



REPUBLIC OF KENYA



**Juma v Republic (Criminal Appeal E052 of 2023)
[2025] KEHC 1156 (KLR) (28 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1156 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL APPEAL E052 OF 2023
DK KEMEL, J
FEBRUARY 28, 2025**

BETWEEN

FRANCIS ONYANGO JUMA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgement of S.W.Mathenge (R.M) in Bondo
Principal Magistrate's Court No.E820 of 2021 delivered on 21st February 2022)*

JUDGMENT

1. The Appellant herein Francis Onyango Juma was charged before the magistrate's court at Bondo for the offence of preparation to commit a felony contrary to section 308 (3)(b) of the *Penal Code* cap 63 Laws of Kenya. The particulars are that on 25th day of May 2021 at around 0300hrs at Akala trading centre, Gem Sub County within Siaya County, together with others not before the court were found inside ARAN's plot of one Collins Aran at night with intent to commit a felony therein to wit burglary and stealing.
2. The matter proceeded to a full trial wherein the Appellant was convicted and sentenced to six years' imprisonment.
3. Being dissatisfied with the decision of the trial magistrate, the Appellant has appealed to this Honourable Court on the following grounds:
 - i. That he was charged and convicted with an offence of preparation to commit a felony contrary to section 308(3) of the *Penal Code* and sentenced to serve 6 years' imprisonment.
 - ii. That the trial magistrate failed in both law and facts to conduct the trial process under Article 50 of *the Constitution*.



- iii. That the prosecution failed to prove their case beyond reasonable doubt as envisaged under section 107 of the *Evidence Act* cap 80 Laws of Kenya.
- iv. That the trial magistrate did not consider his defence which was cogent and efficient in accordance with the time and where he came from, thus amounted to prejudice and miscarriage of justice.

On the foregoing grounds, he prayed that his appeal be allowed, his conviction quashed, his sentence set aside, and he be set free.

4. This being a first appeal, it is the Court's duty to re-consider and re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent findings and conclusions. (See *Okeno vs. Republic* [1972] EA 32). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to make due allowance in that respect as was held in *Ajode v. Republic* [2004] KLR 81.
5. The prosecution called two witnesses in support of its case.
6. PW1 No. 93488Pc John Alubale of Akala police station stated that on 25/5/2021 at about 3.00 am he was on a routine night out together with PC Muchenge. They had placed themselves in Akala town where burglars were common. They saw the movement of three people who were acting suspiciously in a plot next to where they were. The three were trying to break into a house. That he could not clearly see the weapons they had. They tried to approach the two to arrest them but two spotted them and ran off with the weapons. The weapons were metal bars measuring two metres long.

One of them entered into a hideout and they narrowed down on him and found him hiding in a kitchen. That they arrested him then woke up members of that plot who confirmed that he did not live in that plot. That they arrested him and took him to Akala police station. That the man informed them that he was from Malele village which was one kilometre from the scene.

He testified further that they did not recover any exhibits from the scene. That there were street lights at Akala town and that he identified the man he arrested as the Appellant in the dock.

On cross-examination, he stated that they woke up people who lived in that plot to confirm whether the Appellant was a resident of that plot. The owner of the house they tried to break into had travelled. Two of the burglars ran away towards the road and the Appellant entered the kitchen where he hit a jug and was arrested. Some people claimed that the Appellant was from Alego.

7. PW2 No. 119733Pc Muchenge of Akala police station stated that he was the investigation officer in the instant case. That on 25/5/2021 at about 3.00 Am, he and Pc Alubale were on night patrol in Akala town where there had reported numerous break-ins. They spotted three men inside ARAN's plot. They acted suspiciously and thus they attracted their attention. They moved closer and noticed that they were trying to open the 1st door in the plot. That the three suspects were holding a metallic rod. As the officers moved closer, the suspects spotted them and ran away. They pursued them but two escaped and they managed to arrest one of them namely Francis Onyango Juma (points at the appellant /accused at the dock).

They woke the tenants up to establish whether the suspect lived there but they denied. They took his phone for further investigation. They thus escorted him to Akala police station and charged him before a court of law. There were bright security lights. They summoned the tenants but they refused claiming that they knew the accused very well and his character.

On cross-examination, he stated that they were initially about 150 metres from the rental houses but were moving in closer. The plot had rental houses. They did not find him armed but they ran away.



