



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT GARISSA**  
**CRIMINAL APPEAL NO. 101 OF 2012**

**BISHAR MOHAMED MULEHA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From the conviction and sentence in Garissa Principal Magistrate's Criminal Case No. 1220 of 2012  
– Ndungu CM)*

**J U D G M E N T**

The appellant was charged in the Principal Magistrate's court at Garissa with preparation to commit a felony contrary to section 308 (1) of the Penal Code. The particulars of the offence were that on 16th August 2012 at Garissa Township within Garissa County, was found armed with a dangerous weapon namely a knife in circumstances that indicated that he was so armed with intent to commit a felony namely robbery.

He was brought to court on 17th August 2012, and when the charge was read to him, he was recorded as responding that it was not true. A plea of not guilty was thus entered and the case fixed for hearing on 30th October 2012 and also for mention on 31st August 2012.

It was mentioned on 31st August 2012 and when it was mentioned again on 14th September 2012, the appellant asked that the charges to be read again to him. When the charge was read and explained to him in Kiswahili language, he stated that it was true. The trial court did not record whether a plea of guilty was entered and since the prosecutor said he did not have the file, and the matter was put for mention on 17th September 2012.

On that 17th September 2012, the facts were summarized in court. The facts were short and I will reproduce them hereunder:- "On 16th August 2012 at about 11.30pm two police men on patrol stopped accused for interrogation. On quick search they found him with a dagger (long knife). They suspected it was for use to commit a felony. Arrested and charged".

To the above facts, the appellant stated that the facts were correct, and the court then convicted him on his own plea of guilty. Thereafter the prosecutor said that the appellant was a first offender. In mitigation, the appellant asked for forgiveness. The learned magistrate thereafter asked for a probation report in which the appellant was said not to be a first offender but no particulars of the previous case was given. The appellant denied that he had committed a previous offence.

The learned magistrate before sentencing stated that since the appellant had challenged the previous conviction alleged in the probation officer's report, she would treat him as a first offender. The court then sentenced him to the minimum custodial sentence provided by law, to serve 7 years imprisonment.

Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal. He filed his initial grounds of appeal on 17th March 2015. He however filed amended grounds of appeal on 16th February 2016, which are as follows:-

1. **That he pleaded and was convicted on his own plea of guilty.**
2. **That he is remorseful, therefore he seeks leniency.**
3. **That the trial magistrate did not consider his mitigation and went ahead relying on the probation report that was lured by bribery and intimidation.**
4. **The sentence appears to be harsh and excessive.**
5. **That he was sincerely offering apologies to the court as he had turned his back on the evil imposed by the prosecution side.**
6. **That all his parents were dead and he had no one to rely on.**
7. **That this court should review the whole matter considering that he had reformed due to the time he stayed in prison and acquit him.**

During the hearing of the appeal, the appellant orally submitted that he was framed as his mother had sent him in the morning and he was arrested at 1pm before he returned home. He stated that his arrest was during IDD day and that he was arrested by two police officers and charged, while on that day there was widespread slaughter of stock for the IDD celebration.

Learned Prosecuting Counsel Mr. Okemwa, opposed the appeal and asked the court to peruse at the record. Counsel submitted that the appellant was found armed with a dangerous weapon and was thus preparing to committing a robbery.

Counsel submitted that the grounds of appeal appear to be on sentence, and that the magistrate went out of her way to call and consider a Probation Officer's report before sentencing the appellant to 7 years imprisonment, since the probation report was negative on him. Counsel submitted also that though the appellant disputed the Probation report, the magistrate found him to be untruthful and this court should also find him untruthful. Counsel urged the court to dismiss the appeal.

In response to the Prosecuting Counsel's submissions, the appellant submitted that he had with him an ordinary knife for slaughter of livestock, and that he was not preparing to commit a felony.

This is a first appeal. As a first appellate court, I am required to re-evaluate all the evidence on record and come to my own conclusions and inferences. See the case of *Okeno – Versus – Republic [1972] EA 32.*

The appellant is recorded as having been convicted on his own plea of guilty. His grounds of appeal appear to be on sentence. He however also asked for an acquittal which means that he was appealing also against conviction. In his submissions also, he stated that he carried a knife for slaughter of goats during IDD celebrations, and denied preparing to commit a felony.

Though the appellant appears to be appealing on sentence, since he is a lay person, I am bound to reconsider the whole record as it relates to both the conviction and the sentence.

The steps to be taken by the court in taking a plea of guilty have been considered by courts in several cases. One of the often quoted cases is the case of *Adan – Versus – Republic [1973] EA 445* in which the former Court of Appeal for East Africa listed the necessary steps to be taken by a trial court in recording a plea of guilty.

In the present case, the appellant was recorded as having stated initially that the charge was not true in Kisomali. He was later recorded as asking for the charge to be read to him, and when it was read to him in Kiswahili language, he pleaded guilty.

There is thus an issue of language that is whether the appellant actually fully understood the charge in the Kiswahili language in which it was read to him. It is not clear from the record whether the appellant understood Kiswahili. The magistrate also did not record a plea of guilty from what the appellant said in

response to the charge and particulars, as read and explained to him. These two factors put together, create a doubt in my mind as to whether indeed the appellant understood the charge and particulars fully and whether what transpired was clear enough even to the trial court.

The more important issue with regard to the conviction is the facts that were given by the prosecutor for this serious offence. The facts were very scanty and in my view did not themselves disclose the offence of preparation to commit a felony. For example, the facts do not say that the appellant was near any person or any building. They do not say that he was hiding or appeared to be hiding from anybody. They do not say what offence he was suspected by the police of preparing to commit.

In my view, the fact that someone is seen at night carrying a dagger, by itself, is not a reason enough to say that he is preparing to commit a felony. Other circumstances have to be given surrounding his possession of the dagger that could lead irresistibly to the conclusion that he was preparing to commit a felony. I take note of the fact that It is common among pastoralists to carry knives, sometimes for lawful purposes such as what the appellant alleges for slaughter on IDD day, sometimes for unlawful purposes. It is thus important for a prosecutor to give facts to the court, which would convince a reasonable person to come to the conclusion that the culprit was carrying the weapon in preparation to commit a felony before a court can convict on plea of guilty for a charge of preparation to commit a felony.

In my view the facts given by the prosecutor did not establish all the ingredients of this serious offence. The acceptance of the facts by the appellant therefore did not amount to an admission that he committed the offence, as the facts did not disclose the necessary elements of the offence in the first place. I find that the conviction of the appellant on the basis of the facts given by the prosecutor was not proper. The plea of guilty was not unequivocal. I will quash the conviction.

The sentence of 7 years imprisonment will also have to be set aside.

To conclude, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

**Dated and delivered at Garissa this 3rd May 2016**

**GEORGE DULU**

**JUDGE**