



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NUMBER 10 of 2016
DICKSON MACHARIA NDEMI.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT
(An appeal from the original conviction and sentence in the
Chief Magistrate's Court Cr. Case No. 21 of 2015 delivered
by Hon. K. Cheruiyot, PM on 2nd December,2015.)

JUDGMENT

BACKGROUND

The Appellant, Dickson Macharia Ndemi, was charged with two counts. In the first count he was charged alongside another with preparation to commit a felony contrary to Section 308(1) of the Penal code. The particulars were that on 6th January, 2015, at around 1320hrs, along Latema Road they were jointly found with dangerous weapons namely a pair of handcuffs and a knife respectively in circumstances that indicated they were armed with intent to commit a felony.

In the second count he was charged with being in possession of Government Stores contrary to Section 324(2) as read with Section 36 of the Penal Code. The particulars of this charge were that on 6th January, 2015, at around 1320hrs, along Latema Road the Appellant was found in possession of Government Stores namely a pair of handcuffs belonging to disciplined forces suspected of having been stolen or unlawfully obtained.

He was arraigned in a court of law and the learned magistrate convicted him on both charges. He was sentenced in the first count to 7 years imprisonment and in the second count to one year imprisonment. The sentences were to run concurrently. Being dissatisfied with the decision of that court he preferred this appeal. He filed a Petition of Appeal with summarized grounds of appeal as follows;

- 1. That the ingredients for the offence of preparation to commit a felony were not proved.**
- 2. The learned magistrate erred in convicting him on both counts when the evidence on record did not sufficiently prove he was found in possession of the handcuffs.**

3. **The learned magistrate erred in finding that the alleged handcuffs were offensive weapons capable of being used to commit a felony or offences against liberty.**
4. **The learned magistrate erred in finding that the Appellant was in possession of Government Stores without taking into consideration that no report of missing Government handcuffs was adduced to support the charge.**
5. **The learned magistrate erred in taking into consideration unsubstantiated evidence that the Appellant was part of a gang known as Tsunami.**
6. **The learned magistrate erred in not taking into consideration the Appellant's defence.**
7. **The learned magistrate erred in finding that the prosecution had proved the case beyond a reasonable doubt.**

SUBMISSIONS

The parties decided to canvass the Appeal by way of oral submissions. The Appellant, represented by Mr. Sang, submitted that a conviction on the second count was untenable since the evidence on record did not support the charge. He submitted that the failure to dust the handcuffs for fingerprints meant that a connection between them and the Appellant was never established. He relied on **Joseph Nganga Mugure v Republic [2015] eKLR** to support this ground. He further submitted that the fact that the handcuffs were Government stores was never proven and that no report of the loss of the same or a gazette notice showing that they were Government stores was produced. He concluded by stating that the Appellant's defence that the officer had framed him by planting the handcuffs on him due to a personal vendetta was never taken into consideration to the detriment of the Appellant.

On the first count he submitted that even though the Appellant had been found with handcuffs this would not satisfy the ingredients of the offence of preparing to commit a felony. He relied on **Manuel Legesiani & 3 others v Republic [2000] eKLR** to support this submission. He submitted that the persons who informed the police of the suspicious persons were never called as witnesses to corroborate the police story and further there were unsubstantiated allegations raised at the trial concerning the Appellant's affiliation to the Tsunami gang.

He further submitted that the prosecution did not show that the Appellant's arrest occurred in circumstances where he was about to commit a felony. He relied on **Anthony Wambugu Gikera v Republic [2008] eKLR**, **Samuel Ndungu Gitau & 2 others v Republic [2006] eKLR** and **Dishon Nyambega Munuhe v Republic [2015] eKLR**.

He concluded by submitting that the handcuffs were not dangerous weapons and as such did not fall within the ambit of subsection (1) of Section 308 and therefore a crucial ingredient was not proved. He therefore prayed for the Appeal to be allowed, the conviction quashed and sentence set aside.

The Respondent, represented by learned State Counsel, Ms. Akuja opposed the Appeal. She submitted that PW1 and PW2 had given corroborative evidence of the Appellant's possession of the handcuffs and he did not have authority to carry them and neither did he give an explanation for his possession of them. She submitted that handcuffs are dangerous weapons that could cause injury when in the wrong hands.

On the issue of PW1 framing the Appellant, she submitted that the evidence of PW1 was clear that he had never met the Appellant before. Further that the Appellant and his co-accused were conversing in sign language and when they saw the officers they ran away and their behavior raised doubt as to their innocence. She urged that the appeal be dismissed.

EVIDENCE

The prosecution's case was that police officers were alerted of the presence of suspicious persons along

Latema road in Nairobi City. When they went to the location they found the Appellant and another who appeared to be conversing in sign language. However, this appeared to the officers a bit odd and they approached them at which point they took off. The police officers got hold of them and when they conducted a search on them they found that the Appellant had in his possession a pair of handcuffs which they suspected were Government stores which the suspects intended to use in the commission of a felony.

