REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 120 OF 2011

Bernard Kariuki Chege.....…...…….Appellant

Versus

Republic…….....……Respondent

Consolidated with

Criminal Appeal No. 121 of 2011, Criminal Appeal No. 122 of 2011, Criminal Appeal No. 124 of 2011, Criminal Appeal No. 125 of 2011, Criminal Appeal No. 127 of 2011, Criminal Appeal No. 128 of 2011, Criminal Appeal No. 129 of 2011, Criminal Appeal No. 130 of 2011, Criminal Appeal No. 131 of 2011, Criminal Appeal No. 132 of 2011, Criminal Appeal No. 133 of 2011, Criminal Appeal No. 134 of 2011, Criminal Appeal No. 135 of 2011, Criminal Appeal No. 136 of 2011, Criminal Appeal No. 137 of 2011, Criminal Appeal No. 138 of 2011, Criminal Appeal No. 140 of 2011, Criminal Appeal No. 141 of 2011, Criminal Appeal No. 142 of 2011.

(Appeals against Judgement, Conviction and Sentence in Criminal Case Number 392 of 2008, R vs. Bernard Kariuki Chege at Nyeri, delivered by M. Nyakundi, S. R. M on 29. 6. 11).

JUDGEMENT

The appellants in these consolidated appeals seek to quash the convictions and sentences imposed upon them by the Learned Senior Principal Magistrate in Criminal case number **392** of **2009,** whereby they were charged with the offence of preparation to commit a felony contrary to Section **308 (1)** of the Penal Code.[1]It was alleged that on the 20th day of April 2009 at Giakatiga along Nyeri-Karatina road in Nyeri district within central province, jointly with others not before court, they were found armed with offensive weapons namely, Pangas, Knives, and Rungus in a motor vehicle Registration number **KBD 470 T**, Toyota Matatu in circumstances that indicated that you were so armed with intent to commit a felony.

For the sake of clarity, it is important to state that this judgement does not apply to the appellants in criminal appeal numbers **123** of 2011 and **139** of 2011, namely **John Maina Muthoni** and **Zakayo Waweru Ngubiri** respectively against whom warrants of arrest were issued for failing to attend the hearing of this appeal.

This court has a duty to weigh conflicting evidence and draw its own conclusions[2] while making allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses**.**[3]

The crux of the evidence was that the police while manning a road block along the said road received information to the effect that a group of men had boarded a Nissan Matatu from Nyeri headed to Karatina. The police stopped the vehicle, but the driver attempted to drive over the road block. They managed to stop it and noted that the vehicle had excess passengers. Upon checking they found that the passengers were holding pangas. They immobilized the vehicle and ordered the passengers not to move then called for reinforcement from Nyeri and Karatina. The alleged offensive weapons were recovered from the accused persons who were 23 in number including the driver. An inventory of the weapons was prepared at the scene by the police but the appellants refused to sign it.

In their defence, all the appellants except the driver and conductor denied that they were in the vehicle. They individually stated that they were each arrested elsewhere at different places with some saying they

were arrested on their way home while others alleged that they were arrested at bus stages as they awaited to board vehicles to their respective homes or destinations.

The learned magistrate concluded that the prosecution evidence was overwhelming and convicted the appellants as charged and sentenced each one of them to serve **7 years imprisonment** with no option of a fine.

Aggrieved by the verdict, the appellants seek to overturn the said conviction and sentence. Essentially, the major issue raised is whether the prosecution proved its case to the required standard.

The primary objective of criminal law is to maintain law and order in the society, to protect the life and liberty of people and punish the offender. It is the basic principle that criminal liability may be imposed only if all the ingredients of an offence are fully proved beyond reasonable doubt.

The offence the appellants faced falls under the category of offences described as **"inchoate"**

meaning *"not completely formed or developed yet, not yet completed or fully developed; rudimentary."**[4]***

Inchoate comes from a Latin word for beginning. When something is *inchoate*, although you don't yet understand what it is fully, you have a strong sense that it is indeed coming. It's stronger than the wisp of an idea that never turns into anything. But it's hard to really find the language to describe an *inchoate* idea.[5]

Inchoate crimes are incomplete crimes which must be connected to a substantive crime to obtain a conviction. Examples of *inchoate* crimes are criminal conspiracy, criminal solicitation, and *attempt to commit a crime*, when the crime has not been completed. It refers to the act of preparing for or seeking to commit another crime.

