



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEAL NO 354 OF 1983

MUIRURI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was convicted by the first class district magistrate for an offence of preparation to commit a felony contrary to section 308(2) of the Penal Code and sentenced to five years' imprisonment. Section 308(2) of the Code reads:

“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 and where any person is charged with an offence under this subsection proof that he had with him any article made or adopted for use in committing a burglary, theft or cheating shall be evidence that he had it with him for such use.”

The essential ingredients of the offence under the said subsection are:

1. The person was not at his place of abode.
2. The person was found with an article.
3. The article was for use in the course of or in connection with any burglary, theft or cheating.

The subsection also provides that proof that the person had with him such article made or adopted for use in committing a burglary etc shall be evidence that he had it with him for such use. In the instant case the particulars of the charge states:

“On February 10, 1982 at 2.00 am along Kamiti Road in Nairobi Area was found in possession of an instrument of house breaking, namely two star drivers and two screw drivers with intent to commit the felony of burglary and stealing.”

Two essential ingredients of the offence are arising from the particulars of the charge, namely:

- a) The appellant was not at his place of abode.
- b) The two star drivers and two screw drivers were articles for use in the scene of or in connection with any burglary, theft, etc

From the particulars of the charge it would appear that the prosecution had in mind section 308(1) of the Penal Code which carries a minimum sentence of ten years' or maximum of fourteen years' imprisonment with hard labour together with corporal punishment. Moreover, in order to bring the charge within the scope of section 308(1), the star and screw drivers have to be dangerous or offensive weapons.

Moreover, from the judgment of the trial magistrate, it appears that he had also in mind the offence under section 308(1) of the Penal Code. He made no finding (there was no evidence) that the star or screw drivers were articles made or adopted for use in committing a burglary etc. His finding was:

"I am satisfied with the evidence to the effect that the accused with another person were out for the purpose of committing an offence."

The defence of the appellant (he testified on oath) was that he was a mechanic with Top Life Electric Wiring and Radio Repair and that evening after carrying out certain radio repairs, he went to a bar and on his return home he was arrested by the police who did not even inquire whether he lived near the place. He claims that the star and screw driver are his legitimate tools of trade.

The above explanation of the appellant may or may not be reasonable having regard to all the evidence before the trial court, but in considering the same, the trial magistrate shifted the burden of proof on the appellant. In his judgment, the trial magistrate commented that on the explanation of the appellant:

"The accused claimed he worked at Top Life Electric Wiring yet he called no witness for that fact. The accused claimed to have carried out radio repair at Kamau Kimani's yet he declined to call a Mr Kamau to support him over this fact."

With respect, the above was a serious misdirection as the accused person is not obliged to adduce any evidence to support his defence or explanation. If referring to the evidence adduced in court the court is satisfied that evidence so adduced creates a reasonable doubt as to the guilt of the accused person, he shall be entitled to acquittal.

Upon consideration of the defect in the charge sheet with regard to essential ingredients and the non-direction and misdirection of the trial magistrate, the conviction cannot be sustained. It is not supported by the learned senior state counsel.

The appeal is allowed. The conviction is quashed and sentence thereon set aside.

Let the appellant be set free forthwith unless otherwise lawfully held.

Dated and Delivered at Nairobi this 7th June, 1983

F. E. ABDULLAH

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JUDGE