



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 221 OF 2011

BAZIL MWAVULA NJORE APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original Conviction and Sentence in Criminal Case No. 675 of 2010 of the Resident Magistrate's Court at Wundanyi – **Hon. Orange - RM**)

JUDGMENT

The Appellant was Convicted and Sentenced to seven (7) years Imprisonment for the offence of preparation to commit a felony contrary to section 308 (1) of the Penal Code.

The particulars are that:-

“On the 28th day of October, 2010 at 1:30 am at Wundanyi township – Taita Taveta County, jointly with others not before the Court and while armed with unknown weapons one helmet and nylon sack (to conceal identity) prepared to commit a felony namely kiosk breaking and theft”.

A watchman guarding several kiosks sighted three men entering the kiosk at 1:30 a.m. One of three men had a helmet and a gunny bag. When they went near the Complainants kiosks. He shone torch light on them and called the Complainant. They started running but they chased and arrested the Accused. The helmet and gunny bag were recovered and later produced in Court as exhibits.

In his unsworn statement the appellant maintained that he was merely passing near the kiosk when the watchman started alleging that he was a thief.

In his submissions the Appellant gives mitigation factors on Sentence only.

The Appellant was Convicted under section 308 (1) of the Penal Code which provides,

“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 is liable to imprisonment of not less than seven (7) years and not more than fifteen (15) years”.

The operative word here is being armed with a dangerous or offensive weapon.

The watchman (PW 2) had spotted three people near the kiosks with one having a helmet and a gunny bag. The helmet and gunny bag were recovered and produced as exhibits.

Is a helmet and a gunny bag a dangerous and offensive weapon. To my mind they are not.

Secondly, the men were allegedly three in number. It is not clear from whom the helmet and gunny bag were recovered.

The Conviction for the offence of preparation under section 308 (1) of the Penal Code was not safe.

The Accused ought to have been charged under section 308 (2) of the Penal Code which provides,

“ Any person who when not at his place of abode, has with him any article for use in the course of or in connection with any burglary, theft or cheating is guilty of felony and where any person is charged with an offence under this sub section proof that he had with him any article made or adapted for use in committing a burglary theft or cheating shall be evidence that he had it with him for such use”.

Section 308 (2) of the Penal Code provides for a Sentence of five years imprisonment with hard labour.

The Conviction under section 308 (1) of the Penal Code is quashed. It is noted that the Accused has already served a substantive part of his Sentence. The Sentence is set aside.

He is set at liberty unless otherwise lawfully held.

Judgment delivered dated and signed this **27th** day of **February, 2014**.

.....

M. MUYA

JUDGE

27TH FEBRUARY, 2014

In the presence of:-

Learned State Counsel Miss Juma

The appellant present

Court clerk Musundi