



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 6 OF 2014

JOHN WERU KAMANDE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

(Being an appeal against the conviction and sentence in judgment of Hon. W.A.Juma (C.M) dated 20TH December, 2013 in C.M.CR.Case No. 68 of 2013.)

FACTS

1. On Count I the appellant, **John Weru Kamande** was charged with the offence of Robbery with violence contrary to **Section 296(2)** of the **Penal Code**.
2. The particulars of the charge on **Count I** are that on the night of 26.01.2013 at around 7.30pm in Nyeri Town armed with an AK47 rifle he robbed Thomas Mwangi Githinji (**PW1**) of Ksh.620,000/- and immediately before and immediately after the time of such robbery used personal violence to **PW1**.
3. **Count II**, was the offence of Preparation to commit a Felony Contrary to Section 308 (1) of the Penal Code. The particulars are that on the 1st day of February, 2013 at around 23.00hrs within Majengo Estate in Nyeri County the appellant was found armed with an offensive weapon namely a small axe in circumstances that indicated that he was armed with an intent to commit a felony namely robbery.
4. *The appellant was tried and acquitted on **Count I** as there was a problem on the positive identification; but he was convicted on **Count II** on the grounds that the prosecution had proved its case to the desired threshold; the appellant was sentenced to a term of ten (10) years imprisonment.*
5. Being aggrieved by the conviction and sentence the appellant filed a Petition of Appeal on the 22nd January, 2014 and listed five (5) grounds of appeal which are summarized inter alia;
 - (i) The prosecution failed to prove its case beyond reasonable doubt;
 - (ii) The prosecution evidence was full of contradictions and inconsistencies;
 - (iii) That a crucial witness was not called to testify;

(iv) The trial court did not consider his defence and gave no sufficient reasons.

APPELLANTS SUBMISSIONS

6. The appellant relied on his written submissions; the appellant disputed being in possession of the axe; **PW6** testified that when the appellant was arrested he was found with an axe; **PW7** stated that appellant dropped the axe as he ran off and was arrested five (5) metres from where it had been dropped; **PW8** says that it was 10 metres; that if these witnesses were together then their evidence was inconsistent.

7. That the Masai shuka was not produced in court nor was an inventory filed and or produced; that the arrest was founded only on suspicion; on suspicion the appellant referred to the case of **John Kamanda vs R Cr.App.No. 28 of 1997** KLR where it was held that suspicion no matter how strong cannot be an inference of guilt; that the prosecution did not prove its case beyond reasonable doubt.

8. That his sworn statement of defence was not considered and the trial court failed to note that the appellant had no duty to prove his innocence; this burden was on the prosecution.

9. The appellant prayed that the appeal be allowed and the conviction be quashed and sentence be set aside.

RESPONDENTS SUBMISSIONS

10. The appeal was opposed; Counsel submitted that the evidence of **PW6**, **PW7** and **PW8** was consistent and was corroborated; the appellant was wanted for a spate of robberies with violence; that acting on a tip off that the appellant had been spotted in Nyeri Town a man-hunt was conducted that night of 1/02/2013 at 11.00pm; when the appellant saw the police officers he fled from the scene; in the process he dropped the axe which he had been hiding inside his Masai shuka; that he was arrested 5metres from where he had dropped the axe.

11. That possession was proved beyond reasonable doubt; that the charges were not trumped up; the evidence of **PW6**, **PW7** and **PW8** was consistent that the appellant was arrested with an axe and he was unable to give a reasonable explanation and that the only inference that could be drawn was that he was preparing to commit a felony.

12. Counsel prayed that the appeal be disallowed.

ISSUES FOR DETERMINATION

13. After taking into consideration the parties submissions there is only one issue that this court has framed for consideration which is;

(i) Whether the prosecution proved intention to the desired threshold.

ANALYSIS

14. This being the first appellate court, it is trite law and also incumbent upon this court to reconsider and re-evaluate the evidence and arrive at its own independent conclusion always keeping in mind that it did not have an opportunity to see nor hear the witnesses. Refer to the case of **Okeno vs Rep (1972) EA**.

15. The evidence of CPL. David Musyoka (**PW6**), PC Salad Boke (**PW7**) and PC Micaa Gathongori (**PW8**) was that they were on foot patrol when they were called by the Officer-In-Charge that information had been received through an informant that a wanted robber was in the vicinity of a bar known as F2.

16. They proceeded there and the informant pointed out the appellant who was outside the bar; that they proceeded to introduce themselves but the appellant started to run away and in the process dropped

the axe; they pursued him and arrested him at about approximately 5 metres from where the axe had been dropped.

17. Section 308 (1) of the Penal Code reads as follows;

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

18. The key ingredient is intention; it is note-worthy to note that all the above prosecution witnesses were policemen; none of these prosecution witnesses gave evidence on whether they saw the appellant using the axe nor did they testify to having seen him threatening revelers or passers-by so as to prove his intention to commit a felony in this instance, robbery.

19. This court also takes note of the fact that there was no independent civilian witness who testified for the prosecution as to the appellants’ intentions; or as to his use of the axe and or whether the appellant was seen threatening the revelers or any passers-by on that material night.

20. The mere fact that he was walking around with an axe does not go to prove that there was an overt act of intention to commit a felony; he may have been headed home after a hard day’s work of chopping wood; this court opines that suspicion alone does not infer guilt and there must be evidence of steps taken or a chain of events to demonstrate intent and or objective.

21. This court is satisfied that the prosecution failed to prove intention; and thus failed to prove its case beyond reasonable doubt.

FINDINGS and DETERMINATION

22. In the light of the forgoing this court finds that the prosecution failed to prove its case to the desired threshold; and further finds that the conviction on **Count II** to be unsafe.

23. The appeal is found to be meritorious and is hereby allowed.

24. The conviction is hereby quashed and sentence set aside.

25. The appellant be set at liberty forthwith unless otherwise lawfully held.

Orders Accordingly.

Dated, Signed and Delivered at Nyeri this 12th day of May, 2016.

HON. A. MSHILA

JUDGE