REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NOS.182, 183 & 195 OF 2013

(AN APPEAL ARISING OUT OF THE CONVICTION AND SENTENCE OF HON. L.D. ONGOMBE- RM DELIVERED ON 12TH AUGUST 2013 IN KIAMBU CMC. CR. CASE NO.1164 OF 2012)

JOSEPH NG'ANG'A MUGURE……..1ST APPELLANT

ERASTUS MWITA NYAKIAGO…….2NDAPPELLANT

MARY NJERI KAMAU……3RDAPPELLANT

VERSUS

REPUBLIC…….…….....RESPONDENT

JUDGMENT

The 1st Appellant Joseph Ng'ang'a Mugure, 2nd Appellant Erastus Mwita Nyakiago and the 3rd Appellant Mary Njeri Kamau were charged with **preparation to commit a felony** contrary to **Section 308(2)** of the **Penal Code**. The particulars of the offence were that on 15th April 2012 at about 12.30 a.m., along Mboi Kamiti Road in Kiambu County, not being at their place of abode, the Appellants jointly had with them an article for use of or in connection with theft, namely a homemade pistol. The Appellants were further charged with **being in possession of an imitation firearm** contrary to **Section 21(1)** as read with **Section 34(1)** of the **Firearms Act**. The particulars of the offence were that on the same date and in the same place and at the same time, the Appellants were jointly found in possession of an item resembling a pistol. When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the charge. After full trial, the Appellants were found guilty as charged on both counts and sentenced to each serve seven (7) years imprisonment on each count. The sentences were ordered to run concurrently. The Appellants were aggrieved by their conviction and sentences.

Each Appellant filed a separate appeal challenging his or her conviction and sentence. The three separate appeals filed by the Appellants were consolidated for the purposes of the hearing of this appeal. One judgment shall therefore be delivered in respect of the three appeals. The Appellants raised more or less similar grounds of appeal. They were aggrieved that they had been convicted on the basis of the sole evidence of the arresting officers in the absence of any independent witnesses. They took issue with the fact that the trial court had put considerable weight to the evidence of the arresting officers without evaluating the totality of the evidence adduced. The Appellants faulted the trial magistrates for finding that they had been found in possession of a toy pistol yet no evidence was adduced to connect them with the said toy pistol by adduction of fingerprint evidence. They were aggrieved that the trial magistrate

failed to take into account their explanation in regard to the circumstances under which they found themselves in the place that they were arrested. In essence, it was the Appellants' case that the prosecution had failed to establish its case to the required standard of proof. The Appellants therefore urged the court to allow the appeal, quash their respective convictions and set aside the sentences that were imposed on them.

During the hearing of the appeal, the 1st and 2nd Appellants, who were acting in person, urged the court to re-evaluate the evidence and reach a finding that the trial court fell in error when it convicted them on both counts. They were of the view that the trial court did not accord them a fair trial. On her part, the 3rd Appellant, through counsel, argued that the prosecution had not established the ingredients that constituted the charge of preparation to commit a felony and secondly, being found in possession of an imitation firearm to the required standard of proof. The 3rd Appellant submitted that the prosecution did not adduce any evidence either to establish that she was preparing to commit a felony or that she was found in possession of the imitation firearm. She urged the court to allow the appeal. On its part, the State through counsel opposed the appeal. It was the prosecution's case that the evidence that was adduced before the trial court was consistent and well corroborated. The Appellants were arrested by police officers who were on patrol in circumstances that suggested that they were preparing to commit a felony. On being stopped, and the car they were travelling in being searched, a toy pistol was found. Learned counsel urged the court to disallow the appeal. On sentence, the prosecution agreed with the Appellants that the sentences that were meted out by the trial court were unlawful. The Appellants ought to have been sentenced to serve a maximum custodial sentence of five (5) years imprisonment. Other than the concession made on sentence, the State urged the court to disallow the appeal in its entirety.

This being a first appeal, it is the duty of this court to re-evaluate and to reconsider the evidence adduced before the trial court before reaching its own independent determination whether or not to uphold the decision of the said court. In doing so, this court is required to always keep in mind the fact that it neither saw nor heard the witnesses as they testified and therefore give due regard in that respect (see **Njoroge – vs- Republic [1987] KLR 19).** The issue for determination by this court is whether the prosecution proved its case on the charges brought against the Appellants of **preparation to commit a felony** contrary to **Section 308(2)** of the **Penal Code** and **being found in possession of an imitation firearm** contrary to **Section 21(1)** of the **Firearms Act.**

The facts of this case are more or less not in dispute. On the night of 14th and 15th April 2012, while PW2 PC Leonard Ndwiga, PW4 PC Chalton Mureithi and PW6 Corporal Altone Mwangembi Onyango were on patrol along Kirigiti-KwaMaiko Road, in Kiambu County they saw a motor vehicle which was being driven in their view, suspiciously. The time was 12.30 a.m. The motor vehicle was a Toyota Corolla Salon Registration No.KAE 953L belonging to PW1 John Njuguna. Earlier on the evening of 14th April 2012, PW1 had hired out the motor vehicle to the 1st Appellant. The 1st Appellant told PW1 that he wanted to use the motor vehicle to visit his in-laws. PW2, PW4 and PW6 testified that when they attempted to stop the motor vehicle, the occupants of the motor vehicle defied them and drove off at high speed. It was instructive that at the time the police officers were using an unmarked police motor vehicle whose Registration Number was KBQ 181Y.

