



IN THE COURT OF APPEAL

AT NAKURU

(Coram: Platt, Gachuhi & Apaloo JJA)

CRIMINAL APPEAL NO 182 OF 1986

BETWEEN

MORGAN NDUNGU..... APPELLANT

AND

REPUBLIC..... RESPONDENT

JUDGMENT

(Appeal from a Judgment of the High Court at Nakuru, Omolo J)

April 25, 1988, **Platt, Gachuhi & Apaloo JJA** delivered the following Judgment.

It is often the case that charges under section 308 of the Penal Code cause trouble, and this case is no exception.

The appellant was one of two persons charged with an offence contrary to section 308(2) of the Penal Code. The charge was:-

“being in a building at night with intent to commit a felony contrary to section 308(2) of the Penal Code.”

Richard Waweru Kamau and Morgan Ndungu:

“On the night of 2nd day of May 1985 at Narok Township of Narok District etc jointly were found in a building namely shop of Haji Issa with intent to commit the felony namely stealing therein.”

Thus, as the learned High Court judge said on first appeal the wrong section was quoted in the charge. He found it to be an offence under section 308(3)(b) which provides that any person who is found in any building whatever by night with intent to commit a felony therein is guilty of a felony.

The punishment provisions are to be found in section 308(4). It provides:-

“(4) Any person guilty of a felony under subsection (2) or (3) of this Section is liable to imprisonment with hard labour for five years or, if he has previously been convicted of a felony relating to property, to such imprisonment for ten years.”

It will be seen at once that three issues will arise on sentence; can corporal punishment be awarded; and is

hard labour mandatory; is police supervision mandatory? The appellant was sentenced to five years imprisonment and ten strokes of corporal punishment, after being referred to the Senior Resident Magistrate, for punishment under section 221 of the Criminal Procedure Code. On first appeal, the sentence was thought lawful, save that it was lucky that the appellant had not been awarded labour or police supervision. Now corporal punishment was illegal, and hard labour and police supervision were mandatory under section 308(4) of the Penal Code and section 344A of the Criminal Procedure Code, respectively. The Senior Resident Magistrate ought to have imposed those terms. The High Court ought to have increased sentence under section 354(3) and (6) of the Criminal Procedure Code in the case of hard labour and police supervision, and it ought to have reduced the sentence by setting aside the 10 strokes of corporal punishment.

On second appeal to this Court, by virtue of section 361 of the Criminal Procedure Code, the only appeal allowed is one on a matter of law. We are bound on that basis to set aside the strokes. But it is not clear whether this Court has power to enhance the sentence as a matter of law under section 361(2) of the Code. So we leave the matter like that.

On the charge itself, apart from the failure to state the correct section of the Penal Code in the charge, by virtue of section 187 of the Criminal Procedure Code a conviction under any of the provisions of section 308 may be substituted. It was therefore doubly in order to consider the matter as if the particulars of the charge given pertained to section 308(3)(b) of the Penal Code. But in that case the appellant and his co-accused had to be found in the building of Haji Issa with intent to commit theft therein.

They were not. They were found in the building of Siameto Ole Simbere (PW4). So the charge should have been that they were found in Ole Simbere's building with the intent to steal in that building. But the witnesses insisted that the appellant and his co-accused intended to break into Haji Issa's shop next door. The courts below both found that the appellant and his co-accused were found hiding in Ole Simbere's incomplete building, with a plank reaching across to Haji Issa's building (PW1) which is a wholesale shop. It was 10.00 pm at night.

Looking at the facts again in the light of the charge, the particulars were as much at fault as the statement of the offence. As we have mentioned, there is section 187 of the Criminal Procedure Code and we turn to consider whether any other offence is open to us in chapter XXIX. We have noted that the lower courts held that the building of Ole Simbere was under construction. They did not think that there was an intent to steal in the partly constructed building. The lower courts both held that the accused had the kitchen knife to cut off perforated iron sheets on the roof of Haji Issa's shop to enable them to get inside the shop. As a result we must consider the terms of section 308(2) as actually charged.

It says any person who, when not at his place of abode has with him any article for use in the course of or in connexion with any burglary, theft, or cheating, is guilty of a felony.

The rest is not applicable as there is no evidence that the knife was adapted for use in committing a burglary, theft or cheating. These men were not at their place of abode. They had the knife between them. It was to effect entry in Haji Issa's shop by cutting the iron sheets.

The appellant and his companion gave innocent explanations for their presence. Whether it is a charge under section 308(2) or 308(3) would have made no difference to their defences. There would be no prejudice in substituting an alternate verdict under section 308(2) of the Penal Code on this ground.

The appellant however has taken the prosecution witnesses to task. He has pointed out carefully some discrepancies in their evidence. What he says is quite true, and was not clearly referred to in the judgment of the lower courts. It is true that there is some discrepancy as to whether the appellant was on the roof of Ole Simbere's house or in a room on the first floor; whether the knife was between the accused, or whether the appellant lay on it, and at one stage threw it at the wall; and the exact sequence of their arrest. These matters did not shake the confidence in the basic truthfulness of the witnesses in comparison with the stories of innocent urination by the wall of Haji Issa's shop. We have considered this matter carefully, and we have reached the conclusion that the lower courts were quite entitled to find the facts as they did.

The result then is that the conviction of the appellant in the High Court is set aside as well as the conviction in the trial court. There is substituted a conviction contrary to section 308(2) of the Penal Code. The substitution is permitted by section 187 of the Criminal Procedure Code. The sentence of 5 years' imprisonment is maintained, but the order for corporal punishment is set aside as unlawful. That will be some help as the appellant suffers from tuberculosis.

The appeals are dismissed.

Dated and delivered at Nakuru this 25th day of April , 1988

H.G PLATT

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JUDGE OF APPEAL

J.M GACHUHI

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JUDGE OF APPEAL

F.K APALOO

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JUDGE OF APPEAL