REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 28 OF 2011

FRANCIS GITONGA KARIUKI……...APPELLANT

VERSUS

REPUBLIC ………………………...RESPONDENT

(Being an appeal against both conviction and sentence in Nyeri Chief Magistrates' Court Criminal Case Number 1342 of 2003 (Hon. J.B.A Olukoye) on 9th October, 2003)

JUDGMENT

The appellant was charged jointly with another with the offence of preparation to commit a felony contrary to **section 308 (1)** of the Penal Code, Cap. 63; it was alleged that on the 15th day of June 2003 at Mweiga Stadium in Nyeri District within Central Province jointly with others not before court they were found armed with an offensive weapon namely, a toy pistol in circumstances that indicated that they were armed with intent to commit a felony namely robbery.

The appellant's co-accused was also charged with a second count of being in possession of cannabis sativa contrary to **section 3(2) (a)** of the **Narcortic Drugs and Psychotropic Substances Control Act No. 4 of 1991**; the particulars were that on the 15th day of June 2003 at Mweiga stadium in Nyeri District within Central Province, he was found in possession of bhang to wit three rolls in contravention with the Act.

Both the appellant and his co-accused were convicted of the first count and each of them was sentenced to three years imprisonment; the appellant's co-accused was also convicted of the second count but his conviction and sentence are of little relevance to this appeal which, no doubt, has nothing to do with him.

The appellant was dissatisfied with the conviction and sentence and therefore appealed to this court on grounds that; the learned magistrate erred in law and fact in placing him on his defence when the prosecution had not proved its case to the required standards; that she also erred in law and in fact by filling the glaring gaps in the prosecution case; that she shifted the burden of proof from the prosecution to the accused.

The learned magistrate's decision was also faulted because it is alleged that she erred in law and in fact in not according the appellant the benefit of doubt in the prosecution case. According to the appellant, the learned magistrate acted on assumptions without evidence and erred in law and in fact in holding the appellant guilty of the offence of preparation to commit a felony when it was apparent from the prosecution case that the appellant was not involved in the said offence. In the absence of concrete evidence, so the appellant stated, the conviction was not safe and in any event, the sentence was excessive and harsh in the circumstances.

The record shows that the only two witnesses who testified on behalf of the prosecution were police officers from Mweiga police station; police constable **Nicasius Nyaga** (PW1) testified that on 15th June, 2003 at 5 pm, he was at Mweiga stadium together with police constable Gaturuku and other officers apparently on security duties during a public rally presided over by His Excellency, the President. One of his colleagues, police constable **Musyimi (PW2)** told him that there were three people in the crowd one of whom was in possession of a pistol. The officer and his colleagues then trailed the suspects and arrested two of them. Upon a quick search, they recovered three rolls of bhang from the appellant's co-accused. Apart from the bhang, the officers also recovered a black polythene bag that is alleged to have been close to where the suspects stood; the bag is said to have contained a toy pistol, a scarf and a piece of cloth. The officer testified he did not believe the appellant and his co-accused when they told him that they had been given the paper bag by a third person; he thus proceeded to arrest and charge them accordingly.

Upon cross-examination the officer testified that the appellant and his co-accused were in fact seated and not standing when they were arrested and that the paper bag was only five metres away from them. It was his evidence that he saw them placing the paper bag where the police recovered it from; in particular he saw the appellant's co-accused place the paper bag beside where they were seated. He was categorical that the appellant was not holding the paper bag. He admitted that there were many people in the stadium, at that time.

Police constable **Sammy Musyimi (PW2)** testified that on the material day he was on a presidential coverage at Mweiga stadium when he got a tipoff that three men had been spotted with a pistol; the officer was then accompanied by his colleagues whom he identified as police constable Nyaga (PW1) and Kasuku. Together, they laid an ambush and managed to arrest the appellant and his co-accused who is alleged to have been found in possession of bhang in his trouser pocket. Upon interrogation, the appellant and his co-accused are said to have led the officers to where they had hidden a toy pistol and a torch; these items are alleged to have been found 20 metres away from the stadium.

The appellant denied the charge against him and in his sworn statement he admitted that he was in the crowd attending a public rally at Mweiga on 15th June, 2003 when someone who was selling sugar-cane at the stadium called his co-accused and gave him a paper bag. The police came and searched the appellant and his co-accused; nothing was found on their person. The appellant, however, told the police that he saw his co-accused being given a paper bag and he showed them where it had been placed. He later came to learn of the contents of that paper bag at the police station.

The appellant denied knowing the person who gave out the bag to his co-accused but that he was close to him when he was called for the paper bag. The bag, according to his evidence, was hidden 50 metres away from them. The co-accused, according to his evidence, hailed from the same village with him.