PW1, PC SOLOMON MAKAU then of Central Police Nairobi recalled that on 6th January, 2015 he was on patrol with Sergeant Mohamed Ali, CPL Agnes Ndwiga, CPL Musau and PC Kioko along Latema road when they came across 3 suspicious young men communicating in sign language. They stopped them and conducted an official search where upon they recovered a pair of handcuffs from Dickson Macharia, the Appellant herein. He produced the handcuffs that had been recovered. He concluded by testifying that he had no grudge with the Appellant and had met him for the first time on that date.

On cross-examination, he stated that they had not received any report of the presence of the suspects and had arrested them as they appeared suspicious.

PW2, CPL AGNES NDWIGA of Central police Station recalled that on 6th January, 2015 they were in town as usual when they received information that some suspicious young men had been seen along Latema street. She was in the company of Sgt. Mohamed and PC Solomon Makau. They proceeded to Latema road where they found three young men who attempted to flee but whom they managed to arrest. They searched them and a pair of handcuffs was found on the Appellant by PW1 and a knife on his co-accused. They questioned the men and they could not explain their possession of the items. She testified that the Appellant and his co-accused intended to use the items to commit a felony. On cross examination she admitted that police handcuffs have identification numbers and that they had not recorded the number of the handcuffs they recovered from the Appellant.

PW3, No. 62757 CPL CHARLES LIRU also of Central Police Station was the investigating officer. He took over possession of the exhibits the arresting officers had recovered from the suspects. Upon interrogating the suspects he found that two were operating as part of a group known as Tsunami and that they were preparing to commit a felony in the city.

At the close of the prosecution's case, the trial court ruled that the Appellant had a case to answer and was put on his defence. He gave a sworn statement of defence in which he denied committing the offence. He testified that his occupation was that of a businessman trading in clothes. He recalled that on 6th January, 2015 he woke up and went to Gikomba market and afterwards went to deliver a pair of shoes to a customer. At around 12:30 pm he received a call from a friend who asked that they meet at Molo line offices along Latema Road in 30 minutes. He boarded a matatu to the Central Business District and as he was walking towards the bus stop he ran into an officer he knew. This was PW1, Solomon Makau. The officer had arrested two people and was holding a pistol. He knew the officer since he lived at the Mathare depot and was also a boxer training at the Mathare Social Hall where they had shared training facilities and got to know each other. PW1 arrested him and reminded him of bad blood between them emanating from a meeting between them in Eastleigh when the Appellant was in the company of his girlfriend. What had transpired was that officer Makau had stopped them and they had exchanged greetings but afterwards he had said something to his girlfriend he did not like specifically asking for his girlfriend's number which he did not approve. He told the officer this and it irked him. A few days later he went to the social hall as usual where he met the officer who informed him that from then on he should keep away from the social hall since he despised him and did not respect him. He further informed him that he would regret it if they ever met outside the confines of the police station.

He testified that they were arrested and taken to Central Police Station where they were booked and placed in cells without being informed of their crimes until much later when he was charged. He concluded by testifying that the handcuffs had been used to frame him due to the grudge with PW1 who had access to handcuffs and that it was never proven that the handcuffs had been stolen.

DETERMINATION.

On evaluating the evidence and the respective submissions, I have narrowed down the issues for determination to be whether the case was proved beyond a reasonable doubt and whether the sentence meted was excessive in the circumstances. The first count on which a conviction was preferred against the Appellant was that of preparation to commit a felony contrary to Section 308(1) of the Penal Code. The same provides thus;

“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.”

The Court of Appeal decision in **Manuel Legasiani & 3 others v Republic**[2000] eKLR defined the offence as follows;

“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 be committed, has to be shown. Mere possession of a fire-arm not coupled with such an overt act is not an offence under section 308(1) of the Penal Code.”

Again, Holmes C.J in **Commonwealth v Peaslee** (177 Mass 267, 272, 59 N.E Rep 55) held as follows:.

“That an overt act, although coupled with an intent to commit a crime, commonly is not punishable if further acts are contemplated as needful, is expressed in the familiar rule that preparation is not an attempt. But some preparation may amount to an attempt. It is a question of degree. If the preparation comes very near to the accomplishment of the act, the intent to complete it renders the crime so probable ..., although there is still a locus poenitentiae, in the need of a further exertion of the will to complete the crime.”

In **P v Murray** (14 Cal. 159) it was held that:

“Preparation consists in devising or arranging the means or measures for the commission of the offence ; the attempt is the direct movement toward the commission after the preparations are made.”

