IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Law, Miller & Potter JJA)

CRIMINAL APPEALS NOS. 118 & 120 OF 1981

BETWEEN

MAKOKHA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the High Court at Kisumu, Scriven J)

JUDGMENT

On February 25, 1982, we allowed the appeals of both appellants, quashed the convictions and set aside the sentences passed on them. We now give our reasons.

The appellants were jointly charged in the court of the Resident Magistrate at Kakamega with an offence laid under section 308(1) of the Penal Code, the particulars being stated as follows, that the appellants

> "were found armed with dangerous weapons namely *pangas* with intent to commit the felony of robbery with violence to Joshua Okaka".

The sentence on conviction for this offence is imprisonment with hard labour for not less than ten or more than fourteen years, together with corporal punishment. It is clear from a perusal of section 308(1) as a whole, including the marginal note, which reads "preparations to commit felony", that the sub-section is intended to apply to persons who have armed themselves with dangerous weapons in circumstances indicating an intention, previously formed, to commit a felony, and if two or more persons are jointly charged (as in this case) it seems to us to follow that an essential ingredient of the offence must be proof of a common intention between the persons charged jointly to commit a specific felony in the future.

The defence of the first appellant was an alibi. He denied that he was present at the scene of the alleged crime, which was a bridge over a river near Butere. He is a local man. He did not know the second appellant. The second appellant lives at Mumias, about 10 miles away. His defence was that he was on his way to Kisumu when the *matatu* in which he was travelling broke down. He walked to Butere, and on the way he met the complainants, who accused him of being a thief, hit him on the head with a *rungu* and took him to Butere police station. He was unarmed and did not know the first appellant. It is a fact that on arrival at the police station the second appellant was bleeding from a wound on his head.

The evidence for the prosecution was that of three brothers who deposed that at about 9 pm they met three

men, armed with *pangas*, who were together near the bridge. One of these men ran away before anything happened. The other two, who were the appellants, attacked them with *pangas*. None of the prosecution witnesses was hurt, but the first appellant accidentally cut the second appellant on the head and also ran away. They arrested the second appellant.

The magistrate, on this evidence, convicted the appellants as charged and sentenced each of them to 10 years' imprisonment, 2 strokes of corporal punishment, and to 5 years' police supervision after completion of their sentences. He found it proved that the appellants were armed with intent to commit a felony, and he rejected their defences as being mere fabrications.

We can only say that if there was a preconcerted plan between the appellants and the unknown third man to rob passers-by with violence it was carried out with remarkable ineptitude and lack of resolution. We doubt if such a plan was ever formed.

The appellants appealed to the High Court. They repeated, in their "homemade" petitions of appeal, what they had said in their defence, and they repeated that they did not know each other until after their respective arrests. The learned High Court judge, purporting to act under section 352(2) of the Criminal Procedure Code, rejected their appeals summarily. In our respectful view he was wrong in so doing. The assertion by the appellants that they were strangers to each other amounted, in our opinion, to a contention that they could not jointly, acting in concert, have formed the intention, or made preparations, to commit a felony. This was a point of law taking the case outside section 352(2) aforesaid. The trial magistrate did not find that the appellants knew each other before-hand so as to be able to form a common intention to commit a felony in the future; indeed there was no evidence on which such a finding could have been based.

We again draw attention to what we have said in the past about the use of the power of summary rejection of an appeal, for instance recently at page 6 of the judgment of this Court in *Ombena and Another v Republic* (Kisumu Criminal Appeal No 36 of 1981).

For the reasons we have given, we do not think the evidence justified the conviction of the appellants on the charge as laid under section 308(1) of the Penal Code. The appellants have been in custody in connection with this case for 2 years and 4 months. We saw no point, in these circumstances, in remitting their appeal to the High Court for hearing, or to the Resident Magistrate for retrial on some lesser charge.

We recommend that in future no prosecution for offences contrary to section 308 of the Penal Code be instituted without prior reference to the Attorney-General or one of his Provincial representatives. It is a section creating very special offences, requiring careful consideration before being invoked. The consequences of a conviction are very serious. When we allowed the appeals of the two appellants, we forgot to set aside the police supervision orders made against the appellants, and we now formally set them aside.

We direct that copies of this judgment be sent to:

1. the Resident Magistrate, Kakamega;
2. the Judge of the High Court, Kisumu;
3. the Registrar of the High Court, Nairobi;
4. the Commissioner of Police; and 5. the Attorney-General.

Dated and delivered at Nairobi this 1st March , 1982.

E.J.E LAW

JUDGE OF APPEAL

H.E MILLER

JUDGE OF APPEAL

K.D POTTER

JUDGE OF APPEAL

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

DEPUTY REGISTRAR