



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NO.38 OF 2015

(An appeal from original conviction and sentence of Ogembo SPM'S C Criminal Case No. 629 of 2011 by Hon. C.R.T. ATEYA Resident Magistrate dated 5TH May, 2015)

JOB OMAGWA OMWAMU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. **JOB OMAGWA OMWAMU**, the appellant herein, was charged with the offence of preparation to commit a felony Contrary to Section 303 (1) of the Penal Code. The particulars of the offence were that on 18th March 2011 at Nyamecheo Sub-location in Kenyeny District within Kisii County was found armed with an offensive weapon, namely, Maasai sword in circumstances that indicated that he was so armed with intent to commit a felony, namely stock theft.

2. The prosecution called a total of 7 witnesses in support of its case and at close of the prosecution's case, the trial court ruled that a prima facie case had been established against the appellant and placed him on his defence.

3. The appellant tendered sworn evidence and called 2 witnesses in his defence. Upon considering the evidence of both the prosecution and the defence, the trial court found that the prosecution had proved its case beyond reasonable doubt and the appellant was consequently convicted and sentenced to serve 5 years imprisonment.

4. The appellant is aggrieved by the judgment and sentence of the lower and has filed the instant appeal in which he has set down the following grounds of appeal:

1. That the trial magistrate erred in law and fact in not finding and/or appreciating that the prosecution failed to establish their case beyond any reasonable doubt.

2. That the Honourable learned Trial Magistrate erred both in law and fact by finding that the charges leveled against the Appellant were fabrication and baseless.

3. That the Honourable Trial Magistrate erred both in law and fact by not appreciating the glaring inconsistencies, contradictions and discrepancies which are a hallmark running in prosecution evidence

4. That the learned Trial Magistrate erred both in law and fact by meting a manifestly harsh

and cruel sentence against the Appellant without considering all the circumstances.

5. During the appeal, the appellant was represented by Mr. Obure advocate while Mr. Otieno appeared for the state.
6. When the appeal came up for hearing on 27th July 2016, counsel for both sides agreed to canvass the appeal by way of written submissions.

Appellant's written submissions

7. The appellant's advocate submitted that the charge of preparation to commit a felony was not proved against the appellant to the required standards because the prosecution's case was riddled with inconsistencies, contradictions, discrepancies and flaws. In this regard, the appellant contended that there was doubt as to whether the weapon allegedly recovered from the appellant during his arrest was a sword or a knife.
8. The appellant contended that he had a grudge with the complainant over a land dispute which issue of bad blood was not analyzed or considered by the trial court as the reason for his being implicated in the crime. The appellant's case was that the prosecution did not prove that the items allegedly recovered from the scene, to wit, a somali sword and a shoe belonged to the appellant.
9. The appellant contended the trial did not properly evaluate the evidence on record as was required by the law.

Respondent's submissions

10. Mr. Otieno for the state, submitted that the prosecution's case was proved beyond reasonable doubt as the appellant was found with a dangerous weapon in a cattle boma and in circumstances that indicated that he was armed with intent to commit stock theft which is a felony.
11. It was the respondent's case that the prosecution witnesses placed the appellant at the scene of the crime. The state counsel contended that he appellant was cornered by members of the public during the incident and was about to be lynched, and that is why the defence witnesses testified that they saw the appellant being assaulted.
12. On sentence, the state submitted that the sentence of 5 years imprisonment was lawful as the law provides for a maximum sentence of 15 years.
13. This is a first appeal and as was held in the celebrated case of **Okeno vs Republic (1973) E.A 353**, this court is mandated to re-evaluate the entire evidence adduced during the hearing in order to arrive at its own conclusion while at the same time bearing in mind that it neither heard nor saw the witnesses testify.
14. As I have already stated in this judgment, the prosecution called a total of 7 witnesses as follows:
15. **PW1 NICODEMUS OMAIYO OIRERE** was the complainant. His testimony was that on 18th May 2011 at about 11 p.m., he was asleep in his house when he heard someone calling out "there is a thief" "there is a thief". He woke up, went outside and saw that people were going after the thief who turned out to be the appellant. He stated that the appellant was beaten by the people who were pursuing him and was injured. He added that the matter was reported to the police the following day and that at his home, in a cattle boma, a Somali sword and a shoe were recovered by members of the public. He further testified that the appellant was his cousin.
16. On cross-examination, PW1 stated that the appellant was found in his (PW1's) cowshed. When recalled for further cross-examination, PW1 said that on the material night he heard his children Hesbon and Jason shouting "thief" "thief" after which that the appellant was apprehended about 10 meters from

his house and that he found many people beating the appellant. He stated that the appellant was armed with a knife as he was found with it.

