Gachoi v Republic (Criminal Appeal E001 of 2024)
[2025] KEHC 14455 (KLR) (15 May 2025) (Judgment)

Neutral citation: [2025] KEHC 14455 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E001 OF 2024

NIO ADAGI, J

MAY 15, 2025

BETWEEN

JAMES MAINA GACHOI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal on the conviction and sentence delivered on 21" December 2023 by Hon. R.W. Gitau SRM in Criminal Case no. E628 OF 2022 at Mavoko Law Court)

JUDGMENT

Background

1. The Appellant was charged with an offence of Preparation to Commit a Felony contrary to section 308(2) of the Penal Code. The particulars are that on the 7/7/2022 at around 0400 hrs at Mlolongo Township, Masaku area in Athi River Sub-county within Machakos County jointly was found armed with dangerous weapons namely panga, metal rod, catapult and two sacks in a circumstance that indicated that you were so armed with intent to commit a felony namely robbery.

2. The Appellant was convicted and sentenced to 7 years imprisonment on 21st December 2023.

3. The Appellant pleaded not guilty and matter proceeded to full trial.

Prosecution's Case

4. The Prosecution called three (3) witnesses to prove its case.

5. PW1 was No.98099 PC Pakaua Makaua. He indicated that on 7th July 2022, he was in the company of PC Kirui, CPL Roba and PC Muchiri at 2:00am on patrol at Masaku Plaza when they met two men who had covered themselves with Masaai Shukas and they appeared suspicious and upon spotting the police, they tried to run away. He testified that they run after them and caught them where they

recovered from them a panga, metal rod, catapult and two empty sacks. He testified that the two men had no explanation for possessing the items and they thus arrested them. PWI disputed that the 2 men were going to work and testified that they indicated that they had come from Mukuru kwa Njenga. He denied that the two informed the police that they were construction workers or guards.

6. On cross examination, he testified that the time of arrest was 2:00am and not 4:00 am as stated in the charge sheet. It was his evidence that the metal rod and catapult were hid beneath the lessos. He denied that they also possessed a tape measure or a hack saw. He denied that they assaulted them or even demanded Kshs.50,000/=. He testified that based on the items they found the accused persons with, they believed the accused persons intended to commit theft. He further testified that in Masaku area, there were increased cases of theft occurring almost daily.

7. PW2 was No.111965 PC Kenneth. He testified that they were on normal patrol on 7th July 2022 in the company of PC Kirui, CPL Roba and PC Makau at Masaku area. They came across two men who appeared like watchmen for they had wrapped themselves with Masaai lessos and they could also see something protruding beneath the lessos. He testified that he inquired from the men what they were carrying and James, started to run. It was his evidence that he run after him and caught him. They put the items they were carrying down. PW2 testified that they looked inside the sacks and in one sack they found catapult and a craw bar while in the other, there was a panga. They thus arrested the men and took them to the police station.PW-1 stated that James was unresponsive to their queries but Kitui told them that they had come from Mukuru Kwa Njenga and they had gone to try their luck. He further told them that they hadn't stayed in Mlolongo for long and had come from Industrial area where they had been arrested and hadn't been arraigned. They thus sought for help. On separate interrogation of James, he testified that James confirmed what Kitui had said and further stated that his wife as expectant hence the need. He identified the two men they had arrested as the accused persons before court.

8. On cross examination, he denied that they fired in the air and further denied that the accused also had with them a hacksaw. He denied that they assaulted the accused persons. It was his evidence that they effected the arrest at 2:00am and patrolled with them until 4:00am. He further denied that they demanded for money from the accused person. It was his testimony that a panga and craw bar are used in house breaking. He also denied that the accused persons indicated they were going to work.

9. PW3 was No.237289 CPL Emmanuel Sanava, the investigating officer. He stated that he wrote statements of the two arresting officers and was given the items that had been recovered from the accused persons which were in sacks and included a metal bar with a sharp end, a panga, catapult and the masaai lessos. On interrogating the suspects, he testified that they told him that they resided in Mukuru kwa Njenga. It was his evidence that there were spates of burglaries and theft of electronics in Masaku area and they believed that the sacks were to be used as a mode of transportation. He produced the masaai lessos, metal rod, panga, catapult and 2 sacks as PEX 1-5 respectively.

10. On cross examination, he testified that the shape of the objects the accused persons had indicated1 that they intended to commit a felony. It was his assertion that if the accused persons were going to work, they would not have run upon being requested to stop. In his opinion, the metal rod and catapult could only be used to break and harm people. It was his evidence that what the accused persons possessed indicated they intended to commit a crime. He denied that PEx-2 could have ben used to dig holes because it was sharp at the end. He asserted that one used to dig holes have a broad end. He denied having demanded for money from the accused persons. He confirmed that there was nothing wrong with the accused person walking to work at 4:00am but their circumstances were suspicious.

