



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU

HCCRA NO. 51 OF 2015

BILDAD OCHIENG ONDEYO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal from the conviction and sentence of the Senior Principal Magistrate's Court at

Nyando (Hon. P. Wechuli RM) dated the 12th January 2015 in Nyando SPMCRC No, 1420 of 2014]

JUDGMENT

The appellant was charged with preparation to commit a felony contrary to section 308(1) of the Penal Code. The particulars were that on 11th December 2014 at Katito Trading Center in Nyakach District within Kisumu County he was found armed with a dangerous weapon namely a panga in circumstances that indicated that he was armed with intent to commit a felony namely theft.

When he was first arraigned in Court he pleaded not guilty to the charge. The Court fixed the matter for hearing and ordered his release on a bond of 20,000/= with a surety of same sum or a cash bail of 10,000/=.

On January 2015 when the matter was called out for hearing as scheduled and before the trial could begin the appellant requested the Court to read the charges to him. The record shows that the charge was read to him in Dholuo and that this time he said it was true. The Prosecutor then narrated the facts and produced the panga as an exhibit whereupon the accused admitted the facts were correct. The Court then proceeded to record a plea of guilty and after hearing the plea in mitigation proceeded to sentence the appellant to seven years imprisonment which is the minimum provided for that offence.

He has now appealed. In his initial petition he was merely asking for leniency but in the supplementary grounds of appeal filed with the leave of this Court he states that the Court did not warn him of the consequences or the penalty for the offence. He also states that he was not given time to explain the circumstances under which he was found in possession of the alleged panga and that the Prosecution did not produce all the evidence in their hand.

At the hearing of the appeal he relied on written submissions where he states inter alia that all he admitted was that he had a panga but not that he had it with intent to commit a felony and that the Court ought to have given him a chance to explain the circumstances under which he was having the panga.

Miss Wako, Learned Prosecution Counsel opposed the appeal mainly on the ground that the appellant

having pleaded guilty to the charge can only appeal against the legality of the sentence.

It is indeed correct as submitted by the Learned Prosecution Counsel that under Section 348 of the Criminal Procedure a person who has pleaded guilty and has been convicted on that plea by a subordinate court cannot appeal except as to the extent or legality of the sentence.

The manner in which a plea of guilty is recorded were laid down by the Court of Appeal in **Adam V. Republic [1973] EA.A 445** when it held:-

"(i) the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;

(ii) the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;

(iii) the prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or add any relevant facts;

(iv) if the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered;

(v) if there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded."

At page 447 the Court explains:-

"The statement of facts serves two purposes: It enables the magistrate to satisfy himself that the plea of guilty was really unequivocal and that the accused has no defence and it gives the magistrate the basic material on which to assess the sentence. It not infrequently happens that an accused after hearing the statement of facts, disputes some particular fact or alleges some additional fact, showing that he did not really understand the position when when he pleaded guilty; it is for this reason that it is essential for the statement of facts to precede the conviction."

It is against this background that we must examine the plea of guilty recorded in this case. The record shows that the charge was read over and explained (CROA) to the appellant in Dholuo and that he admitted the same. The Prosecutor then narrated the facts as follows:-

"Prosecutor: On 11/12/2014 at about 11pm Ip Wekesa and his team were on patrol within Katito area. They met with the accused who was alone carrying a panga. He was stopped. He didn't give an explanation as to where he was going and why he was armed. He was arrested and taken to Katito police and charged. The panga was kept as an exhibit and is in Court. I wish to present it."

The accused is then recorded as having stated Facts are correct. The Court then convicted him on his own plea of guilty. In his mitigation he again stated **"Indeed I had the panga....."**

In my mind the ingredients of the offence in Section 308(1) of the Penal Code are first, that the person is found armed with any dangerous weapon and secondly in the circumstances that indicate that he was so armed with intend to commit any felony. In the instant case the facts narrated by the Prosecutor only stated that the appellant was carrying a panga and that he did not give an explanation as to where he was going and why he was armed. It was however not stated that he had that panga in circumstances that indicated that he had it with intent to commit any felony. He contends that he did in fact admit he had a panga as he had one but that had he been given a chance he could have explained the circumstances under which he had it. The record seems to bear him out and indeed it cannot be said that his plea was unequivocal. The ingredients of the offence were not fully or sufficiently explained to him for him to

sufficiently answer to the charge.

Accordingly I find his appeal competent and merited and proceed to allow it. The conviction and sentence are set aside and the appellant shall be set at liberty forthwith this Court being satisfied that this is not a proper case for re-trial.

Signed, dated and delivered at Kisumu this ...11th.. day of .February. 2016

E.N. MAINA

JUDGE

In the presence of:-

Miss Wakio for the state

Appellant in person

CC: Felix Magutu