REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

HCRA. 53 OF 2013

PAUL VITALIS NYAMU ……..……....…....APPELLANT

=VERSUS=

REPUBLIC ….……..…RESPONDENT

(An Appeal against the conviction and sentence of 7 years imprisonment in CR. CASE No. 413 of 2012 by Hon. L.K GATHERU (PM) at MARIAKANI COURT on 22nd day of March 2013)

JUDGMENT

1. The Appellant was sentenced to 7 years imprisonment for the offence of preparation to commit a felony contrary to section 308 (1) of the penal code.

2. The particulars of the charge were that on 29th September 2012, at Samburu trading centre, Samburu Location within Kwale County, the Appellant was found with a dangerous and offensive weapon namely a panga and knife in circumstances that he was so armed with intent to commit a felony namely robbery with violence.

3. The prosecution evidence was that the Appellant was re- arrested by PW1 and PW2 who are police officers after the Appellant was taken to the police station by members of the public under arrest. The allegation was that the Appellant was part of a group that attacked the residents in the area and caused insecurity.

4. PW1 did a search on the Appellant and recovered a panga tied to his waist and an army knife in its scabbard and a small porch with a flag and a Vodafone.

5. The Appellant in his defence said he had boarded a matatu enroute to Mombasa when an officer came and asked him to alight. The officer took him to Samburu police station where the officer handed him over to two other officers.

6. The trial Magistrate found the Appellant guilty as charged and convicted him and sentenced him to 7 years imprisonment.

The Appellant has now appealed to this court on the following grounds:-

(i) THAT the learned trial Magistrate erred in law and facts when convicting the Appellant by failing to consider that nowhere on the record indicated what manner of the felony he was

out to commit or where.

(ii) THAT the learned trial Magistrate erred in law and facts when convicting the Appellant by fully relying on the fact that he was found in possession of the offensive weapon given the other facts;

(a) He was not charged with an appropriate charge of being in possession of offensive weapon.

(b) The same are household tools easily found in many homes.

(c) It is not an offence for a citizen of Kenya to have in his/her possession any of the recovered items (pangas and knives).

(iii) THAT the learned trial Magistrate erred in law and in facts when convicting the Appellant by failing to consider that none of the alleged members of the public who arrested him appeared in court to give evidence.

(iv) THAT the learned trial Magistrate erred in law and facts in convicting the Appellant by failing to note that the prosecution evidence was full of contradictions.

7. The Appellant filed written submissions as follows:-

(i) That he was arrested with a panga and a knife which are items used in many homes in Kenya and that no member of the public appeared in court to testify.

(ii) That there is no evidence that he was preparing to commit an offence or that he is a member of MRC secessionist group.

8. The Respondent opposed the Appeal and testified as follows:-

(i) On the ground that there was insufficient evidence to prove that the Appellant was preparing to commit a felony, the Respondent submitted that it is not mandatory that the offence he was about to commit be specified.

(ii) Further, the Respondent submitted that there was evidence that the Appellant was not at his place of abode and that he was in possession of dangerous weapons namely a panga, tied to his waist and a knife which were concealed and that he was first arrested by members of the public.

9. I have re-evaluated the evidence adduced in the trial court. I rely on the case of ***David Njuguna Wairimu V Republic [2010] eKLR*** where the court, relying on the holding of the Court in ***Okeno v R*** held that:

"The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision"

10. My findings are as follows:-

(i) The Appellant was charged with the offence 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."

(ii) I rely on the case of **Dickson Macharia Ndemi v Republic [2016] eKLR where it was held as follows:-**

"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."

Also in the case of 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.""

(iii) I find that the Appellant in the current case was arrested in public in broad daylight in a matatu traveling to Mombasa. It has not been shown that the possession of the weapons was coupled with an overt act on the part of the Appellant.

(iv) The members of the public who arrested him did not give evidence in this case.

(v) I find that the prosecution did not prove its case to the required standard.

(vi) The conviction herein is not secure. I allow the Appeal, quash the conviction and set aside the sentence. I further order that the Appellant be set free unless lawfully held for any other reason.

Delivered and signed at Mombasa this 15th day of November 2016.

ASENATH ONGERI

JUDGE.