Defence Case

11. DW1 was James Gachoi Maina. He testified that he resided in Mukuru kwa Njenga and would do construction works. He testified that on 7th July 2022, he was going to work at Lukenya Hills and he decided to use Katani route for it did not have police patrols. He indicated that with him was a sack containing his items, that is craw bar, panga, catapult, saw, tape measure and a wire used to connect construction wires. On reaching Masaku area, he met a police vehicle and in it were four police officers who told him to stop and he obliged. He indicated that he told the police he had come from Mukuru kwa Njenga and was headed to Lukenya Hills. He denied that he had hid the sack. He testified that he was arrested and police went with him on their patrols and subsequently took him to the police station. He indicated that police asked for Kshs.50,000/= to secure his release but he said he had no money.

12. On cross examination, he testified that Katani Quarry route was safe and had no police patrol. It was his evidence that he uses catapult for birds hunting as a hobby. He denied that he was going to steal and maintained he was going for construction jobs. He denied that he tried to run and maintained that he stopped upon request. He indicated that he was walking so as to save on fare. he further stated that his work at the construction site was to dig trenches, clear the ground and fence off the construction site. It was his evidence that he was in the company of the 2nd accused person.

13. DW2 was Kitui Matii. He stated that he resided in Mukuru kwa Njenga and did construction jobs. He testified that on 7th July 2022, he was going to work using Katani, Masaku Plaza route and on getting to Masaku plaza at around 4:00am, he saw police motor vehicle ahead and police standing next to it. He was stopped and was asked what he was carrying and where he was headed. He indicated that he told the police he was going to work in Lukenya and was carrying his work tools. It was his evidence that he was ordered to put down the items which he obliged, he was handcuffed and slapped. The police upon opening the sack called him a thief and assaulted him. They then told him to walk with them and at around 5:20am, he was taken to the police station. He testified that while in the cells, officer Makau asked for Kshs.50,000 for the case to come to an end and amount he did not have. He admitted that inside his sack was a panga, craw bar, tape measure, hacksaw and a rope.

14. On cross examination, he maintained the items he had were construction tools and that he was headed to Lukenya for work. It was his evidence that he was in the company of the 1st accused person and that he also had with him Kshs.8,600/-, a phone a watch and a wallet which police indicated would book but they refused to return the money. He denied that he had hid the items. He stated that he had covered himself with a masaai lesso since it was cold. He denied having attempted to run. He explained the journey from Mukuru to Lukenya to be a four-hour journey and stated that the Ksh.8600/- was for rent and for fees.

15. Those were the evidence tendered by both the prosecution and defence. I have carefully evaluated the same I now have to decide whether or not the prosecution has proved its case to the requisite standard of beyond reasonable doubt.

16. Being dissatisfied with the conviction and sentence, the Appellant has filed this instant appeal in Grounds of Appeal dated 29th December 2023 raising 4 grounds of appeal namely:

    i. That the learned trial magistrate erred in matters of law and facts by convicting the Appellant while relying on the prosecution's evidence which was doubtful and contradicting.

    ii. That the trial magistrate erred in both law and facts by failing to consider the Appellant's firm defence.

iii. That the learned trial magistrate erred in matters of law and fact by drawing an inference of guilt to the Appellant in a case where the burden of proof was not discharged to the required standard called for in criminal trials.

iv. That the learned trial magistrate erred in matters of law and fact by imposing a harsh sentence to the Appellant which is contrary to the dictates of Article 50(2)(p) of *the Constitution* 2010.

17. This being a first appeal, this court has a duty to reconsider and re-evaluate the evidence to arrive at its own conclusion. In the case of Kiilu and Another v R [2005] l KLR 174. The court of appeal stated the principles governing the hearing of first appeals as follows:

> An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.
>
> It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court' findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses"

18. The appeal herein was directed to be canvassed through written submissions. The Appellants' submissions are dated 19th September 2024 whilst the Respondent's submissions are dated 7th February 2025. On evaluating the evidence and considering the parties' respective submissions, I have narrowed down the issue for determination to be whether the case was proved beyond reasonable doubt and whether the sentence meted out was excessive in the circumstances.

19. Section 308(1) of the Penal Code provides thus:

> " 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."

20. The Court of Appeal in Manuel Legasiani & 3 Others v Republic [2000] eKLR defined the offence as follows:

> " 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."

21. In P v Murray (14 Cal. 159) it was held that:

> " Preparation consists in devising or arranging the means or measures for the commission of the offence; the attempt is the direct movement toward the commission after the preparations are made."

