



**REPUBLIC OF KENYA**

**High Court, at Nairobi November 6, 1984**

**Sachdeva J**

Criminal Appeal no 556 & 586 of 1984

*Criminal law - preparation to commit a felony contrary to section 308(1) Penal Code cap 63 - charge disclosing felony covered in section 308(2) - whether court could alter sentence in view of the discrepancy.*

The appellants were found hiding behind a fence at night time and sprinted away when challenged by the police and were arrested at gun-point. Upon their person were found various items which could be used in connection with theft and they were not at their abode at the time. They fully satisfied the ingredients for the offence of preparation to commit a felony.

On being challenged they were found guilty of the offence of preparation to commit a felony and sentenced to 10 years and 10 strokes corporal punishment. They were aggrieved by the conviction and sentence, and appealed.

**Held:**

1. It was uncontroverted that the appellants were found concealing themselves behind a fence at night time and that they ran off upon challenge by the police and that they had on them instruments of stealing.
2. It was prejudicial to convict the appellants of the offence under section 308(1) of the Penal Code when they could have been guilty of an offence under section 308(2) of the Penal Code cap 63.

*Appeals allowed in part. Sentence varied.*

**Cases**

Kipsana v R (1975) EA 253

**Statutes** Penal Code section 308(1), 308(2)

**Advocates**

*J Njongoro* (state counsel) for Respondents

November 6, 1984, **Sachdeva J** delivered the following Judgment. I have consolidated the two appeals.

Both the appellants, who had been jointly charged, were convicted by the learned resident magistrate, Nairobi, of preparing to commit a felony contrary to section 308(1) of the Penal Code, and each was sentenced to 10 years' imprisonment, with 10 strokes of corporal punishment.

I have given due consideration to all that the appellants have urged in the respective petitions of appeal, but there was evidence from a policeman, which the learned magistrate was entitled to accept, that both of them were hiding together behind a fence near a Tour company at night-time, that they started to run away when challenged to stop, that they were arrested at a gun-point, that they were found with various items which could be used in connection with a theft and that they were not at their place of abode at that time.

However, the felony specified in the charge, is theft, which is also specifically covered in section 308(2)

of the Penal Code and applying the principle in *Kipsana v R* (1975) EA 253, it was prejudicial to convict the appellant of an offence under section 308(1) of the Penal Code when they could not have been guilty of an offence under section 308(2) of the Penal Code.

Consequently, I will substitute a conviction under section 308(2) of the Penal Code, in respect of both the appellants. I will set aside the sentences imposed upon them and in lieu thereof, substitute a sentence of 18 months' imprisonment upon each of them (with no corporal punishment).