Juma v Republic (Criminal Appeal E041 of 2022)
[2023] KEHC 21790 (KLR) (26 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21790 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL E041 OF 2022

REA OUGO, J

JULY 26, 2023

BETWEEN

VITALIS SIMIYU JUMA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence in a judgment dated 31st March 2022 in SRM's Court at Webuye by Hon. N.N Barasa (PM))

JUDGMENT

1. The Appellant was charged with the offence of being in possession of being in possession of an imitation of firearm with intent to commit any criminal offence contrary to section 34 (1) of the Firearm Act Cap 114 Laws of Kenya.

2. The particulars as per the charge sheet were that on 11th December 2019 at Milima area in Webuye East Sub County within Bungoma County, was found being in possession of an imitation of a firearm resembling a pistol with intent to commit a criminal offence.

3. He also faced a second count of being in possession of government stores contrary to section 324(3) as read with section 36 of the *Penal Code*. The particulars of the offence were that on 11th December 2019 at Milima area in Webuye East Sub County within Bungoma County, had in possession Government stores namely: one long sleeved jungle shirt, one jungle trouser, two jungle hats, one black beret, one peak cap all being properties of disciplined forces namely Kenya Defence Forces and National Police Service respectively, such properties reasonably suspect of having been stolen or unlawfully obtained.

4. The appellant pleaded not guilty on both counts and a trial followed before the subordinate court. At the end of the trial, the trial magistrate in convicting the appellant found that the prosecution produced the inventory of the recovered items from the operation. The prosecution proved its case against the

appellant beyond reasonable doubt and the defence offered by the appellant was dismissed for being unbelievable.

5. The appellant dissatisfied with the finding of the subordinate court filed his memorandum of appeal on 14th April 2022 and Amended grounds of appeal on 10th January 2023 raising the following grounds:

    1. That the learned trial magistrate erred in law and in fact by holding that the sentence meted to the appellant on the two counts must run consecutively but failed to note that the counts emanated from the offence committed on the same transactions thus it was only fair and procedural to order that the sentences run concurrently.

    2. That the learned trial magistrate erred in law and in fact by awarding a conviction and sentence on evidence framed under section 34(1) of the *Firearms Act* but failed to note that this evidence was not properly procured and not fairly presented to court thus it was a misdirection to the court to award a conviction on such flimsy evidence. The sentence was void for want of support of evidence.

    3. That the learned trial magistrate erred in law and in fact by awarding a conviction and sentence of 10 years imprisonment on evidence framed under section 324(3) as read with section 36 of the *Penal Code* but failed to consider the way this evidence was n procured and presented, it was a misdirection to the court to award a conviction and sentence on unproved evidence.

6. No 231207 PC Edwin Onyango (Pw1) testified that they received reports from members of the public that the appellant had been terrorizing the residents of the area with robbery with violence cases. On 11/12/2019 at midnight in the company of No. 236173 Inspector Josephine Andia (Pw3) they went to the appellant's home. They found the appellant sleeping in the home of his second wife, they identified themselves and ordered him to open the door. They explained why they were at his home and searched the house and recovered a gadget that resembled a pistol and 2 jungle hats. He explained that the accused person's house was still under construction and the pistol like gadget was found on the first floor of the house while the appellant occupied the ground floor as his living area. They asked the appellant to take them to the house of his first wife where they retrieved Kenya Defence Forces uniforms being a trouser, shirt black beret and a green V-cap suspected to be property of the National Police Service and prison service. They arrested the appellant and upon interrogating him, the appellant stated that the items came to be in his possession in the course of his work. Pw1 prepared an inventory of the items. No. 85575 PC John Maru (Pw2) testified that he was also part of the search team that went to the appellant's house. He testified that after searching the appellant's house they recovered an imitation firearm hidden on the frame of the corner of the house. They also recovered 2 green jungle hats that were in the cupboard. He recalled that the appellant lived with his 2 wives in the same compound and they also went and searched the house of the first wife and found KDF clothing: a shirt, trouser and beret. Pw2 arrested the appellant and took him to Webuye Police station.

7. Pw3 Inspector Josephine Andia testified that she received an intelligent report of a suspect living in Milima who had a gun and police uniform. She shared the information with the Divisional Criminal Investigations Officer and they agreed to conduct further investigations. Pw3 prepared 9 officers from the Directorate of Criminal Investigations and also from the station. They met on 10/12/2019 but agreed to carry the operation at night. At midnight they left for Milima area. When they arrived at the compound, they got intelligence that the suspect had 2 wives and they did not know where he slept. She assigned suspects to both houses. She then declared that they were police officers before the first

house and asked the suspect to surrender. She explained to him that they were going to search his hose and he cooperated. They recovered items from the appellant's house and the same were captured in the inventory. The appellant denied using the items. The appellant was charged as he was not authorized to have the items.