An i*nchoate* offense requires that the defendant have the specific intent to commit the underlying crime. An *inchoate* crime may be found when the substantive crime failed due to arrest, impossibility, or an accident preventing the crime from taking place.

Strictly *inchoate* crimes are a unique class of criminal offences in the sense that they criminalize acts that precede harmful conduct but do not necessarily inflict harmful consequences in and of themselves. It can thus be appreciated that it could extend the criminal law too far to reach behind those acts and criminalize behaviour that precedes those acts.

An ***inchoate offense***, ***preliminary crime***, or ***inchoate crime*** is a crime of preparing for or seeking to commit another crime. The most common example of an *inchoate* offense is "attempt". "*Inchoate* offense" has been defined as: "Conduct deemed criminal without actual harm being done, provided that the harm that would have occurred is one the law tries to prevent."[6] Every *inchoate* crime or offense must have the *mens rea* of intent or of recklessness, but most typically intent.

Specific intent may be inferred from circumstances.[7] It may be proven by the doctrine of "dangerous proximity", and the presence of a "substantial step in a course of conduct".[8]

The dividing line between legal and illegal conduct is whether there is a *"substantial step"* towards committing a *specific* crime; similarly, the dividing line between attempt and conspiracy is whether or not there is another person involved or an agreement, *plus* a substantial step.

When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is said to attempt or to prepare to commit the offence.

In a commentary on the *Indian Penal Code (Act XLV of 1860),***[9]** the learned authors have authoritatively defined the essential ingredients of an *attempt to commit an offence* in the following words:-

"In every crime, there is first intention to commit it, secondly, preparation to commit it, thirdly to commit it. If the third, that is, attempt is successful, then the crime is complete. If the attempt fails, the crime is not complete but the law punishes the act. An 'attempt' is made punishable because every attempt, although it fails of success, must create an alarm, which, of itself, is an injury, and the moral guilt of the offender is the same as if he had succeeded"

Thus, for there to be an attempt to commit an offence by a person, that person must:-

(a) Intend to commit the offence;

(b) Begin to put his intention to commit the offence into execution by means which are adapted to its fulfilment. This means that the accused begins to carry out his intention to commit the offence in a way suitable to bring about what he intends to achieve;

(c) Do some overt act which manifests his intention; that is, the accused performs an act which is capable of being observed by another (although it may not have been) and which in itself makes clear his intention to commit the offence,[10]

But in fact he does not commit the whole offence. For the offence of preparing or attempting to commit an offence to be proved, the prosecutor must prove each of those three elements beyond reasonable doubt.

The act relied upon as constituting the attempt or preparation to commit an offence must be an act immediately, not merely remotely, connected with the contemplated offence. This was enunciated in the case of *Williams, Ex parte The Minister for Justice and A-G*.[11]What is done must go beyond mere preparation to commit the crime and must amount really to the beginning of the commission of the crime. But it is necessary that the accused should have done his best or taken the last steps towards the intended offence. There can be an attempt to commit an offence where the failure to complete the commission of it is due to ineptitude, inefficiency or insufficient means on the part of the accused person. In fact, the fact that a person, having done something which amounts to an attempt, then voluntarily desists from continuing the attempt, does not relief him from criminal responsibility for the attempt which he made before desisting.

For the prosecution to prove the offence of preparation to commit a felony, they must establish that the appellants had the intention to commit the offence.[12] It must be shown that the appellants had put in motion their intention by making preparations to commit the offence. The prosecution must establish that the appellants made the attempt to put into effect their intention . The question that calls for determination is whether or not the conduct of the appellants constituted an overt act sufficiently proximate to constitute preparation to commit an offence.

The High Court of Tanganyika grappled with the difficulties courts face in resolving cases of this nature in the case of *Mussa s/o Saidi vs Republic***[13]** where, **Spry J** (as he then was) stated:-

"The principles of law involved are very simple but it is their application that is difficult. If the appellant intended to commit the offence of larceny and began to put his intention into effect and did some overt act which manifests that intention, he is guilty of attempted larceny. The burden on the prosecution is therefore first to prove the intention and secondly to prove an overt act sufficiently proximate to the intended offence. The intention will, in the majority of cases, only be capable of proof by inference and it follows in such cases that an act must be of such a character as to be incompatible with another reasonable explanation. Secondly, if the intention is established, the act itself must not be too remote from the alleged intended offence"

