



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NANYUKI
CRIMINAL APPEAL NO. 23 OF 2017

BENSON KARIUKI APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

Consolidated with

CRIMINAL APPEAL NO. 17 OF 2017

BRIAN NGUNJIRI APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. B.S. KHAPOYA – SENIOR RESIDENT MAGISTRATE dated 11th September 2014 in Maralal Principal Magistrate’s Court Criminal Case No. 520 of 2014)

JUDGMENT

1. **BENSON KARIUKI, 1st appellant** and **BRIAN NGUNJIRI, 2nd appellant** were charged with three counts before the Maralal Principal Magistrate’s Court. On the first and second count they were charged with offence of attempted robbery, against Caroline Wanjiru on the first count and against Lydia Mathenge on the second count contrary to section 297(2) of the Penal Code, Cap 63. On the third count they were charged with being in possession of imitation firearm contrary to section 34(1)(3) of the Firearm Act No. 2 of 2002.
2. When the appellants were initially presented before the trial court they only faced the first and second counts. They pleaded not guilty on those two counts. The trial thereafter commenced.
3. The prosecution presented three witnesses. The first witness was **Caroline Wanjiru, (P W 1) (Caroline)**. Caroline was employee at a shop called Ox Bow Enterprises (the shop). That shop was an agent of M-Pesa, that is money transfer agent.
4. The **second witness** was **Lydia Mathenge (Lydia)**. She also worked at the shop.
5. The prosecution’s evidence was that the 1st and 2nd appellants went to the shop posing as clients who wanted to withdraw money from their

M-pesa account. The 1st appellant then pointed a pistol to Lydia. Caroline screamed and she was cautioned by the 2nd appellant to keep quiet. Her screams attracted people which led to the arrest of both appellants.

6. The **third witness** to testify was **Cpl Simon Wachira** an administration Police Officer. He was, on the material day, driving in Maralal town. He saw a crowd gathered and when he went to that crowd he was informed that both appellants had attempted to rob Ox Bow M-Pesa shop.

7. When the prosecution concluded with the evidence of that third witness it sought an adjournment to enable other witnesses to attend court and testify. When the case was next fixed for hearing prosecution applied and was allowed to add the third count against the appellants. The appellants pleaded not guilty to the further count. The case was fixed for further hearing on 3rd September 2014. On that day prosecution was not ready to proceed with the hearing and therefore sought an adjournment. Before the trial court could Rule on whether an adjournment would be allowed both appellants interjected and asked for the charges to be re-read to them. The charges were read and the appellants pleaded guilty to the three counts.

8. At the hearing of the appeals both appellants informed this court that they received threats from police officers involved in this case that if they were released they would be shot dead. They stated that it is because of that threat which led to their change of their plea to guilty. The first appellant, in particular, said that at the time he was 18 years old and said that he pleaded guilty because he did not understand the procedures. Appellants on being asked why they did not report the threats to the trial court stated that they were unaware they had a right to do so.

9. It is difficult as an appellant court to determine whether indeed the appellants were threatened and thereby their right to require a trial was interfered with. What however I would state is that I observed the two appellants and I formed the impression that they were being truthful when they said they were threatened. On that basis I find that the appellant's plea of guilty was equivocal.

10. There are, however two other observations I have made of the trial which will lead me to find that the conviction of the appellants was not safe.

11. Firstly the trial court on allowing the amendment of the charges did not inform the appellant of their right to recall the witness that had testified before the amendment. This is what was stated:-

*“In the case: **REPUBLIC V PETER GITAU NJUGUNA & ANOTHER [2014]eKLR** where the court referred to the Court of Appeal case **HARRISON MIRUNGU NJUGUNA V REPUBLIC Criminal Appeal No. 90 of 2004** as follows:-*

“The Court of Appeal held that ‘the right to hear the witnesses give evidence afresh on the amended charge or to cross-examine the witnesses further is a basic right going to the root of a fair trial’ the court found the proceedings substantially defective and explained that the failure of the court to inform an accused of his rights given to him by law was not a procedural technicality which could be cured under the provisions of section 382 of the Penal Code. We find in this case that the accused were fully aware of their right to recall witnesses but that the court did not heed their numerous calls to give effect to the law.”

12. It follows in the trial court not informing appellants the rights to recall witnesses was in breach of their rights. That failure may have contributed to the appellants' change of plea.

13. The other issue I wish to raise is that the first and second counts omitted a vital ingredient of the offence of attempted robbery contrary to section 297(2) of the Penal Code. **Section 297(1)** and **(2)** provides:-

“297.(1) any person who assaults any person with intent to steal anything and at or immediately before or immediately after the time of the assault, uses or threatens to use actual violence to any

person or property in order to obtain the thing intended to be stolen, or to prevent or overcome resistance to its being stolen, is guilty of a felony and is liable to imprisonment for seven years.