8. The appellant in his defence testified that he has only one wife and works in Kitale Academy Farm. Occasionally he visits his home to see his family. He testified that on 30/11/2019 he visited his home and that there was a boundary dispute with his neighbour. He decided to put up a fence. As he was cutting a tree to be used for the fencing it fell in the neighbour's land and he was demanding compensation. On 11/12/2019 he heard a knock at his door and his neighbour came in the company of 3 police officers. The appellant told them the dispute was over the damage of sugarcane. He was taken to the police station and arraigned in court on 13/12/2019 and he denied the charges. He testified that the police informer was not a witness in this case and neither did the informer make a formal complaint.

Submissions By Parties

9. The appellant submits that the offences were committed in one transaction and therefore should run concurrently. He cited the case of *Amon Muthuni v Republic (2020)* eKLR and *Peter Mageria v Republic [1983]* eKLR. He further submits that the case of *Lewis Muli Wanza v Republic (2018)* eKLR defines the offence under section 34(1) of the *Firearms Act*. The appellant submits that it was necessary to get an expert witness on whether Pexh. 21 was an imitation of a firearm and it was not sufficient that the prosecution witnesses testified that the item looked like a pistol like gadget. He relied on the decision of *Robert Karuru Njuguna v Republic (2017)* eKLR. In any event he submits that Pexh21 was not properly recovered in accordance to section 57 of the *Police Service Act*.

10. As regards the second count, the appellant submits that there was no evidence to suggest that the items recovered came from the Kenya Defence Forces. Pw1, Pw2 and Pw3 were from the Kenya Police Service and had no authority to give evidence on behalf of KDF and relied on the decision in Dickson Macharia Ndemi v Republic (2016) eKLR. There was no report from the KDF claiming loss of such items.

11. The prosecution filed their submissions in response to the appeal. They concede that the sentence meted by the trial magistrate was illegal. It was submitted that the appellant was supplied with witness statements before the trial began and he participated in cross examination of the witnesses. The inventory was done in the presence of the appellant and his two wives and the appellant appended his signature on the inventory. The evidence of Pw1 and Pw2 show that the imitation firearm was recovered at the appellant's house and in addition clothes normally used by the police and military were recovered from his 2 houses. The respondent therefore submits that the combines effect of the recovered government stores with the imitation firearm show that the appellant was so armed with the items with the intention of committing a criminal offence. The evidence tendered proved the case beyond reasonable doubt.

Analysis And Determination

12. The appellant having been convicted under section 34 (1) of the F*irearms A*ct, it is important that I reproduce the said provisions of the Act:

> "(1) If any person makes or attempts to make any use of a firearm or an imitation firearm with intent to commit any criminal offence he shall be guilty of an offence and liable to imprisonment of not less than seven, but not exceeding fifteen years, and where any person commits any such offence he shall be liable

to the penalty provided by this subsection in addition to any penalty to which he may be sentenced for that other offence.

(2) A firearm or imitation firearm shall, notwithstanding that it is not loaded or is otherwise incapable of discharging any shot, bullet or other missile, be deemed to be a dangerous weapon or instrument for the purposes of the Penal Code (Cap. 63).

(3) In this section, "imitation firearm" means anything which has the appearance of being a firearm, whether it is capable of discharging any shot, bullet or other missile or not."

13. In this appeal, the court will examine whether the prosecution established all the elements of the offence. Pw1, Pw3 and Pw3 testified that they found a pistol like gadget at the first floor of the appellant's house hidden on top of a frame. The imitation pistol was produced by the prosecution as Pexh1, however, the same was never examined by a ballistic expert to determine whether it qualified to be referred to as imitation firearms. The court in *John Wabwire Opesa v Republic [2012]* eKLR stated:

> In the present appeal, the items which were referred to as an imitation AK47 rifle and imitation pistol were produced into evidence by the investigating officer. The said items were not examined by a ballistic expert to determine whether they qualified to be referred to as imitation firearms. The prosecution did not call a ballistic expert to establish that indeed the said articles found in possession of the appellants were imitation firearms. In the absence of the evidence of a ballistic expert to proof or establish that the articles found in possession of the appellants were indeed imitation firearms, the trial court erred in finding that the prosecution had established its case to the required standard of proof beyond any reasonable doubt.
>
> That being the case, the prosecution failed to prove the charge that the appellants were found in possession of the imitation firearms to the required standard of proof. The prosecution did not discharge the burden placed on it to establish the fact that indeed the appellants were found in possession of imitation firearms in accordance with the definition of the same as provided under Section 34 of the Firearms Act.