17. **PW2, JACKSON OGECHI NYAACHI**, a member of Community Policing team from Nyamecheo Sub location testified that on the material night at about 11pm he heard screams of “thief” thief” and when he went outside his house, he found people beating up the appellant. He convinced the mob not to kill the appellant after which the appellant was escorted to the assistant chief’s home. According to PW2, the appellant was injured and was escorted to the clinic. As search was later on carried out in the home of PW1 and a shoe was recovered. PW2 stated that a Somali sword was also later recovered in the home of PW1 by one Miruka and that PW2 was told that the sword had been recovered from the appellant. PW2 identified the shoe and the sword as MFI-1 and 2 respectively.

18. **PW3, JASON OMBASO OMAIYO** was the son of PW1. He testified that on 18th May 2011 at about 10.30 p.m. he heard noises from behind his house and upon going out to investigate what the matter could be, he met the intruder who threw a metal bar at him and they clashed. He screamed and many people gathered. Members of the public cornered the appellant, attacked him and managed to disarm him. On cross examination, PW3 said that the appellant had a bolted rungu and a knife when he clashed with him and that the appellant threw the knife away. PW3 also stated that the Somali sword was taken away while the bolted rungu that the appellant threw at him was not recovered.

19. **PW4, KEFA OMARE NYAMINTO** saw the appellant at the home of the assistant chief after the appellant’s arrest and assault.

20. **PW5 WILFRED OGIRI OMBATI** was the assistant chief who received information about the arrest and assault of the appellant on the night of 18th May 2011. He advised the mob to take the appellant to hospital as he had been injured. He stated that he was given a knife which the appellant allegedly had and that a shoe had been recovered. PW5 stated that he was told appellant had been arrested while trying to steal cows and that the appellant was the neighbor of the complainant. On cross examination, PW5 stated that the appellant had a boundary dispute with the complainant.

21. **PW6 HESBON MIRUKA**, also the son of PW1, testified that on the night of the attack, he heard his brother shout “thief” “thief” after which he went out and saw someone running away whereupon he gave chase and apprehended the appellant about 30 meters away with the assistance of a neighbor. He conceded that the appellant was their neighbor. On cross examination, PW6 stated that it was his brother who saw the appellant and raised an alarm.

22. **PW7 No. 71520 CPL ALEX CHACHA** was the investigating officer who arrested and charged the appellant. He produced a shoe that was suspected to be that of the appellant and a knife as P-exhibit 1 and 2 respectively.

23. When placed on his defence the appellant gave a sworn statement and stated that on the night of 18th May 2011, he was heading to his home from a meeting when he was attacked from behind by a person he could not identify whereupon he fell down and screamed for help. The attacker covered his mouth, tied him up and carried him back to where he had come from. He was beaten and robbed of his phone and Kshs. 5,500/= after which he was taken to the chief’s home. The chief advised the assailants to take the appellant to hospital but they instead abandoned him on the road where he stayed till morning as he was not able to walk. The appellant was taken to the village elder’s home by good Samaritans and later his parents came and took him to hospital.

24. On cross-examination, the appellant stated that he was found passing near the complainant’s home when he was beaten and robbed for no apparent reason. The appellant denied that he had tried to steal from the complainant’s home. He stated that he reported his assault to the police who issued him with a p3 form. According to the appellant, the complainant incited his children to assault him because of a land dispute that existed between the appellant and the complainant’s family.

25. **DW2 ZABLON WANYONTE MACHUKI** witnessed members of the public assaulting the

appellant on the night in question. He identified the assailants as Ondara, Miruka Omaiyo and Elijah Nyaachu. On cross-examination, DW2 stated that he attempted to rescue the appellant from the assailant's who turned on him and assaulted him.

26. **DW3 EVANS OMOKE MONDA** also witnessed the appellant's assault that happened near the home of PW1.

ANALYSIS AND DETERMINATION

27. I have carefully analyzed the evidence tendered before the lower court and considered the rival submissions of the state and the appellant. The main issue that presents itself for determination in this appeal is whether the prosecution's case against the appellant was proved beyond reasonable doubt.

28. The appellant faced the charge of preparation to commit a felony contrary to section 308 of the Penal Code. The said Section stipulates as follows:

“308. (1) Any person found armed with any dangerous or offensive weapon in circumstances that indicate that he was so armed with intent to commit any felony is guilty of a felony and is liable to imprisonment of not less than seven years and not more than fifteen years.”