Criminal law seeks to restore order, decency and social equilibrium in society. It is aimed at curtailing or reducing to the minimum grave incidents of anti-social conduct. Punishment of an offender lies at the root of criminal law. Where an offence is committed, the offender or wrong-doers is punished, however, the criminal law also seeks to punish those who intend to commit offences but could not successfully do so. That is, they merely attempted to commit an offence. The fact remains that they intended to commit an

act which they know is unlawful and prohibited, but the completed offence was never accomplished. The offence remains *inchoate* because the accused could not accomplish his desires, or that the end result of his acts or omission is not what he envisaged. He has all the same, attempted to commit an offence. It is a criminal attempt and therefore an offence. Will an accused person be allowed to go scot-free because he could not finish his plans? No. He would be made to face some form of punishment even though he never completed the offence. In my view, any legal system would be defective if criminal liability only arose when substantive offences have actually been committed.

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.[14] To prove the offence in question some overt act, to show that a felony was about to be committed, has to be shown.

It was held in the case of ***Mwaura & others vs. Republic[15]*** that although there is no definition of "dangerous or offensive weapon" specifically applicable to section 308(1) of the Penal Code[16] it ought to be shown that the weapon was one which could have caused injury. I find no difficulty in finding that the weapons in the case before me are of such a nature that they could cause injury. I am aware of the court of appeal decision in *Manuel Legasiani & Others v Republic**[17]** where a conviction in a similar offence was quashed, but a look at the said decision shows that the weapon in question was a homemade gun which was not proved by evidence of a ballistic expert as capable of causing injury and that the appellant was not charged with a offence under the Fire Arms Act.*[18]

Turning to this appeal, I take the view that the appellants argue that there was insufficient evidence to sustain the conviction. In other words, did the prosecution prove the case of preparation to commit a crime beyond reasonable doubt as required under the law?

My understanding of section 308 (1) of the Penal Code[19] is that the key requirements for the offence to be proved are that the accused person must be found armed with *any dangerous or offensive weapon in circumstances that indicate that he was so armed with intent to commit any felony.*

Upon evaluating the evidence and considering the submissions by state and the appellants counsel, I am persuaded that the key ingredients of the offence as discussed above were satisfied. The appellants were arrested at a road block, a search revealed the weapons produced in court, no explanation was offered as to where the appellants were going or why the weapons were in the vehicle. The driver and conductor of the vehicle were charged in court with the offence of carrying excess passengers, a confirmation that the vehicle was arrested with passengers who exceeded the legal capacity.

The account given by the appellants in their defence is that each one of them was arrested at a different place, with some saying they were arrested as they walked home or at a bus stage. To me, their explanation is highly unconvincing and does not rebut the prosecution evidence nor does it give a reasonable explanation of their presence or absence in the vehicle.

There is no denying that in a criminal cases, unless the guilt of the accused is established by proof beyond reasonable doubt, he is entitled to an acquittal. But when the trial court rules that the prosecution has established a *prima facie* case against an accused person, the accused person assumes a definite burden. It becomes incumbent upon accused to adduce evidence to meet and nullify, if not overthrow, the *prima facie* case against him.[20] This is due to the shift in the burden of evidence, and not of the burden of proof.

When a *prima facie* case is established by the prosecution in a criminal case, the burden of proof does not shift to the defense. It remains throughout the trial with the party upon whom it is imposed—the prosecution. It is the burden of evidence which shifts from party to party depending upon the exigencies of the case in the course of the trial.[21]

A *prima facie* case need not be countered by a preponderance of evidence nor by evidence of greater weight. Defendant's evidence which equalizes the weight of accuser's evidence or puts the case in

equipoise is sufficient. **9**

In my view, the appellants conduct in totality and in absence of a reasonable explanation to the contrary, and taking into account all the circumstances, amounts to preparation to commit a crime. It's a conduct which a reasonable person properly exercising his mind to the facts and the law can safely construe as an attempt to commit a crime or preparation to commit an offence, hence the offence was proved and the appellants were rightly convicted. I am persuaded that the circumstances surrounding the arrest and the presence of weapons are in absence of a reasonable explanation an overt act of such a character as to be incompatible with any other reasonable explanation.

