



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**HIGH COURT CRIMINAL APPEAL NO 16 OF 2017**

**ERICK OCHOLLA OTIENO .....1<sup>ST</sup> APPELLANT**

**DANIEL OTIENO OMOGO .....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An appeal from the conviction and sentence by B.R. Kipyegon (SRM) in Ndhiwa Criminal Case No 70 of 2016)**

**JUDGMENT**

**1. DANIEL OTIENO OMOGO (1<sup>st</sup> appellant) and ERICK OCHOLLA OTIENO (2<sup>nd</sup> appellant) were convicted on a charge of preparing to commit a felony contrary to section 308 of the Penal Code and sentenced to serve 7 years imprisonment. The prosecution case was that on 11<sup>th</sup> March 2016 at NDHIWA AP LINES they were found on motor-cycle registration no **KMDR 202 Bajaj Boxer**, armed with a machete having a real intention to commit a felony.**

**2. APC SANDE WESONGA (PW2) was inside his residence which is near the gate at the Ndhiwa AP quarters on 1/03/16 at about 11.40pm when he heard the sound of a motor-cycle engine outside. This was followed by two loud knocks at his door but no one was talking. On the third knock PW2 asked who was at the door but got no response. He was apprehensive that someone was about to come in so he switched on the torch on his phone and opened the door.**

**3. PW2 saw two people standing just about 3 metres away from his door and he recognized **OCHOLA** (the 1<sup>st</sup> appellant who was carrying a panga) and a stranger standing outside his door. He realized the 1st appellant was advancing towards him, so he called out his name and ordered him to stop where he was because he was suspicious and feared the 1<sup>st</sup> appellant’s intentions. PW2 raised his voice and this alerted the other officers within the AP lines who woke up and responded to his distress calls.**

**4. All this time the stranger who was identified as the 2nd appellant stood at the scene and now sensing that he would be outnumbered, the 1<sup>st</sup> appellant attempted to escape but was apprehended within the compound after a joint chase by all the other officers.**

**5. The 1<sup>st</sup> appellant demanded to know why his mother had been arrested. PW2 confirmed to the trial court that indeed the 1st appellant’s mother had been arrested by his colleagues for being in possession of bhang. The motor cycle the intruders had used plus the panga were presented as exhibits.**

6. **APC JOHN BOSCO BULUMA (PW1)** confirmed hearing a distress call from his colleagues within the camp at about 11.40pm. He ran out of his house and found two men standing, one of them whom he knew as **ERICK** (the 1<sup>st</sup> appellant) was holding a panga. He explained that several officers were responding to PW2's distress calls, all their houses had electricity lights and PW2 had opened the door to his house so the rays of light from the house illuminated and he was able to see the intruders. The 1<sup>st</sup> appellant told the police they would know why they had arrested his mother so he had gone to avenge the arrest.

7. The 1<sup>st</sup> appellant in his unsworn defence confirmed that his mother had been arrested on 11/03/2016, then one Friday he arrived home in the company of his brother (the 2<sup>nd</sup> appellant) and suspected that thieves had broken into their home as there was some grain strewn all over the place and the chicken were roaming about. They decided to ride back to the police station to make a report but on the way they met police officers on patrol who claimed that they were up to no good, The officers assaulted them and arrested them even as one **Omollo** who used to borrow the 1<sup>st</sup> appellant's motorcycle claimed that the appellant had a different case related to bhang. He denied going to the camp with an intention of staging an attack and wondered how he could have armed himself with a panga for that purpose.

8. The 2<sup>nd</sup> appellant gave a similar version of events.

9. The trial magistrate noted that the encounter between the appellants and the police officers took place past midnight and that even though the appellants claimed to have been arrested then dragged by the police into the camp, none of them ever commented on the panga which was central to the allegations of preparing to harm the police.

10. The court also found it illogical that the appellants would go to the police station at night simply to make a report about some suspected break-in at their home. The Trial court also considered the logic raised by the 1<sup>st</sup> appellant as to how he could have armed himself to go and attack the police officers but observed that:

“...taking judicial notice of the nature and establishment of Ndhiwa AP quarters such an act was indeed possible. The police house/units are distinctly apart with most policemen and women living singly. Most of the APs at the time were not only recent police recruits, but also newly posted to Ndhiwa.... not necessarily armed most of the times... when within their respective residences at night with no guard duties assigned.”

11. The trial court was persuaded that these were enormous advantages within the knowledge of the appellants and they capitalized on it. The overt act was described as intruding into the AP lines at midnight to single out one particular police officers unit and target one police officer's door and dare that police officer for an attack at about midnight.

12. In challenging the trial court's decision, the appellants stated that the panga which was produced in court was not dusted to ascertain who handled it, and in any event the court failed to consider that there was an existing grudge between them and the police officers.

13. They made written submissions where the 1<sup>st</sup> appellant argued that it was illogical for the trial magistrate to believe that he actually armed himself with a machete intending to stage an attack at the police lines where police officers are heavily armed. He pointed out that there was no legal barrier as to the time a report should be made to the police once a crime has been committed. He also complained that there was no proof that he had handled the panga.

