



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BOMET**

**CRIMINAL APPEAL NO. 42 OF 2018**

**HILLARY KIPYEGON ALIAS KIMONDA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an appeal from the original Conviction and Sentence in Bomet**

**PM's Cr Case no 1565 of 2016 Hon. Nyigei – SRM)**

**JUDGMENT**

The appellant was 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 are that on the 16<sup>th</sup> day of November 2016 at 3:00 pm at Bomet town he was found armed with a knife in circumstances that indicated that he was so armed with intent to commit a felony namely robbery.

A perusal of the record of proceedings shows that on 6/2/17 the court consolidated Cr. Case no 1565/2016 with Cr. Case No. 1569/2016

Cr. Case no 1565/2016 was ordered to be the lead file, however, there appears to have been confusion as Cr. Case no 1569/2016 which had been ordered closed is the one which proceeded to hearing.

The appellant was charged with four counts in court file no 1565/2016.

Count no 1 – Stealing from the person Contrary to Section 278 as read with Section 275 of the Penal Code

Count no 2 – Resisting arrest Contrary to Section 254 (b) of the Penal Code.

Count III Preparation to commit a felony Contrary to Section 308 (1) of the Penal Code.

Count 4 – Refusing to be taken fingerprints Contrary to Section 5 (5) of the National Police Service Act no 11 (4) of 2011.

In Cr. Case no 1565 of 2016 the Appellant is shown to have been charged with three counts.

1<sup>st</sup> count – Stealing from person Contrary to Section 268 as read with Section 275 of the Penal Code.

2<sup>nd</sup> count – Resisting arrest Contrary to Section 254 (b) of the Penal Code.

Count three – Preparation to commit a felony Contrary to Section 308 (1) of the Penal Code.

In her Judgment the learned trial magistrate acquitted the accused on the 1<sup>st</sup> and 2<sup>nd</sup> counts and convicted him on the 3<sup>rd</sup> and 4<sup>th</sup> counts.

In the first count the appellant was acquitted and rightfully so, as the complainant did not appear in court to testify.

Joel Kipchirchir Kirui (PW1) a watchman at Bomet bus stage testified that the person he saw stealing from a person was one Kipsaburior whom he knew very well but not the appellant who was a stranger to him.

PC Allan Mathenge (PW2) testified that while at the police station's report office, a boda boda rider went there at 2:00 am and reported that there was a man who was terrorizing members of public at family Bank. He proceeded to the scene and found the appellant having been surrounded by watchmen. He told him to accompany him to police station but he refused saying that he had another case in court. When he tried to arrest him he removed a knife. With the help of watchmen they overpowered him and took him to police station.

PW3 was the Investigating Officer. He produced the knife allegedly found with the accused by PW2 PC Allan Mathenge. PC Mathenge went to the scene after information that the accused was selling stolen items related to the case of stealing from the complainant in count no. 1.

In her Judgment the learned trial magistrate correctly gave exposition of the law as regards preparations to commit a felony but failed to correctly evaluate the evidence before her.

According to PW2 the report that was made to him by a boda boda rider was that there was a man near Family Bank who was terrorizing members of public. This report, if at all it was made at the report office, it ought to have been booked. This boda boda rider has a name. He should have recorded a statement so as to be called as a witness.

PW3 testified that on 16/11/16 PC Mathenge received information that some stolen items were being sold in town by a known person. It was upon arrival there that the accused who had been surrounded by watchmen produced a knife and threatened to stab him.

It is instructive to note that none of the watchmen at Family Bank were called to testify in this case.

Apart from the knife which was produced in court, there is no other evidence to link the appellant with preparation to commit a felony.

Section 308 (1) of the Penal Code provides "Any person found armed with a dangerous or offensive weapon in circumstances that indicate that he was so armed with intent to commit a felony is guilty of a felony and liable to imprisonment for a term of not less than 7 years and not more than 15 years"

Being armed with a knife if so proved is not in itself an indication that one has the intention to commit a felony.

The prosecution has to adduce evidence on the circumstances obtaining at the time, that raise reasonable apprehension that the person so armed has the mens rea to commit a felony.

The accused was allegedly found near family Bank Bomet. This is a well-lit area and most likely covered by adequate security. That is not an area that one can choose to commit robberies on members of public unless the Bank itself.

The circumstances surrounding the arrest of the accused are not very clear. If the report was made at the report office that there was a man terrorizing members of public in town. Would an officer leave the report office alone with a view to arrest such a dangerous person. There are serious doubts and gaps in the prosecution case which are hereby resolved in favour of the appellant. Upon a careful evaluation of the evidence on record I am not satisfied that the prosecution provided its case beyond reasonable doubt. The conviction was not safe and sentence was not lawful. Conviction is quashed and the sentence is set aside. The appellant is set at liberty unless otherwise lawfully held.

Judgment delivered dated and signed in open court this 13<sup>th</sup> November 2018 in the presence of learned counsel for prosecution Mr. Wawire. Appellant present, Court assistant – Mr. Rotich.

**M. MUYA**

**JUDGE**

**13/11/2018**