The police gave chase and managed to corner the motor vehicle when it lost control and veered off the road. According to PW2, PW4 and PW6, they ordered the occupants of the motor vehicle to come out of the motor vehicle. They did not respond. It was then that they decided to shot at the tyres of the motor vehicle to prevent the occupants from making any attempt to escape. The tyres of the motor vehicle were deflated. The gunshots persuaded the occupants of the motor vehicle to get out of the motor vehicle. After arresting the occupants of the motor vehicle (the Appellants in this case), PW2, PW4 and PW6 searched the motor vehicle and recovered a toy pistol. The Appellants were taken to Kiambu Police Station where they were detained and later charged with the present offences.

PW3 Chief Inspector Mwangi Gitau Gideon, a Scenes of Crime Officer based at CID Headquarters took the photographs of the motor vehicle at Kiambu Police Station. The photographs were produced into evidence. PW5 Chief Inspector Emmanuel Lagat, a Ballistic Expert based at CID Headquarters testified

that on examination of the item that was handed to him, he established that it was a toy pistol which cannot fire but which looks like a real pistol under the **Firearms Act**. According to PW2, PW4 and PW6 the circumstances in which the Appellants were arrested suggested that they were preparing to commit a felony, in particular, theft. It was in that regard that they arrested and charged the Appellants.

The explanation given by the Appellants in their defence was simple. On the material night they were on their way to Kirigiti. They had spent the entire evening enjoying themselves as they were celebrating the birthday of the 1st Appellant. On the way, they were stopped by a motor vehicle with private number plates. They thought that they were being stopped by robbers. They defied the order to stop. They drove off but the occupants of the pursuing motor vehicle caught up with them. They heard gunshots. The tyres of their motor vehicle were deflated. They were arrested by the police. They denied that the toy pistol was found in their possession. It was their case that the toy pistol was planted in the motor vehicle by the police. It was their defence that the police ought to have lifted fingerprints from the toy pistol to establish if indeed the same was connected with any of them. They denied that the circumstances of their arrest suggested that they were preparing to commit a criminal act.

Section 308 of the **Penal Code** sets out the circumstances under which an accused person can be said to have been found while preparing to commit a felony. The circumstances are where the accused is found armed with a dangerous or offensive weapon under circumstances that indicated that he was so armed with intent to commit a felony. Other circumstances include where the accused person is found having his face masked or blackened or otherwise being disguised, or where the accused is found in any building at night with the intent to commit a felony therein or where the accused is found in any building by the day with the intent to commit a felony therein and had taken precaution to conceal his presence.

An important ingredient for the prosecution to establish the case for preparation to commit a felony is that the accused person must be arrested in circumstances that suggested that he was about to commit a felony. **Black's Law Dictionary, 8th Edition** defines preparation as:

> ***"the act or process of devising the means necessary to commit a crime."***

The accused must have done something positive with a view to actualizing the attempt to commit a crime. The accused person must have been found at a place which is not their usual place of abode in circumstances that clearly points to the fact that they intended to commit a crime. The accused must actively have conducted himself in a manner that leaves no doubt to the court that he intended to commit a felony.

The Court of Appeal in **Maina & 3 Others –Vs- Republic [1986] KLR 301**, when confronted with the nature of evidence that ought to be adduced to establish the offence of **preparation to commit a felony** under **Section 308** of the **Penal Code,** held that the prosecution must adduce evidence which proximates the possession of the dangerous weapon with the commission of a felony which can be discerned from the evidence. In the present appeal, it was clear that the circumstance under which the Appellants were arrested does not lend credence to the assertion by the prosecution that the Appellants intended to commit a felony. While there is no doubt that the Appellants failed to stop their motor vehicle when they were stopped by the police, they cannot be blamed for failing to stop at that time of the night. This is because the police were in an unmarked police motor vehicle. The suspicion by the Appellants that they were being stopped by robbers was not unjustified in the circumstances. The Appellants were driving the motor vehicle in a public road. *What commission of a felony is discernable from their conduct?* This court holds that the prosecution adduced no evidence to support their contention that the Appellants intended or were preparing to commit a felony. The Appellants wore no disguises, and were not in the place where they were not supposed to be. Being in a public road at that time of the night cannot constitute a criminal offence.

As regard the allegation that they were found in possession of a toy pistol, reasonable doubt was raised by the Appellants when they testified that the toy pistol was planted on them by the police. The police were required to secure the said exhibit so that fingerprints are lifted from it to exclude the possibility that the same was planted at the scene of crime as claimed by the Appellants. There was no direct evidence which

connected any of the Appellants with the recovery of the toy pistol. As stated earlier in this judgment, the 1st Appellant took possession of the motor vehicle a few hours before the Appellants were arrested. The possibility that the toy pistol was in the motor vehicle at the time the 1st Appellant took possession of the same cannot be ruled out. This court in the circumstances holds that the prosecution did not adduce sufficient evidence to establish, to the required standard of proof beyond any reasonable doubt, that the Appellants were preparing to commit a felony. The prosecution did not also establish that the toy pistol was found in the Appellants' possession.

The upshot of the above reasons is that the respective appeals lodged by the Appellants have merit and are hereby allowed. The Appellants' convictions are quashed. The sentences meted out by the trial court on the Appellants are hereby set aside. The Appellants are hereby ordered set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 7TH DAY OF OCTOBER 2015

L. KIMARU

JUDGE