This was the evidence the learned magistrate was confronted with and it has been necessary to reproduce it here because as the first appellate court, this court is bound to analyse the evidence afresh and come to its own conclusions independent of those that the learned magistrate came to but always bearing in mind that it is only the trial court that had the advantage of hearing and seeing the witnesses; if any authority is needed for this position of the law then the decision in **Okeno versus Republic (1972) EA 32** comes in handy; in that case the Court of Appeal for East Africa had this to say on the need to evaluate the evidence at the trial afresh:-

> ***An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."(See page 36 of the decision thereof).***

This fresh scrutiny and analysis of evidence is more meaningful when it is done within the spectrum of the law under which the appellant was charged; the law in question here is **section 308(1)** of the **Penal Code, Cap 63 and it provides as follows:-**

> ***308. Preparations to commit felony***
>
> ***(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.***

This provision of the law was discussed **in Criminal Appeal No. 59 of 2000 Manuel Legasiani & 3 Others versus Republic (2000) eKLR** where the Court of Appeal placed much emphasis on the word "preparation"; in its decision, the Court asked itself whether in the case before them there was any evidence of preparation to commit a felony. In unraveling this question the Court said:-

> ***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, Eighth Edition. To prove the offence in question some overt act, to show that a felony was about to 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. If the offence is a lethal weapon and is held without a licence another offence may be indicated.***

In order to convict under **section 308(1)** of the **Penal Code** the trial court must be satisfied beyond all reasonable doubt that the accused person was not only in possession of what has been described as a "dangerous or offensive weapon" but must also demonstrate that there was some act tending towards what would amount to preparation to commit a felony. The prosecution has also to discharge the burden of proving that whatever article that is considered a weapon in the context of **section 308(1)** is "dangerous" and "offensive" and the court must equally be satisfied beyond reasonable doubt that sufficient evidence has been led to bring the weapon within this definition. In **Mwaura & Others versus Republic 1973 EA 373** the Court of Appeal for East Africa described dangerous and offensive weapons as understood under section 308(1) to mean *"any articles made or adapted for use for causing injury to the person, such as a cosh, knuckleduster or revolver; or any articles intended, by persons being found with them for use in causing injury to the person."*

Coming back to the evidence against the appellant at the trial, I am not satisfied that the prosecution proved any of these essential ingredients or elements of the offence under **section 308(1)** of the **Penal Code**, at least to the required standard.

The prosecution evidence was inconsistent in its material aspects as far as the evidence of possession of what was alleged to be a dangerous or offensive weapon was concerned; while **Nicasius Nyaga (PW1)** testified that the black polythene bag in which the toy pistol is said to have been wrapped was only five metres away from the appellant and that he saw his co-accused place it where the police officers recovered it **Sammy Musyimi (PW2)** testified that the accused person led the police to where this package was apparently hidden, which was 20 metres away from where the appellant and his co-accused were either seated or were standing.

It is also curious to note that while **Musymi (PW2)** testified that amongst the other contents in the paper bag was a torch, **Nyaga (PW1)**, on the other hand, testified that apart from the toy gun, the only other items in bag were a scarf and a piece of cloth; none of the alleged items was exhibited in court but more importantly, considering the contradictions on evidence of what was found in the paper bag, it is doubtful whether any of these items including the purported pistol was found in the paper bag as claimed.

It must be noted that the appellant and his co-accused were not the only people within the proximity of the alleged paper bag; the prosecution's own evidence was that there was some sort of public rally at the stadium where the appellant was one amongst the many people in the crowd that had gathered for the

rally. If this is the case, it is not clear, or to be precise, it was not proved why the police officers picked on the appellant and his co-accused from the large crowd as the people who must have been in possession of the paper bag.

I note that although the learned magistrate found as a fact that the appellant and his co-accused were not found in possession of the alleged offensive weapon she still proceeded to hold that they committed the offence as charged.

I would agree with the learned magistrate that the fact of possession of the alleged offensive or dangerous weapon was not proved satisfactorily but I will not go as far as holding the appellant liable for the offence under **section 308(1)** when the ingredient of possession was not established.

Even if possession was to be proved the next hurdle which the prosecution did not surmount was proof of the preparation by the appellant and his co-accused to commit a felony. It has been noted in **Manuel Legasiani & 3 Others versus Republic (supra)** that possession of an offensive or dangerous weapon *per se* is not an offence under **section 308(1)** of the Penal Code; the prosecution must go further and prove what the court described as some overt act that a felony was about to be committed. No evidence was led to show that the appellant and his co-accused were about to commit a felony, and in particular a robbery.

Ms Maundu for the state conceded that the appeal has merits because of the contradictions in the prosecution case; I agree with the learned counsel that indeed there were inconsistencies in the prosecution evidence but more than that, there was no evidence upon which a safe conviction could be sustained.

In convicting the appellant and the co-accused the learned magistrate held that they failed to call witnesses to support them on the fact that they had nothing to do with the weapons or that they were together and did not know each other. This was a clear misdirection both in law and in fact on the part of the learned magistrate because it was not up to the appellant and his colleague to prove their innocence; the burden of proof was on the prosecution and it was in error for the learned magistrate to shift this burden to the appellant.

I am satisfied that the appellant's appeal is merited and ought to be allowed. I hereby allow it, quash the conviction and set aside the sentence. It is so ordered.

Dated, signed and delivered in the open court on the 8th July, 2016

Ngaah Jairus

JUDGE