(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company ;with one or more other person or persons, or if, at or immediately before or immediately after the time of assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

14. Appellants were charged on count No. 1 and 2 with the offence under section 297 (2). It will be noted from the above reproduced section 297(2) that the offender must be armed with “dangerous or offensive weapon or instrument.” The particulars of count No. 1 and 2 are in every sense the same except the person being attempted to be robbed were different. The particulars of count 1 are:-

BENSON KARIUKI [2] BRIAN NGUNJIRI: On the 18th day of July 2014 at about 07.40 hours at Maralal town in Samburu Central sub county within Samburu County with others not before court being armed with a toy pistol attempted to rob CAROLINE WANJIRU money and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Caroline Wanjiru.

15. Those particulars show that the ingredient in section 297(2) the words “**armed with any dangerous or offensive weapon or instrument**” are missing. That omission of those ingredients rendered the charges on count No. 1 and 2 to be defective. The Court of Appeal in the case **NYADENGA V REPUBLIC [1989]eKLR** had this to say in respect to a charge under **section 308(1)** of the Penal Code, which just like section 297(2) had the ingredients of the words “armed with dangerous and offensive weapons”:-

“An accused person commits the offence of preparation to commit a felony contrary to section 308(1) of the Penal Code if he is found “armed with any dangerous or offensive weapon in circumstance that indicate that he was so armed with intent to commit any felony” thus, an accused person must be found:-

1. Armed with any dangerous or offensive weapon; and

2. In circumstances that indicate that he was so armed with intent to commit a felony.

These ingredients must be specified in the particulars of the offence under section 308(1). An omission of any one of those ingredients will render the charge for such offence defective to the extent that it discloses no offence. If such charge is not sufficiently amended, on appeal, a conviction thereon will be quashed – see the case of Matu s/o Gichumu V. Rex, (1951)18 EACA 311 at page 316.

The particulars of the offence under section 308(1) of the Penal code for which the appellant, John Dalla Nyadenga, was charged in the court of first instance read as follows:-

“John Dalla Nyadenga: On the night of 8th January, 1987 at Kaidakwa estate in Siaya Township in Siaya district of the Nyanza province was found armed with a panga and a rungu with intent to commit a felony.”

These particulars made no reference to the panga and the rungu mentioned therein being dangerous or offensive weapons. Indeed, the proceedings in the court of first instance made no intimation that these weapons were dangerous or offensive.

The words dangerous or offensive weapon contemplates the weapon being used to cause peril: or intended for or used in attack. It is not for nothing therefore that these words used in section 308(1) of the Penal Code. Failure to indicate in the particulars of the offence set out above that the panga and the rungu were either dangerous or offensive weapons amounted to an omission

of one of the two ingredients that constitute the offence under the section aforementioned. A panga and a rungu, as the first appellate judge rightly pointed out, are not per se dangerous weapons but can be used to inflict injuries on people. The omission of the ingredient mention above together with the absence of evidence being led in the court of the first instance that these weapons were either dangerous or offensive made the charge against the appellant totally defective. That charge disclosed no offence. A conviction arising there from cannot stand.”

16. Failure to include that ingredient in the charges appellants’ faces at trial court will lead to the quashing of the conviction under count No. 1 and 2, because the charges under those counts disclose no offence.

17. In respect to the count No. 3, as stated before this court is of the view the plea of guilty was equivocal. The free choice of pleading was taken away from the appellants by the threats they suffered from the investigating officer. The threat may have been made to bear because the prosecution’s evidence, particularly after the first witness testified, showed there was no evidence of any wrong doing by the appellants. After the second witness took oath and began to testify the prosecution abruptly applied for an adjournment which was allowed and at the resumed hearing that same witness gave very damning evidence against the appellants unlike before the adjournment. It did seem to me that prosecution feared that the appellants, on the evidence already on record could have been found not guilty and therefore adjourned the case to coach the witness.

18. In the end the convictions against the appellants Benson Kariuki and Brian Ngunjiri are hereby quashed. Their sentences are hereby set aside. This court orders that they be set free unless otherwise lawfully held.

DATED AND DELIVERED AT NANYUKI THIS 14TH DAY OF JUNE 2017.

MARY KASANGO

JUDGE

CORAM:

Before Justice Mary Kasango

Court Assistant: Njue/Mariastella

Appellants: Benson Kariuki

Brian Ngunjiri

For the State:

Language:

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE