IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: CHUNGA, C.J., TUNOI & SHAH, JJ.A.)

CRIMINAL APPEAL NO. 59 OF 2000

BETWEEN

1. MANUEL LEGASIANI

2. HARRY SABASI

3. HIPOLTI ALOYCE

4. MUSA KARIA KISANO .....APPELLANTS

AND

REPUBLIC .....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa (Commissioner Tutui) dated 23rd March, 2000

in

H.C.CR.A. NOS. 139, 140, 141 & 142 OF 1999)
****

JUDGMENT OF THE COURT

The four appellants, Manuel Legasiani, Harry Sabasi, Hipolti Aloyce and Musa Karia Kisano, were charged with two separate offences in two unrelated counts as follows:

1.Being unlawfully present in Kenya contrary to section 13(2) of the Immigration Act, Cap.172 Laws of Kenya.

2.Preparing to commit a felony contrary to section 308(1) of the Penal Code.

In this appeal we are not concerned with the first count as all the appellants, who are Tanzanians, pleaded guilty to the first count. They were, each fined Kshs.4,000/= or were to serve six months imprisonment in default.

The appellants were after trial convicted of the offence mentioned in the aforesaid second count and were each sentenced to 4 years imprisonment and six strokes of the cane each.

On 13th January, 1999 Kura Omari Mzee (PW.1) was driving a yellow Canter vehicle, the registration number whereof he gave as KAG 48L, on a farm towards the main road when he saw the four appellants. He alleged that one of them had 'something' which made him go and report to the police as he felt suspicious that the four persons were 'bad men'. He had in the vehicle one Shabani Athumani (PW.2). PW.1 elucidated that he saw one of the appellants carrying something that looked liked a pistol. He got policemen from Challa, for the reason, he so surmised, that one of the four men had ordered him to stop. The four were arrested and led to the Chief's Office at Challa and to the police post there. He further stated that when his vehicle returned with the policemen to the place where the four men were the third appellant (the original first accused) dropped what looked like a pistol on the ground and he also saw a torch and knife on the ground. The four were later taken to Taveta police station and charged. PW.1 at first said that the third appellant had been charged with the offence of theft of the said Canter motor vehicle in Tanzania because his wife had stolen the same from him (PW.1) after having had given him some medication to make him sleep. He then changed his version thereof to say that the third appellant was only a witness in the Tanzanian case.

PW.1 did not know the other three men. What is important, insofaras the evidence of PW.1 is concerned is that he said, clearly, that what he saw was what looked like a pistol.

PW.2 said that after the four men were arrested the home made "gun" was taken from one of the four men and that the torch and the knife were on the ground near where the four men stood.

All said and done, what is important for the purposes of this appeal is: Was there any evidence to show any preparation to commit a felony? The second point that needs to be gone into is: What evidence is necessary to show that a home made weapon is one which qualifies as a gun or a pistol or a fire-arm?

The word 'Preparation' is not a term of art. In its ordinary meaning it means "the act or an instance of preparing" or "the process of being prepared". This is the meaning ascribed to the word 'Preparation" in the Concise Oxford Dictionary, Eighth Edition. To prove the offence in question some overt act, to show that a felony was about to be committed, has to be shown. Mere possession of a fire-arm not coupled with such an overt act is not an offence under section 308(1) of the Penal Code. If the fire-arm is a lethal weapon and is held without licence another offence may be indicated.

We are not concerned with that here. The mere act of flagging down a vehicle does not, per se, denote an overt act of preparing to commit a felony. On that score alone this appeal ought to be allowed; but there is the other issue posed by us. Before a firearm can be classified as a firearm, when the same is stated to be home made, there has to be evidence of a fire-arms' expert, to the effect that the 'home-made' firearm was capable of being classified as one which was made or adopted for use for causing injury to a person or persons. There was no such evidence before the trial court. It was held in the case of **Mwaura & others vs. Republic** (1973) EA 373 that although there is no definition of "dangerous or offensive weapon" specifically applicable to section 308(1) of the Penal Code it ought to be shown that the weapon was one which could have caused injury. With respect, we agree with that decision.

Earlier authorities show that a home-made gun had to be proved, by evidence, to be a lethal barrelled weapon. See Mwangi s/o Njoroge vs. R (1954) 21 E.A.C.A. 377 and Gatheru s/o Njagwara vs. R (1954) 21 E.A.C.A. 384. There being no such evidence in the trial court the evidence as regards preparation to commit a felony with a weapon falls short of evidential requirements.

Coming to the other two items, namely the torch and the knife we can say straight away that a torch is not an offensive weapon. A knife, per se, is not a weapon of offence although it could be so used. There was no evidence however that the knife was in any manner shown to have been used or even attempted to be shown to be used so as to support the prosecution case.

The upshot of this is that this appeal is allowed; the convictions of the appellants are quashed and the sentences set aside. All the appellants are ordered to be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Mombasa this 19th day of July, 2000.

B. CHUNGA

.....

CHIEF JUSTICE

P. K. TUNOI

.....

JUDGE OF APPEAL

A. B. SHAH

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR