivered on 30.1.18 by Hon. P.K.Rugut (RM)

JUDGEMENT

The Trial

1. On 30th January, 2018 preparation to commit a felony contrary to section 308(1) of the Penal Code Chapter 63 Laws of Kenya was sentenced to serve 15 years imprisonment.

The Appeal

2. Being dissatisfied with the conviction and sentence, the Appellant lodged the instant Appeal. In the amended grounds of Appeal filed on 9th July, 2018, Appellant raised 5 grounds of Appeal ***THAT:***

> ***1. The Learned trial Magistrate erred in law and in fact by convicting and sentencing the appellant for 7 years for an offence that was not properly investigated***
>
> ***2. The Learned trial Magistrate erred in Law and in relying on prosecution evidence that was marred with contradictions and inconsistencies***
>
> ***3. The Learned trial Magistrate erred in Law by shifting the burden of proof to the appellant***
>
> ***4. The sentence was harsh and excessive***
>
> ***5. The Learned trial Magistrate failed to consider the Appellant's Defence***

3. When the Appeal came up for hearing on 9th July, 2018, Appellant indicated that he was relying wholly on the amended grounds of Appeal and Submissions filed on 9th July, 2018. Mr. Muia, learned counsel for the state opposed the appeal and submitted that the prosecution case had been proved beyond reasonable doubt in that appellant was arrested by the chief while in the act of committing a robbery and further that an axe and a slasher were recovered from him while a toy pistol was recovered from his house.

Analysis

4. The Court of Appeal in the case of ***GABRIEL NJOROGE VS REPUBLIC (1982 - 88) 1 KAR 1134*** described the role of the first Appellate Court on an Appeal from the subordinate Court in the following terms:-

> ***"…As this Court has constantly explained, it is the duty of the first Appellate Court to remember that the parties to the Court are entitled, as well on the question of fact as on the question of law to demand a decision of the Court of the first Appeal, and as the Court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in***

mind that it has neither seen nor heard from the witnesses and to make due allowance in this respect….."

This being a first Appeal, this Court has a duty to evaluate the evidence, analyze it afresh and draw its own conclusion, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses testify as did the trial Court, and give due allowance for that.

The prosecution's case

5. The prosecution called 4 witnesses in support of the charge. PW1 the Complainant stated that on 2.10.17, he heard noise at his door. He peeped through the window and saw a tall man. That he went out and found people walking by whileappellant was near a bush nearby. That when he questioned appellant, he tried to attack him before walking away. That he called the assistant chief who found appellant sitted on some stones near his house, arrested him andrecovered an axe and a slasher from him.

6. PW2 Peter Otieno Ochieng, the assistant chief stated that on 2.11.17 at about 10.00 pm. He received complainant report that someone had tried to break into his house. That he went to complainant's and found appellant behind the house. He said he later went to appellant's house from where he recovered a rungu, a toy pistol and a slasher and later handed him over to the police.

7. PW3 Elidah Atudo Ode stated that on 2.11.17 at about 10.00 pm, she heard commotion outside the house. That she peeped through the window and saw appellant being ordered to sit down.

8. PW4 Corporal Fredrick Onsembe,the investigating officer received appellant from PW2 who also handed to him a slasher and axe allegedly recovered from appellant and a rungu and a toy pistol allegedly recovered from appellant's houseand after recording statements of witnesses charged the appellant was charged.

The Defence Case

9. When put on his defence, he stated that on 2.11.17 at about 8.30 pm, he was going home when he decided to sit on a heap of stone and wait from his friend. That when complainant found him there, he screamed and the villagers who gathered said that there was no cause for the complaint. That he left the scene and later while passing by the same place with one Wycliffe, he was arrested by the assistant chief and taken to his house from where a slasher, axe rungu and a toy pistol he uses for drama activities were recovered from.

THE ISSUE FOR DETERMINATION BEFORE THE COURT

10. The issue for determination is whether on the evidence presented before the Court, there was any evidence to show any preparation to commit a felony namely housebreaking.

In the case of***Manuel Legasiani& 3 others v Republic [2000] eKLR,*** the Court of Appeal had this to say: -

"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.

11. For the prosecution to prove the offence of preparation to commit a felony, they must therefore establish that the accused had the intention to commit the offence. (**See Kimaru J. in Simon KandegeOndego v Republic, Nakuru High Court Criminal Appeal No. 142 of 2005**).

12. It must be shown that the appellant had put in motion his intention by making preparations to commit the offence. The prosecution must establish that the appellant made the attempt to put into effect his intention.This means that the accused begins to carry out his intention to commit the offence in a way suitable to bring about what he intends to achieve.

13. Evidence tendered is that someone tried to break complainant's house by holding the door handle and appellant was arrested nearby. There is no evidence that it was the appellant that tried to break into complainant's house. Complainant appears to have been suspicious of the appellant only because he sat on some stones near his house. And while PW2 stated that he found appellant hiding behind complainant's house, appellant's evidence that he was arrested while sitting on some stones near complainant's house is corroborated by the complainant.

14. Concerning possession of dangerousoroffensiveweapon, appellant's evidence that the weapons were recovered from his house is well corroborated by the chief who disputed complainant's evidence that appellant was armed at the time of his arrest. Indeed, the assistant chief stated that he *recovered a rungu, a toy pistol and a slasher from appellant's house. Appellant's defence that the items are used in drama activities was neither investigated nor controverted.*

15. It is important to state that suspicion cannot suffice to infer guilt. The Court of Appeal in the case **Joan Chebichii Sawe v Republic Crim. App. No. 2 of 2002** had this say about suspicion in a criminal case:

"The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this court made clear in the case of Mary Wanjiku Gichira vs Republic (Criminal Appeal No. 17 of 1998 (unreported), suspicion however strong cannot provide a basis for inferring guilty which must be proved by evidence."

16. From the foregoing, I find that the prosecution did not prove beyond doubt that appellant was armed at the time of arrest or that he was the one that tried to break complainant's door on the material night.

Decision

17. Having considered the evidence in its totality, I reach a conclusion that the prosecution did not discharge its burden of proof. Accordingly,the

conviction is quashed and the sentence set aside and unless otherwise lawfully held, it is ordered that appellant shall be released and set free forthwith.

It is hereby so ordered.

DATED AND SIGNED ON THIS 19th DAY OF July 2018

T. W. CHERERE

JUDGE

IN THE PRESENCE OF:

Court Assistant: Felix

Appellant: Present in person

For the State: Mr. Muia