



**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL APPEAL NO. 138 OF 2013**

**DOMINIC MUTIE WILLY.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(Being an appeal from the original conviction and sentence in Mavoko Principal Magistrate's Court Criminal Case No. 223 of 2012 by Hon. L.A Mumassabba, RM on 14/6/2012)*

**J U D G M E N T**

1. The appellant is charged with the offence of preparation to commit a felony contrary to **Section 308(1)** of the **Penal Code**.
2. Particulars of the offence are that on the on the **1<sup>st</sup> day of July, 2012** at **Mlolongo Township in Athi River District** within **Machakos County**, jointly with others not before court, were found armed with dangerous weapons namely, one (1) small hacksaw, one (1) crow bar, one (1) kitchen knife, one (1) chisel and one (1) club in circumstances that indicated that they were so armed with intent to commit a felony namely; robbery with violence.
3. He was convicted and sentenced to serve **three (3) years** imprisonment. Being aggrieved by the conviction and sentence he now appeals on grounds that:-
  - i. The learned trial magistrate erred in law and fact in finding the appellant guilty when all the essential ingredients of the offence were not proved;
  - ii. The appellant was not found in possession of dangerous weapons therefore could not be said to have been armed to commit a felony;
  - iii. Evidence adduced was insufficient and the defence adduced was not appreciated and upheld.
4. Briefly, facts of the case were that on the **1<sup>st</sup> July, 2012** at about **7.00pm** Police Officers from **Mlolongo Police Station** acting on information received moved to the roadside where a motor-vehicle registration, City Hoppa had been abandoned for about one (1) year. They opened the motor-vehicle that that was locked. Some people fled through windows. They arrested others. Some of them were found in possession of items, a hacksaw, crowbar, a club and knife. The appellant in particular did not have anything. They arrested them and charged them.
5. In his defence the appellant stated that on the material date he woke up and left going to work at 7.30am. He took a shorter route. He met his co-accused (2<sup>nd</sup> accused). He was on his way to the construction site. Two (2) people emerged as they chatted. They arrested them and took them to the city-hoppa. They were searched. Nothing was recovered. They were taken to the police station. He called the manager of the construction site where he worked to send his co-worker, **Pius Muthini** to collect keys to the site. **Pius Muthini** his witness confirmed that indeed they were workmates. DW3, **Moses Matolo** similarly confirmed that they used to work at the construction company with the appellant.
6. This being the first appeal, I am duty bound to reconsider the evidence adduced afresh and come

up with my own conclusions bearing in mind that I neither heard nor saw witnesses who testified at trial ( see **Okeno versus Republic (1972) E.A. 32**).

7. In convicting the appellant, the learned trial magistrate stated thus:-

***“Accused No. 3 was not found with any weapon but he was in the company of the others”.***

8. Per the evidence adduced the appellant was not found in possession of anything. He did not have the dangerous weapon alluded to in the charge sheet. It is stated that he was found inside the abandoned motor-vehicle. His argument however, was that he was found elsewhere, along a nearby road by the police who were armed and ordered to enter the motor-vehicle in which he found other people. PW1 and PW2 denied existence of a road nearby. However, the investigating officer, PW3 admitted that there was a road where the appellant was arrested.

9. Looking at the section that creates the offence the appellant faced, in order for the person to be guilty;-

i. He must be armed with a dangerous weapon.

ii. He must have had an intent to commit a felony with such a weapon.

10. The motor-vehicle in which the people were found was alleged to have been near Continental Hotel. Evidence from people nearby would have been of some help.

11. That notwithstanding, the intent in relation to commission of a felony was discussed in the case of **Manuel Legasiani & Others versus Republic- Criminal Appeal No. 59/2000** by the Court of Appeal which states thus:-

***“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, the 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 firearm not coupled with such an overt act is not an offence, under Section 308(1) of the Penal Code.”***

12. As clearly stated by the learned trial magistrate the appellant was convicted because he was with others. Could he have interrogated how and why he was found in the vehicle especially so having heard PW1 and PW2 who arrested him. There was an allegation of people who had been attacking motorists and some suspicious people having been seen at the site where the motor-vehicle was. The prosecution did not attempt to prove any act that was done in furtherance of a common intention of the appellant and people who were arrested.

13. Further, no evidence was adduced of some overt act that could clearly be said to have been done from which a criminal intent would be inferred in regard to an offence of robbery with violence. Mere possession of weapons by some of the people who were arrested could not be inferred to have manifested an intent to commit a felony on the part of the appellant.

14. In the circumstances, the charge in respect of the appellant could not have been proved beyond any reasonable doubt.

15. In the result, I allow the appeal, quash the conviction and set aside the sentence imposed. The appellant shall be released forthwith unless otherwise unlawfully held.

16. It is so ordered.

**DATED, SIGNED and DELIVERED at MACHAKOS this 9<sup>TH</sup> day of SEPTEMBER, 2014.**

**L.N. MUTENDE**

**JUDGE**