Under the above definition, the offence of preparation to commit a felony is not complete before an overt act to show that an offence is about to be committed is established. A departure from this definition is given the case of **Re. T. Munirathinam Reddi A.I.R 1955 And. Prad. 118** where it was held thus:

“The distinction between preparation and attempt may be clear in some cases, but in most of the cases, the dividing line is very thin. Nonetheless, it is a real distinction. The crucial test is whether the last act, if uninterrupted and successful, would constitute a crime. If the accused intended that the natural consequence of his act should result in death but was frustrated only by extraneous circumstances, he would be guilty of an attempt to commit the offence of murder.”

My view is that, the latter case more clearly define the offence of preparation to commit a felony. It is however important that the prosecution when adducing evidence must indicate what felonious intent or act the accused was preparing. This may be implied or deduced from the circumstances the accused is arrested in. In that case, the framers of the charge must be very careful so that they do not delve into elements that may constitute the offence of intent to commit a felony. The rationale to this explanation is that an overt act constituting the offence should be disclosed in the evidence. It is after the disclosure of evidence that the trial court would find whether or not the elements of the offence have been established.

From the foregoing, I am of the view that the offence as charge created difficulty in so far as that the Appellant could not deduce the offence it was alleged he was preparing to commit. This is demonstrated by the evidence of PW1 and PW2 who were not consistent as to the probable cause leading to the

Appellant's arrest. PW1 testified that they stopped the Appellant and others after observing them communicating in sign language which they found suspicious while PW2 testified that they were informed of the suspicious persons by an informant leading them to the arrest of the Appellant and his co-accused. It is perturbing that the use of sign language constituted probable cause to occasion an arrest. That aside, the fact that the arresting officers gave conflicting accounts of what led to the arrest of the Appellant creates doubt that there was reasonable cause to arrest and subsequently charge him. This lends credence to his defence that he was framed by one of the arresting officers with whom he had a grudge.

Further, with regard to count I, the Appellant argues that he was not in possession of the handcuffs in question and that they were all planted on him as part of a setup to frame him due to a grudge with PW1. He further submitted that even if he was in possession of the said handcuffs they could not be termed a dangerous weapon. In **Manuel Legasiani & 3 others v Republic (Supra)** the court held:

“It was held in the case of Mwaura & others vs. Republic (1973) EA 373 that although there is no definition of “dangerous and offensive weapon” specifically applicable to section 308(1) of the Penal Code it ought to be shown that the weapon was one which could have caused injury. With respect, we agree with that decision.”

In the **Mwaura and others v. Republic(supra)** at page 375 the court held that:

“In our view “dangerous or offensive weapons” mean any articles made or adapted for use for causing injury to the person, ...; or any articles intended, by the person being found with them, for use in causing injury to the person. In regard to the latter, that is intent, see Woodward v Koessler [1958] 1 W.L.R. 1255 and R v. Powell, [1963] Crim. L.R. 511.”

From the above definition, it is clear that although handcuffs may be wielded in such a manner as to occasion an injury on a person, in this particular case, it is not clear that the weapon was adapted in such a manner as to make it dangerous. As such, I find that the elements of count 1 were not established to the required standard.

In count II the Appellant was charged with, and convicted for, being in possession of Government Stores contrary to section 324(2) as read with section 36 of the Penal Code. Section 324(2) reads:

“Any person who is charged with conveying or having in his possession, or keeping in any building or place, whether open or enclosed, any stores so marked, which may be reasonably suspected of having been stolen or unlawfully obtained, and who does not give an account to the satisfaction of the court how he came by the same, is guilty of a misdemeanour.”

The prosecution's case was that the Appellant was found in possession of handcuffs that were the property of the Government. The learned magistrate in his judgment held that, ***“handcuffs though not reported missing are ordinary government stores for use by the disciplined forces = prisons, police, Kenya Wildlife and rest services to lawfully restrain offender. I thus find the 1st accused(the Appellant) was found in possession of government stores. He had no authority to be in possession of those handcuffs.”***

However, the finding of the learned magistrate was an error and a misdirection on law and fact because it was not proven that the handcuffs belonged to the Government thus constituting Government stores. He ought to have carefully evaluated the prosecution's evidence against the evidence of PW3 who was categorical that government handcuffs always bear serial numbers. In lieu thereof, any other proof ought to have been tendered in court to establish that the handcuffs were government stores. The evidence fell far short of this threshold as a result of which the second count also ought to have failed.

In the end, the appeal succeeds. I quash the conviction, set aside the sentences and order that the Appellant be and is hereby forthwith set free unless otherwise lawfully held. It is so ordered.

DATED AND DELIVERED THIS 7TH DAY OF SEPTEMBER, 2016.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of;

1. *Miss Njagi holding brief foe Mr. Sang for the Appellant.*
2. *Miss Atina for the Respondent.*