The elements of preparation vary, although generally, there must be intent to commit the crime, an overt act beyond preparation, and an apparent ability to complete the crime. The attempt becomes a crime in itself, and usually means one really tried to commit the crime, but failed through no fault of himself or herself. In criminal law, an attempt to commit a crime, is an endeavour to accomplish it, carry it beyond preparation, but failing short of execution of the ultimate design, either in whole or in any part of it. I find that these elements were proved.

The South African case of *Ricky Ganda vs The State*[22]provides useful guidance. It was held:-

> *".....The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt"*

Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellants, I am persuaded that the conviction was justifiable. The explanation offered by the appellants is in my view improbable and does not cast reasonable doubt on the prosecution case. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.[23]

After weighing the explanation offered by the accused and the prosecution evidence, I find that the prosecution evidence is truthful, credible and probable as opposed to the incredible and highly improbable defence offered by the appellants. The appellants defence did not raise any reasonable doubts on the prosecution case. Accordingly I find that the appellants were rightly convicted and I uphold the conviction.

I also wish to comment on the particulars of the offence. In my view, the particulars of the offence ought to have ended immediately after the word felony. It was not necessary to state the offence the accused persons were indenting to commit nor was there evidence to show what kind of felony they were preparing to commit. I however hold that the particulars do disclose an offence under section 308 (1) of the Penal Code[24] and that the inclusion of the last part of the statement of the particulars is an error capable of being cured and that at all material times the appellants fully understood the allegations against them.

On the sentence, it is settled law that sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred.[25]

I have carefully considered the facts of this case, the nature of the offence and the above principles and I have also considered the purpose of sentencing and the principles of sentencing under the common law[26] and the sentencing policy guidelines. The appellants were jailed for **7 years without the option of a fine**. Section **308 (1)** of the Penal Code[27]provides that a person convicted of an offence under the said section is liable to imprisonment for a term of **not less than seven years** and **not more than fifteen**

years.

I find that the appellants were sentenced to the minimum sentence provided under the law, hence I hereby up hold the said sentence. In computing the said period, I direct that the period the appellants were in custody (if any) in the lower court during the trial and after conviction before being granted bail pending appeal be taken into account.

The upshot is that this appeal against both conviction and sentence fails.

Right of appeal 14 days

Signed, Delivered and Dated at **Nyeri** this **13th** day of **September** 2016

John M. Mativo

Judge

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[1]Cap 63, Laws of Kenya

[2]Shantilal M. Ruwala V. R (1957) E.A. 570

[3]see Peters V.Sunday Post (1958) E.A. 424

[4] http://www.dictionary.com/browse/inchoate

[5] https://www.vocabulary.com/dictionary/inchoate

[6] *Larry K. Gaines, Roger LeRoy Miller (2006). Criminal Justice in Action: The Core. Thomson-Wadsworth Publishing.*

[7]*See People v. Murphy, 235 A.D. 933, 654 N.Y.S. 2d 187 (N.Y. 3d Dep't 1997)*

[8] James W.H. McCord and Sandra L. McCord, Criminal Law and Procedure for the paralegal: a systems approach, pp. 189-190, (3d ed. Thomson Delmar Learning 2006).

[9]The Indian Penal Code (Act XLV OF 1860), by RatanlalRanchhoddas&DhirajlalKeshvalalThakore (26th Edition (Reprint 1991), at bpage 517

[10] See Barbeler {1977} QD 80

[11] {1965}Q B R 86

[12] See Kimar J. in Simon KandegeOndegoVs Republic, Nakuru High Court Criminal Appeal No. 142 of 2005

[13] {1962} E.A. 454

[14] Eighth Edition

[15] {1973} EA 373

[16] Supra

[17] **MSA CA Criminal Appeal No. 59 of 2000 [2000]eKLR**

[18] Cap 114, Laws of Kenya

[19] Cap 63, Laws of Kenya

[20] Moran Rules of Court, Vol. III, pp. 542-543; People vs. Upao Moro 101 Phil. 1226.

[21] Florenz D. Regalado, Remedial Law Compendium, 1970 ED; p. 795

[22] {2012}ZAFSHC 59, Free State High Court, Bloemfontein

[23]Duhaime, Lloyd, Legal Definition of Balance of Probabilities, Duhaime's Criminal Law Dictionary

[24] Supra

[25] See Shadrack Kipchoge Kogovs Republic, Criminal Appeal No. 253 of 2003(Eldoret), Omolo, O'kubasu&Onyango JJA)

[26] Regina vs MA {2004}145A

[27] Supra