29. From the particulars of the charge, the appellant was allegedly found armed with an offensive weapon, to wit a Maasai sword under circumstances that indicated that he was armed with intent to commit the felony of stock theft.

30. The prosecution therefore had to prove that;

a) The appellant was on the material night found armed and;

b) That he (appellant) intended to commit the felony of stock theft.

31. The key words in this charge were therefore the **“Maasai sword”** and **“stock theft”**. Of critical importance in this appeal is whether or not the appellant was found in possession of a sword and under circumstances that indicated that he intended to commit the offence of stock theft. On the issue of being in possession of a sword, PW1 stated:

“a Somali sword was recovered from him by members of the public.”

On cross examination, PW1 said:

“He was armed with a knife. I know because he was found with it. It was a Somali sword.”

32. PW2 stated as follows concerning the sword:

“Somali sword was with Miruka. I was told it had been recovered from the accused.”

33. PW3 had the following to say:

“Members of the public attacked him and managed to disarm him.”

On cross examination PW3 said:

“The Somali sword you had was taken... You threw the knife away.”

“When I clashed with you, you were carrying a bolted rungu and a knife.”

34. From the above extract and analysis of the prosecution witnesses' testimonies, it was not clear who

exactly 'disarmed' the appellant yet PW3 stated that the appellant threw the knife away. Furthermore, PW3 also alleged that the appellant was armed with a bolted rungu which was never recovered. If indeed the appellant, was caught red-handed in the act of preparing to commit a felony, then the question that begs answers is what became of the bolted rungu that he allegedly had at the time. Moreover, it was not lost to me that none of the witnesses came out clearly to state where exactly the appellant was found on the night of his arrest before he was subjected to assault by the mob. While PW1 testified that the appellant was found in the cowshed, PW3, who was the first person to see and interact with the appellant on the night in question did not say that he found the appellant in the cowshed. PW3 had the following to say:

"Seeing he had no chance, he tried to run to the lower side but was caught."

35. The appellant testified that he was attacked from behind by an unknown assailant while he was walking towards his home on the fateful night. The exact place where the appellant was found by his assailants was of critical importance to this case considering that the complainant and the appellant were next door neighbors and therefore it was not strange that the appellant was in that location or in the vicinity of the complainant's home at that time. The prosecution did not prove that the appellant was found inside the complainant's cowshed or that he was about to steal a cow. There was no proof that the shoe which was allegedly found in the complainant's cowshed belonged to the appellant or matched any of the appellant's shoes.

36. The appellant gave a sworn statement in his defence which evidence was, in my view, not impeached by the prosecution whose duty was to prove its case beyond reasonable doubt. I agree with the submissions of the appellant's counsel when he stated that the trial court did not consider and analyze the possibility that the existing land dispute between the appellant and the complainant could have been a reason for his being implicated in the crime bearing in mind that the key witnesses were the complainant and his two sons PW3 and PW6.

37. The Court of Appeal in **Manuel Legasiani & Others v Republic MSA CA Criminal Appeal No. 59 of 2000 [2000]eKLR** dealt with the issue of "preparation" as envisaged in **section 308 (1)** of the **Penal Code** and it observed as follows;-

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, the 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. Mere possession of a firearm not coupled with such an overt act is not an offence under Section 308(1) of the Penal Code.

38. The trial magistrate appeared to suggest that since the sword was found in possession of the appellant, then it automatically meant that he was preparing to commit a felony. In my humble view, being possession of a knife or sword is not an offence *per se*. There was no indication that any law was breached by the possession of that knife. In any case, it is not uncommon for people in the villages to walk around with weapons such as knives, pangas or runqus for their own security especially at night.

39. The trial magistrate held that the defence evidence was contradictory without giving any reasons for such a holding and to me, this was tantamount to shifting the burden of proof to the appellant. The burden is always on the prosecution to prove its case beyond reasonable doubt and that burden does not shift to the accused at any point during the trial.

40. The inconsistencies and gaps that I have noted in the prosecution's case create reasonable doubt in my mind on whether or not the offence of preparation to commit a felony was proved to the required standards.

41. Having found that the prosecution's case was not proved beyond reasonable doubt, I allow the appeal, quash the conviction, set aside the sentence and order that the appellant be set free forthwith unless he is

otherwise lawfully held.

Dated, signed and delivered in open court this 6th day of March, 2017

HON. W. A. OKWANY

JUDGE

In the presence of:

- Mr. Otieno for the State
- Appellant in person for the Appellant
- Omwoyo court clerk