22. To prove the offence of preparation to commit a felony, there must be an overt act to show that an offence is about to be committed. A departure from this definition is given in the case of Re. T. Munirathinam Reddi A.I.R 1955 and Prad. 118 where it was held thus:

> " The distinction between preparation and attempt may be clear in some cases, but in most of the cases, the dividing line is very thin. Nonetheless, it is a real distinction. The crucial test is whether the last act, if uninterrupted and successful, would constitute a crime. If the accused intended that the natural consequence of his act should result in death but was frustrated only by extraneous circumstances, he would be guilty of an attempt to commit the offence of murder."

23. In view of the foregoing judicial precedent, it is intrinsic that the prosecution proves the felonious intent on the part of the appellant or the preparation to execute a felony. This can be seen from the circumstances under which the appellant was arrested. The phrase "dangerous or offensive weapon" is not defined in Section 308 of the Penal Code or in Section 4 – the interpretation section of the Penal Code. Section 89(1) of the Penal Code creates the offence of possession of a firearm or other "offensive weapon" etc and Section 89(4) of the Penal Code defines "offensive weapon" for purposes of Section 89 as meaning:

> " any article made or adapted for use for causing injury to the person or intended by the person having it in his possession or under his control for such use".

24. In Mwaura and Others v Republic [1973] EA 373 the High Court in dealing with the question whether a panga, an iron bar, a wheel spanner, a king shaft, screw driver, a stone and a chisel were "dangerous or offensive weapon" for the purposes of the offence of preparation to commit a felony under Section 308 (1) of the Penal Code held at page 375 letter F stated;

> " In our view "dangerous or offensive weapons" means any articles made or adapted for use for causing injury to the person such as a knuckleduster or revolver or any article intended, by the persons found with them for use in causing injury to the person".

25. It can therefore be argued that, although a panga or metal bar with a sharp end are not made for purposes of causing injury to a person, they can suffice to be a dangerous weapon in terms of Section 308 of the Penal Code if the appellant in possession of them intend to use them for burglary or causing injury to any person.

26. PW2 testified that they were on normal patrol on 7th July 2022 in the company of PC Kirui, CPL Roba and PC Makau at Masaku area when they came across two men who appeared like watchmen for, they had wrapped themselves with Masaai lessos and they could also see something protruding beneath the lessos. He inquired from the men what they were carrying and James (1st Accused/Appellant), started to run. He ran after him and caught him. They put the items they were carrying down. Upon looking inside the sacks, in one sack they found catapult and a craw bar while in the other, there was a panga. They thus arrested the men and took them to the police station.....

27. In the case of Maina and 3 others v Republic (1986) KLR 301 cited in Mugure's case (Supra) the Court of Appeal dealt with a similar case and held that the prosecution must adduce evidence which proximates the possession of the dangerous weapon with the commission of a felony which can be discerned from the evidence.

28. The appellants upon being given an opportunity to offer their defence failed to give a reasonable explanation why they were at the area at that particular time and with a panga, metal rod and catapult. It was also not clear why the appellants decided to use Katani route for it did not have police patrols or why the Appellant ran away if they were genuine construction workers who were heading to their place of work. What the appellants did was just to deny the charge and no cogent explanation was offered in that, they simply claimed that they worked at construction site and were to going to work in Lukenya carrying their work tools. I am not therefore satisfied that the panga, metal bar and catapult which the appellants had in this case were not intended to be used to commit a felony.

29. The assertions by the appellant that the arresting police officers were not putting on police uniforms and that there was contradiction in the time of arrest shown in the Charge Sheet and the time given through testimonies do not hold any waters. I find that the said contradiction in the charge sheet did not materially affect the proceedings in the trial court, and is curable under Section 382 of the Civil Procedure Code.

30. In regard to sentencing, this is an action that is within the discretion of the trial court, and an appellate court will not interfere with the exercise of such discretion unless it is demonstrated and found that the court, in exercising its discretion, acted on a wrong principle or overlooked some material factor or imposed a sentence that was manifestly excessive. In Shadrack Kipchoge Kogo v Republic Eldoret Court of Appeal Criminal Appeal No. 253 of 2003, the Court of Appeal stated that:

> " Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred".

31. I note that the appellant was charged under Section 308 (2) of the Penal code and the same provides thus 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 for not less than seven years and not more than fifteen years. The appellant herein was sentenced to Seven years imprisonment which is the minimum sentence for the offence he was charged with. I find this sentence to be proper and in accordance with the law since the trial court exercised its discretion.

32. The upshot is that the appeal is devoid of merit and I dismiss it.

33. Right of appeal Fourteen (14) days.

34. Orders accordingly. File closed.

JUDGMENT WRITTEN, DATED & SIGNED AT MACHAKOS THIS 15TH MAY 2025

NOEL I. ADAGI

JUDGE

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 15TH MAY 2025

In the presence of:

..... for Appellant

..... for State

..... Court Assistant