14. It was also not clear if the appellant intended to use the said pistol like gadget was to commit a felony or his arrest was on information that he was suspected to have been involved in incidences of robbery with violence prior to his arrest. Pw1, Pw2 and Pw3 all testified that there had been reports that the appellant had been involved in robbery with violence cases in Webuye region. It is evident from the testimonies of the prosecution witnesses that the pistol-like device in question may have been used in past robberies, in which the appellant was suspected to have taken part according to their informant. However, there was no evidence presented suggesting that the appellant intended to employ the gadget once more in criminal activities. I agree with the finding of Matheka J. in Muhuthu Macharia v Republic [2020] eKLR where it was observed that the prosecution must not only establish that an appellant was found in possession of an imitation firearm but also lead evidence showing that he had an intention of committing a criminal activity. The Court stated as follows:

> " The facts of the case as read to the appellant were that he was found in possession of the 2 firearms and 3 rounds of ammunition.
>
> Section 34(1) speaks of a person making use/attempting to make use with intent to commit a felony.

> There was nothing in the facts as read to the appellant to prove/to establish that he was found attempting to make use/making use of the firearms to commit a felony. There were no facts read to establish any intention on his part to commit a felony. The facts as read simply established that the firearms were found in his house.
>
> There were no facts read that police officers conducted further investigations to establish whether there had been use of the said firearms to commit any felony or whether the appellant had attempted to use them to commit any offence. The only thing they had on him was possession.
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> ...
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> In any event, the description part of Section 34(1) does not speak of possession but of USE and these are 2 different things."

15. It was not enough for the trial magistrate to only consider that a search was conducted and the pistol like gadget recovered, she was also required to consider whether the prosecution proved that the appellant committed the offence to the required standard. I therefore find that the prosecution failed to prove the offence under section 34(1) of the *Firearms Act* to the required standard.

16. I now turn to consider whether the prosecution proved the offence in the second count. The appellant was charged with the offence of being in possession of government stores contrary to section 324 as read with section 36 of the *Penal Code*. The relevant sections provide as follows:

> 36. General punishment for misdemeanours
> When in this Code no punishment is specially provided for any misdemeanour, it shall be punishable with imprisonment for a term not exceeding two years or with a fine, or with both.
>
> 324 (3) Any person conveying or having in his possession, or keeping in any building or place, whether open or enclosed, any stores being the property of the disciplined forces, which may reasonably be suspected of having been stolen or unlawfully obtained, and who does not give an account to the satisfaction of the court of how he came by the same, shall be guilty of a misdemeanour.

17. Pw1 testified that he prepared the inventory of the items collected from the appellant's house. Pw3 produced the following items collected from the appellant's house: 2 jungle hats marked as Pexh 2 (a) and 2 (b); a jungle shirt Pexh 3; a jungle trouser Pexh4; black beret Pexh 5 and V-Cap Pexh6. Although the appellant has argued in his submissions that the case against him was not proved to the required standard as no witness from Kenya Defence Forces was availed to confirm to the court that the Pexh2-Pexh4 were stores from Kenya Defence Forces. In my view, Pw1, Pw2 and Pw3 being members of the disciplined forces gave clear testimony that Pexh2-Pexh4 were stores from Kenya Defence Forces. In any event, the witnesses were members of the Kenya Police and Pw1 testified that Pexh5 and Pexh6 were stores belonging to the National Police Service and Prison Service. The appellant therefore had unlawfully obtained stores which were property of the disciplined forces. I have weighed the prosecution evidence which revealed that the stores were found in the appellant's house against the appellant's defence that he had a land dispute with his neighbour and I find that the appellant's defence did not displace the prosecution evidence against him. In the end, I find that the prosecution proved the second count against the appellant.

18. However, I note that the appellant was sentenced to 10 years imprisonment despite the offence being a misdemeanour. The 10-year sentence in my view was excessive.

19. Consequently, the appeal against conviction and sentence on that first count is allowed, the conviction is hereby quashed and sentence set aside. The appeal against the conviction and sentence on the second count is partly successful, while I confirm the conviction, I hereby allow the appeal on sentence and substitute the sentence of 10 years with that of 2 years to run from 13/12/2019.

DATED, SIGNED AND DELIVERED AT BUNGOMA VIA MICROSOFT TEAM THIS 26TH DAY OF JULY 2023

R.E. OUGO

JUDGE

In the presence of:

Vitalis Simiyu Juma- Appellant- Present online

Miss Omondi -For the Respondent

Wilkister/ Okwaro-C/A