



IN THE COURT OF APPEAL

AT KISUMU

(Coram: Masime JA, Gicheru & Kwach AG JJ A)

CRIMINAL APPEAL NO 84 OF 1988

BETWEEN

JOHN DALLA NYADENGA..... APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

(Appeal from a judgement of the High Court of Kenya at Kisumu, Omolo J, dated 25th September 1985

in

High Court Criminal Appeal No 183 of 1987)

June 22, 1989, the following Judgment of the Court was delivered.

An accused person commits the offence of preparation to commit a felony contrary to section 308 (1) of the Penal Code if he is found “armed with any dangerous or offensive weapon in circumstance that indicate that he was so armed with intent to commit any felony. “Thus, an accused person must be found:

1. Armed with any dangerous or offensive weapon; and
2. In circumstances that indicate that he was so armed with intent to commit a felony.

These ingredients must be specified in the particulars of the offence under section 308(1). An omission of any one of these ingredients will render the charge for such offence defective to the extent that it discloses no offence. If such charge is not sufficiently amended, on appeal, a conviction thereon will be quashed – see the case of *Matu s/o Gichumu V. Rex*, (1951) 18 EACA 311 at page 316.

The particulars of the offence under section 308(1) of the Penal Code for which the Appellant, John Dalla Nyadenga, was charged in the Court of first instance read as follows:

“John Dalla Nyadenga: On the night of 8th January, 1987 at Kaidakwa estate in Siaya Township in Siaya District of the Nyanza province was found armed with a *panga* and a *rungu* with intent to commit a felony.”

These particulars made no reference to the *panga* and the *rungu* mentioned therein being dangerous or offensive weapons. Indeed, the proceedings in the Court of first instance made no intimation that these weapons were dangerous or offensive.

The words dangerous or offensive weapon contemplates the weapon being used to cause peril: or intended for or used in attack. It is not for nothing therefore that these words are used in section 308(1) of the Penal Code. Failure to indicate in the particulars of the offence set out above that the *panga* and the *rungu* were either dangerous or offensive weapons amounted to an omission of one of the two ingredients that constitute the offence under the section aforementioned. A *panga* and a *rungu*, as the first appellate Judge rightly pointed out, are not *per se* dangerous weapons but can be used to inflict injuries on people. The omission of the ingredient mentioned above together with the absence of evidence being led in the court of the first instance that these weapons were either dangerous or offensive made the charge against the appellant totally defective. That charge disclosed no offence. A conviction arising therefrom cannot stand.

Accordingly, we allow the appellant's appeal, I quash his conviction and set aside the sentence of 10 years imprisonment with hard labour together with 3 strokes of corporal punishment. His police supervision order is also set aside. He is to be set at liberty forthwith unless held in custody for any other lawful cause.

That is the order of the court.

Dated and Delivered at Kisumu this 22nd day of June, 1989.

J.R.O. MASIME

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JUDGE OF APPEAL

J.E. GICHERU

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AG. JUDGE OF APPEAL

R.O. KWACH

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AG. JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR