



REPUBLIC OF KENYA



KENYA LAW
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**Mwaura v Republic (Criminal Appeal E148 of 2024)
[2025] KEHC 11325 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11325 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E148 OF 2024
DR KAVEDZA, J
JULY 31, 2025**

BETWEEN

SIMON MWAURA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered by Hon. Kabuya I.M (S.P.M) on 15th November 2023 at Kibera Chief Magistrate's Court Case No. 928 of 2023 Republic vs Omar Mohamed Hamisi and 2 others)

JUDGMENT

1. The appellant Simon Mwaura was jointly charged with anothers, not before this court, with the offence of preparation to commit a felony contrary to section 308(1) of the *Penal Code*. After a full trial, he was convicted and sentenced to serve (7) years imprisonment.
2. Aggrieved by the decision of the trial court, the appellant has lodged an appeal in this court vide a petition of appeal. He challenged the totality of the prosecution's evidence against which he was convicted. He urged the court to quash his conviction and set aside the sentence imposed upon him.
3. This being the first appellate court, we are guided by the ruling in *Okeno v. R* [1972] EA 32. In this case, the court opined that a court of first appeal ought to re-examine all the evidence afresh and exhaustively, so as to come up with its own conclusions without overlooking the conclusions of the trial court, bearing in mind that it never saw the witnesses testify.
4. The prosecution called three witnesses. PW1, Corporal Edward Ndungu, testified that on 2nd June 2023 at 11:20 p.m., while patrolling the Next Gen area in South C with PW2, they encountered a motorcycle, registration KMFV 849K, beside which stood two men. When questioned, the first accused, Omar, promptly stated that they were not thieves. The appellant attempted to flee but desisted when threatened with being shot. The officers ordered both men to lie down for a search. Omar



- attempted to escape and fell into a nearby flower bed, where PW2 apprehended him and recovered a concealed imitation pistol. The officers secured the scene and called for reinforcement.
5. Omar informed the officers that a third accomplice was delivering a parcel in a nearby flat. Upon arrival of the backup team, some officers remained with Omar and the appellant, while others proceeded to the flats. They arrested the third suspect, whose explanation for being at the premises was unsatisfactory. Several other individuals found in the parking lot were also arrested for possession of cannabis. In total, six persons were apprehended and later taken to Langata Police Station.
 6. PW2, PC Daniel Nganga, corroborated PW1's testimony. PW3, Corporal Tom Omondi, stated that on 3rd June 2023, he interviewed the suspects, compiled an inventory of recovered items, and wrote to NTSA. The NTSA confirmed the motorcycle was registered to Kanos Limited. He also compiled a report dated 4th August 2023 indicating that the imitation firearm was capable of firing. Upon cross-examination, PW3 admitted he did not dust the weapon for fingerprints nor retrieve CCTV footage.
 7. The trial court found a prima facie case and placed the accused on their defence. DW1, Omar, claimed he was arrested without cause after dropping a passenger at Next Gen Mall. DW2, the appellant, stated he was waiting at the stage when he was arrested. DW3, Alphan Mugo, confirmed he was with the appellant and was arrested shortly after returning to collect a forgotten pizza.
 8. The appeal was canvassed by way of written submissions by the parties, which have been duly considered. The offence of preparation to commit a felony is provided under section 308 of the [Penal Code](#), which states as follows;

308 (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 sub section proof that he had with him any article made or adopted for use in committing a burglary, theft or cheating shall be evidence that he had it with him for such use.
 9. The evidence presented by the prosecution confirms that the appellant was apprehended outside Nextgen Mall late at night. He was not at his residence, and the circumstances surrounding his arrest were suspicious. It is not in dispute that his co-accused, Omar, was found attempting to conceal an imitation firearm in a flower bed, clearly aware of the illegality of his conduct. Omar further disclosed that another accomplice was nearby, allegedly delivering a parcel. These facts point to a coordinated operation, and it is evident that the appellant acted in concert with Omar and the third individual. Their conduct falls squarely within the doctrine of common intention under section 21 of the [Penal Code](#).
 10. The appellant's claim that the prosecution failed to call the arresting officers is without merit. PW1, Corporal Edward Ndungu, was one of the officers involved. Additionally, the appellant's argument that the prosecution did not prove the intended use of the firearm is misplaced. The law does not permit a person to be in the company of another found with a homemade firearm under such circumstances. The presence of the appellant with his co-accused, and their conduct, supports the conclusion that they acted jointly with a shared purpose.
 11. I am satisfied that the prosecution proved its case beyond reasonable doubt. The appellant's conviction is hereby affirmed.
 12. On the sentence, the appellant was sentenced to serve seven years' imprisonment. The court considered his mitigation, the fact that he was out on bond during trial, and that he was a first offender. There is no reason to interfere with the sentence, which shall run from 23rd November 2023.



13. The appeal is found to be lacking in merit and is dismissed in its entirety.

Orders accordingly.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 31ST DAY OF JULY 2025

D. KAVEDZA

JUDGE

In the presence of:

Appellant Present

Timoi for the Respondent

Karimi Court Assistant.