8. That marked the close of the prosecution's case. The trial magistrate ruled that the prosecution had established a prima facie case and subsequently placed the Appellant on his defense. He tendered an unsworn statement.
9. DW1 Francis Onyango Juma, stated that he is a resident of Malele village in, South west Gem. That on the evening of 24/05/2021, he left his home and headed to a friend's place, who had requested him to go did a grave for the burial of his mother. That he dug the grave and at midnight he started walking back to his home. That on the way at Akala market, he saw movement of some people and he became afraid. That he ran into a rental plot and hid in a shed where there were empty jerrycans. The Jerrycans fell and two police officers came and arrested him. They took his phone allegedly for further investigations. That he was taken to Akala police station and later on charged before court.
10. The appeal was canvassed by way of written submissions. The Appellant submitted that the trial magistrate erred in convicting the Appellant based on hearsay evidence. He submitted further that the persons who were to confirm the allegations of the charge were the owner of the house, the tenants, and or the landlord, all of whom never appeared to testify whether truly the Appellant tried to break into the house that fateful night of 25/5/2021.

The Appellant submitted further that the investigations done were very shoddy in that the officer investigating the matter did not file in court any document to show the extent of the investigations done on the phone which they took from him; and secondly that the investigation officer failed to procure eye witnesses to support his allegations. It was likewise his submissions that it was against the law for one to be an arresting officer and an investigating officer as well.

Based on the foregoing, the Appellant prayed that the appeal be allowed, the conviction quashed, and the sentence set aside.

11. On their part, the Respondent submitted that they have proved their case beyond reasonable doubt as by law required and therefore the appeal should be dismissed.
12. I have considered the record of the lower court plus submissions. I find the issue for determination is whether the case was proved beyond reasonable doubt by the Respondent.
13. Section 308 of the *Penal Code* stipulates thus:
 - (1) Any person found armed with any dangerous or offensive weapon in circumstances that indicate that he was so armed with intent to commit any felony is guilty of a felony and is liable to imprisonment of not less than seven years and not more than fifteen years.
 - (2) 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.
 - (3) Any person who is found—
 - (a) having his face masked or blackened, or being otherwise disguised, with intent to commit a felony; or
 - (b) in any building whatever by night with intent to commit a felony therein; or
 - (c) in any building whatever by day with intent to commit a felony therein, having taken precautions to conceal his presence, is guilty of a felony.



- (4) Any person guilty of a felony under subsection (2) or (3) is liable to imprisonment with hard labor for five years or, if he has previously been convicted of a felony relating to property, to such imprisonment for ten years.
14. In the case of Charles Wamalwa Karani vs Republic (2017) KEHC 4155 the court stated that for the offense in issue herein to be proved one ought to establish the following;
- a) that the accused was armed with a dangerous weapon.
 - b) that the accused is found not within his place of abode.
 - c) the weapon /articles found were in the course or connection of a crime, burglary, or theft.
16. In the instant case, it is not in dispute that the Appellant was found not at his place of abode. He was however not armed and nothing was found on him as a weapon. The witnesses who were only the arresting officers claimed that the Appellant was in company of two others who ran away and that they were armed with metal rods measuring two metres long, but when the other two saw the officers approaching, they ran away with the metal rod.
17. Upon the escape of the other two suspects, the police officers claimed that they cornered the Appellant herein hiding in a kitchen store and that they woke up tenants in that plot to establish if the Appellant lived there. However, no tenant, or land landlord of the plot where the Appellant was allegedly arrested was brought as a witness so as to back the claim that the Appellant did not reside at the said plot and thus prove the ingredient that it was not his place of abode. It seems the Appellant was charged on the basis of suspicion. In Mary Wanjiku Chichira vs. Republic Criminal Appeal No. 17 of 1998, the court held that:
- “suspicion alone however strong cannot form the basis for a conviction.”
19. As the Respondent failed to call the occupants of the plot where the Appellant was found hiding to establish if he ever lived there and further the fact that the Appellant was not found in possession of any weapon or article, it is clear that he was charged with the offence based solely on grounds of suspicion. As noted above, suspicion alone should not be a basis for the conviction arrived at by the trial court. I find that there was some doubt created about the Appellant’s involvement in the alleged crime. It seems the learned trial magistrate got carried away by the description given to the Appellant by the local administration vide a pre-sentence report wherein the Appellant has been given the moniker name “Dera Mwizi”. The Appellant could as well have many such unpleasant names but the suspicion alone is not sufficient to sustain a conviction. The Respondent’s duty to prove its case beyond any reasonable doubt was not lessened or shifted to the defence. I am satisfied that the conviction arrived at by the learned trial magistrate was unsafe and thus the same must be interfered with.
20. As the appeal on conviction has succeeded, there is no need to delve into the issue of sentence.
21. In the result, it is my finding that the Appellant’s appeal has merit. The same is allowed. The conviction is hereby quashed and the sentence set aside. The Appellant is ordered set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

DATED, AND DELIVERED THIS 28TH DAY OF FEBRUARY, 2025

D. KEMEI

JUDGE



In the presence of:

Herman Onyango Juma...Appellant

Siota.....for Respondent

Ogendo.....Court Assistant