14. The 2<sup>nd</sup> appellant also argued that there was no evidence that he was armed with any weapon and simply passing by the police lines on their way to report a crime at the Ndhiwa police station cannot be reason to victimize him.

15. In opposing the appeal **MR OLUOCH** submitted on behalf of the State that both appellants were at

the AP lines at 11.40 pm while armed with a panga and their intention was to execute revenge because their mother had been arrested in connection with bhang. Counsel pointed out that the evidence of various prosecution witnesses confirmed that the 1<sup>st</sup> appellant had in the past had many brushes with the law and was known for his violent tendencies. Counsel also pointed out that if their intention was merely to make a report or to find out about their mother's fate then there was no need to carry a panga.

16. He argued that the overt acts consisted of:

- Going to the AP camp at night while armed
- Demanding to know why their mother had been arrested even though there was evidence that they already knew why she had been arrested
- Advancing menacingly towards PW2 as to leave no doubt that their intentions were not good

Counsel urged the court to find that the offence was proved.

17. There was no dispute that there was an encounter between the appellants and the police officers on the date in question at about 11.40 pm. There was also no dispute that the appellant's mother had earlier on been arrested by APs in connection with bhang, that the 1<sup>st</sup> appellant was known to the police officers who testified.

18. The issue which the trial court had to resolve is whether this encounter was an ill intended scheme by the appellants to attack the police due to the arrest of their mother, or whether the police who were on patrol simply cooked up the scenario they described after meeting the appellants who were on their way to make a report to the Ndhiwa police station concerning a suspected crime at their home.

19. The trial court in the judgment analysed the meaning of the term preparation as envisaged under section 308 (1) of the Penal Code and relied on the decision in **MANUEL LEGASIANI and others VERSUS REPUBLIC Criminal Appeal No 59 of 2000** where the court of appeal pointed out that to prove the offence some overt act to show that the felony was about to be committed must be demonstrated because the mere possession of a weapon when not accompanied with such overt act would not constitute an offence under that section. The trial court held that although there was no legal definition as to what is a dangerous or offensive weapon, nonetheless the fact that such weapon would cause injury would qualify into the contemplated group.

20. I acknowledge that the trial magistrate lived in Ndhiwa and probably had the advantage of knowing the layout of the AP lines, but he seems to have gone beyond just taking judicial notice of that and in fact led evidence that the officers at the lines were not usually armed while at their residences, that there was no guard at night and that most of the officers living there were recent recruits who had been recently posted to the area.

21. I think that sort of information ought to have come from the officer in charge of the APs at Ndhiwa since even the police officers who testified never alluded to the issues pointed out by the trial court. If the evidence of the two police officers who claimed to reside at the camp is anything to go by, then they were not recent recruits as PW1 said in cross examination that he had been in Ndhiwa for 5 years and PW2 had been there for a year.

22. Issues such as whether none of the officers at the lines are issued with a firearm are administrative issues where an arms movement register would be presented to confirm that none of the officers at the lines had been issued with a firearm that night. With the greatest respect to the prosecuting counsel, there was no evidence on record that the appellants' mother was being held at the AP camp or the police lines. The uncontested evidence presented was that she had been arrested by the AP officers in connection with bhang.

23. Would two adult men decide to go and attack police officers at their quarters at night using a motor cycle whose sound already alerted the officers? Why would the two of them carry only one panga if their mission was to attack the police officers? What were the alleged overt acts by the 2<sup>nd</sup> appellant?

24. From the evidence on record he was not carrying any weapon, he did not say a word to the officers at the lines nor did he attempt to run away or assist the 1<sup>st</sup> appellant as he advanced towards PW2 or even when the police officers were chasing after him within the compound. Indeed the prosecution witnesses were consistent that he just stood watching. It cannot be said that he did anything to constitute acting in concert with the 1<sup>st</sup> appellant other than that he was in his company. Maybe he was simply the one riding the motor cycle.

25. How many police officers live at the AP lines? I ask this because if this was a night attack I would expect more than two officers to come and tell the court what happened-surely even in their evidence the two police officers did not mention names of fellow officers who responded to the distress call or even joined in chasing after the 1<sup>st</sup> appellant within the compound.

26. While I will resist speculating and reconstructing what could have actually taken place, the fact that only two police officers from the lines were the prosecution witnesses gives the impression that the two were probably on night patrol and not within the quarters. There was no evidence presented that the 1<sup>st</sup> appellant had in the past had many brushes with the law and the nature of offences he has committed or anything tangible to confirm that he was of a violent disposition. No particular criminal charge or incident was mentioned or even a court case referred to.

27. From the above I find that there were far too many loopholes to warrant a conviction and the same is hereby quashed. The sentence meted is set aside and the appellants shall be set at liberty forthwith unless otherwise lawfully held.

**Delivered and dated this 13<sup>th</sup> day of March 2017 at Homa Bay.**

**H.A.OMONDI**

**JUDGE**