REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NOS 306, 286, 287, 326, AND 307 OF 1977

PETER MWANGI.....1ST APPELLANT

SIMON GIKONYO.....2ND APPELLANT

NZANGI NZUILI.....3RD APPELLANT

PAUL GACHOCHE.....4TH APPELLANT

KIMANI GITARI.....5TH APPELLANT

VERSUS

REPUBLIC.....DEFENDANT

JUDGMENT

The appellants were, at about 9.00 pm, in a Nairobi Street. They were sitting on the back seat of a motor car. On the seat also, and in its boot, so says the charge, were these articles:

> adapted for use in the course of burglary and stealing to wit two iron bars, one *simi*, one knife, one axe, one welding instrument, one sisal rope, one welding pipe, one maroon cylinder, one oxygen cylinder, one glove, three whistles, one adjustable spanner and a bunch of keys.

Three men were speaking to the appellants about the cost of a journey, these men went away, and their place was taken by the same number of plain-clothed policemen. The appellants did not try to escape.

Upon these facts were the appellants brought before the Court to face the charge that they were, contrary to section 308(2) of the Penal Code, preparing to commit the felony of burglary. A reference to that part of the charge which we have reproduced makes it clear that the prosecution were relying upon the fact, not that the articles which were in the vehicle had been made, but that they had been adapted, to enable burglary to be committed. What we have to resolve is whether the articles were proved to have been adapted, within the meaning of the applicable law, for use in the course of a burglary. But before we discuss this, we will set out section 308(2) under which the appellants were charged. It reads:

> Any person who, when not at his place of abode, has with him any article for use in the course of or in connection 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 adapted for use in committing a burglary, theft or cheating shall be evidence that he had it with him for such use.

We think that the reference to adaptation was probably made in the charge for two inter-linked reasons: that it was not in the order of things possible to prove that any one of the items was made to carry out the crime of burglary; and it was not possible, or thought to be not possible, having regard to where and the circumstances in which the appellants were found, to say what, if anything, they intended to do with them except to drive away with them. To put it another way, it was appreciated, or thought to be the case, that unless it was established that the articles had been adapted within the meaning of the subsection, there could be no convictions because the presumption contained in the subsection was essential to the prosecution case and without it the other evidence could not possibly, of itself, prove guilt. Authorities were put before the lower court in support of the argument that the facts of the case could not warrant a finding of adaptation, and they were in point; but at the end of the day, convictions were nonetheless entered. We believe, and State counsel has not sought to suggest otherwise, that they should not have been entered.

This Court (Trevelyan J) held in *Kaura v The Republic* [1972] EA 178 that a hammer is not an article made to be an instrument of burglary. It would have been better had it been said that a hammer "is not ordinarily made" for such purpose but no matter now. The decision was not referred to the Court of Appeal for East Africa in two appeals which it subsequently heard, ie in *Kimonde v The Republic* [1972] EA 484 and *Bakari v The Republic* [1974] EA 251, but it would, as we think, have received, at all events, qualified approval because, in the *Kimonde* case the Court held that a screw driver is not necessarily made or adapted for use in theft, and in the *Bakari* case it held that neither a cap nor a torch is an article for use in the course of or in connection with burglary. We see no reason to think that a case could not be brought in which it would be possible to prove that a hammer or a screwdriver was especially made to promote a burglary (that, no doubt, is why the Court of Appeal for East Africa used the word "necessarily"), but it would be for proof by the prosecution. Manufacturers of such articles do not ordinarily make them so that people's houses may the more conveniently be broken into. No doubt some may be used for that purpose; but that is beside the point. They are not made so that this may be done.

The convictions were entered because the magistrate took the view that whilst there were decisions of higher Courts as to what could not be said to be an article made or adapted for the purpose of section 308(2), there was none saying what articles could be said to have been made or adapted therefor. He therefore had recourse to the dictionary definition of the word "adapt". But the decisions of the Court covered the facts which were before him and, we have to say, he has misunderstood the definition.

None of the articles specified in the charge was sought to be proved to have been made for use or in connection with burglary and theft and no adaptation was proved either. There was only evidence that such articles were in the car. What the magistrate did was to relate adaptation to the use to which the articles would, as he thought, be put; but that is not the kind of adaptation which the law envisages for that adaptation is to the article itself, ie an article having been made, it is modified by way of attachment or alteration to enable it to be used for a purpose or in conditions other than that, or those, for which it was originally intended. For instance, a hammer is made and primarily intended for breaking rocks, beating metal, driving nails, and the like. It may be said to have been adapted when a pad had been stuck over the striking area of its head. There is, as we think, support for our interpretation, if support be needed, to be found on page 485 of the report of the *Kimonde* case for it reads:

> In this case the prosecution had to prove the following ... 2. That the appellant had in his possession an article for use in the course of theft, that is, he had with him the screwdriver.
>
> If the article was made or adapted for use in committing the offence of theft, that would be evidence that the appellant had it with him for such use. An ordinary screwdriver cannot be said to have been made or adapted for use in committing the offence of theft, and the magistrate made no findings that the appellant had it in his possession for use in the course of theft.

and we draw particular attention to this part of what we have just quoted, ie "An ordinary screwdriver cannot be said to have been made or adapted for use in committing the offence of theft". It is, as we read it, completely against the magistrate's interpretation.

Let us put the matter slightly differently. The prosecution must, to secure a conviction under section 308(2), prove that an accused had an article with him for use in the course of the felony specified in the charge, and that can only be done by putting evidence before the Court from which it can be found to be so. In the simplest situation a man is seen about to use an instrument, say a hammer, to gain entry into a building. In a more complex situation he is just sitting in a motor car in a country road with a hammer beside him. In the first case it may not be difficult to satisfy a Court that the offence under section 308(2) was committed, though a conviction is not upon such facts inevitable for it may be that it was the accused's own house and he had lost its keys. In the second case, however, it may be very difficult to prove guilt. But, where a man has in his possession an article found to have been made for breaking in, say a jemmy, or an article not made, but found to have been adapted for such purpose, it is pertinent to ask, "Why did he have it with him if not for such purpose?" Even then a conviction does not have to follow because, as the *Kimonde* judgment makes clear, possession of such an article is no more than evidence in the case that the accused had it with him for such use, and that is all. It has to be considered with all other evidence in the case.

Let us now relate what we have said to the facts of the case before us. What was there to prove that the appellants intended to commit burglary with the aid of the articles which were in the car? The men were not proved to have been near a dwelling-house but in a vehicle in a street; they were being spoken to about the cost of a journey, suggesting that the locality was of no real importance; and they did not try to run away though one or two might well have succeeded in avoiding arrest had they tried to as they outnumbered the police. The defences were not accepted, but it yet had to be proved and proved by the prosecution that the appellants had the things with them for the purpose specified in the charge, and that was, on the facts, ever impossible of achievement, and as we said no doubt recognised as such, unless the articles had been adapted within the meaning of section 308(2) so that the presumption could be raised because the other evidence was not enough. Adaptation was not proved, and on the facts could not have been proved, and acquittals should have been ordered. The appeals are allowed. We quash the convictions and set the sentences aside.

Appeals allowed.

DATED and delivered at Nairobi this 14th day of February 1978.

E.TREVELYAN **J.H.S TODD**

JUDGE **JUDGE**