IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Law, Miller & Potter JJA)

CRIMINAL APPEAL NO. 50 OF 1981

BETWEEN

STEPHEN NGUGI NG'ANG'A.....APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

Potter JA The appellant was jointly charged with six other accused persons with the offence of preparation to commit a felony, contrary to Section 308(1) of the Penal Code (Cap 63). The particulars of the offence given on the charge sheet were that on September 9, 1980, at Ruaka Trading Centre in Kiambu District of the Central Province, the seven accused were jointly found armed with dangerous weapons, namely two simis, one axe, one iron bar and a rope in circumstances which indicated that they were so armed with intent to commit a felony.

The seven accused persons, including the appellant, were convicted by the Senior Resident Magistrate sitting at Kiambu, and sentenced to the minimum term of ten years imprisonment and to corporal punishment, all seven appealed to the High Court and their appeals were dismissed.

The appellant Stephen now brings a second appeal to this court against conviction.

The prosecution case was that on September 9, 1980, shortly after 10.30 pm, Sergeant Muturi (PW 1) and PC Njage, acting on information, found a Peugeot 404 station wagon registration number KLE 033 at Ruaka trading centre, with all seven accused in the vehicle. When the sergeant flashed his torch at the vehicle, two of the seven men, the appellant Stephen (accused No 2) and Robert (accused No 6), ran away. The remaining five were arrested. In the vehicle the sergeant found two simis, an axe and an iron bar. Sergeant Muturi, who knew the appellant and Robert and their homes, went to look for them, and at about 2 am on the following day he and PC Ngumo (PW 2) arrested the appellant and Robert in the house of one Kiarie.

In his unsworn statement the appellant said that on September 9, 1980 he asked Francis (accused No 1) to take him home in the vehicle to see his mother-in-law's child, who was sick. At lunch time Francis, Lawrence (accused No 3) and the appellant went in the vehicle to the appellant's home. Shortly after 6 pm Francis and Lawrence left. At about 10 pm the appellant and Robert went to bed in Kiarie's house, where they were arrested at about 2 pm.

The appellant's first four grounds of appeal attack the evidence of identification of the appellant as one of

the seven occupants of the vehicle. The prosecution did not call PC Njage, who helped Sergeant Muturi arrest the five men. If the prosecution do not call a material witness, they do so at their own risk. As to the informer, it is not the practice of the police to expose their informers by calling them as witnesses, for obvious reasons which the courts accept.

Sergeant Muturi (PW 1) testified that he knew the appellant and Robert and their homes. The appellant complains that the sergeant did not give any details of his knowing him. This is not surprising, because he was not asked. When cross-examined by the appellant, the sergeant repeated that he saw the appellant run out of the vehicle.

The appellant complains that the evidence of the sergeant (PW 1) was confused. It is true that throughout his evidence in chief, Sergeant Muturi referred to the appellant as accused No 7 and not as accused No 2, and did not correct himself until cross-examined by the appellant and by Robert. But it is quite clear, from the evidence as a whole, that the sergeant was referring to the appellantin his evidence in chief when he spoke of accused No 7.

Further, the appellant submits that the circumstances did not permit for a positive identification or recognition. Sergeant Muturi said of the appellant and Robert:-

“Before they escaped I had seen them clearly as I had a six cell torch which was powerful.” It is well established law that the evidence of identification of a single witness should be carefully tested; see *Abdalla Wendo v Republic* [1953] 20 EACA 166. We agree with Mr Owuor, who appears for the appellant, to this extent, that, the appellant not being represented, the learned magistrate should have questioned the witness with a view to testing his acquaintance with and recognition of the appellant. But on the evidence as it stands we respectfully agree with the learned High Court judges that the evidence of Sergeant Muturi that he recognised the appellant was supported by the fact that the two men he said he saw at the scene before they escaped were soon afterwards arrested together in a house. We have no doubt that the appellant was one of the seven men in the vehicle, and we agree with the concurrent findings of the courts below to this effect.

The appellant’s final ground of appeal is that the charge is defective in that it does not specify the felony which the accused persons were preparing to commit. On this point we are again in agreement with the High Court. The law of East Africa was stated in *Rex v Bakari Bin Yusuf* [1940] VII EACA 63, in which it was held that an information charging the entering of a dwelling house with intent to commit a felony therein should show the particular felony intended, but that failure to do so will not be a fatal defect if the accused was not prejudiced thereby.

We do not think that the appellant suffered any prejudice whatsoever in this case. Sergeant Muturi said in evidence:

“Having looked at the weapons (MF 1 to 5) I was satisfied that they had an intention of committing a felony like robbery.” This was quite sufficient for the appellant to know what kind of felonious preparation he was accused of.

Accordingly this appeal is dismissed.

As **Law** and **Miller JJA** agree, it is so ordered.

Dated and Delivered at Nairobi this 9th day of October 1981.

E.J.E.LAW

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JUDGE OF APPEAL

C.H.E.MILLER

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JUDGE OF APPEAL

K.D.POTTER

.....

JUDGE OF APPEAL

I certify that this iis a true copy of the

original.

DEPUTY REGISTRAR