



REPUBLIC OF KENYA

AT THE HIGH COURT OF KENYA

AT MARSABIT

CRIMINAL APPEAL NO.E002 OF 2021

IBRAE UMORO ADANO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. Collins Ombija,

Resident Magistrate, in Marsabit SRM 'S Court Criminal Case No,13 of 2020

delivered on 25/2/2021)

JUDGMENT

1. The appellant was convicted of two counts of being in possession of a firearm without a certificate contrary to section 4(2)(a) as read with section of Firearms Act Capi14 Laws of Kenya and being in possession of ammunition without firearms certificate contrary to the above said sections. The particulars of the offences were that on the 2nd January 2020 at Elbeso sub-location North Horr location in North Horr sub-County within Marsabit County was found in possession of a firearm namely carbine serial no. 2201262 and 5 rounds of ammunition 7.62 x 39mm special without a firearm certificate. The appellant was sentenced to 20 years imprisonment on both counts that were ordered to run concurrently. The appellant was aggrieved by the conviction and the sentence and filed this appeal.
2. The grounds of appeal are:
 1. That the learned trial magistrate erred in law and fact in finding that the firearm was found in possession of the appellant.
 2. That the learned trial magistrate erred in law and fact by not serving the appellant with statements of witnesses during the proceedings who due to the language failure did not request for the same and did not understand what transpired during the trial.
 3. That the learned trial magistrate erred both in law and fact in convicting the appellant while relying on weak evidence of the prosecution.
 4. That trial court erred in law and fact by failing to determine that the prosecution witnesses gave contradictory and conflicting testimonies.
 5. That the learned trial magistrate erred in law by convicting the accused person based on confession evidence which was not taken lawfully.
 6. That learned magistrate erred in law and fact by convicting the accused person based on the evidence of the arresting officer who was also the investigating officer. Thus no free and fair investigation was conducted occasioning the accused person fundamental injustice.
 7. That the trial magistrate failed to consider that there was fundamental breach of the constitutional right of the accused person as the witness statements issued to accused person was in English language, a language not understood by the accused person as he is illiterate thus occasioning fundamental injustice.
3. The appeal was disposed of by way of oral submissions by the learned counsel for the appellant, Mr. Behailu, and the learned prosecution counsel Mr. William Ochieng.

4. Mr. Behailu submitted that the prosecution had failed to prove the case against the appellant beyond reasonable doubt. That the firearm and the ammunition were not found in possession of the appellant. That the prosecution witnesses PW2, 3 and 4 stated that the exhibits were found in an open place which was not the residence of the appellant. That there was nothing to link the appellant with the exhibits. Therefore, that possession was not proved.
5. It was submitted that the appellant was not served with copies of witness statements in advance in a language that he understands so as to prepare for his defence which was a breach of article 50(2)(j) of the Constitution of Kenya 2010.
6. Counsel submitted that the trial court relied on purported confession to convict the appellant that the appellant admitted that the gun was his and that he asked for forgiveness. That the confession was not taken before an Inspector of police as required by the law. That the evidence was inadmissible.
7. Counsel submitted that the Investigating Officer PW4 was also the arresting officer. That it was unfair for the witness to act both roles.
8. The prosecution counsel conceded to the appeal. He submitted that the gun was not found in possession of the appellant and no nexus was shown between the appellant and the gun. That there was no evidence that the appellant is the same person who was given a lift by the police and that he is the same one who came to be found with the gun. That the trial court was wrong to have relied on the evidence of PW2 and PW4 that the appellant pleaded for forgiveness. That the evidence was not taken in accordance with Section 29 of the Evidence Act.
9. The case for the prosecution was that police officers were on patrol on the Elbeso highway after they received a report that a lorry had been attacked on the said highway. They found the appellant on the road and gave him a lift. They dropped him at a certain place. They suspected that the area is where the lorry had been attacked and started to search the area. They found some people seated under a tree. They approached the people.
10. It was the evidence of one of the policemen who was on the patrol PW2 that when they were approaching the people one person left the group and headed to a thicket while carrying an object. They followed him and he threw away the object and returned to the group under the tree. They searched the area where he had thrown an object and found a gun with 5 rounds of ammunition. The person who had headed to the group under a tree was taken to where they were. He was the appellant. He admitted that the gun was his. He was taken to the police station.
11. The other police officer who was in the group, PW4, testified that they found the accused under a tree with some children. That he saw him throwing away something. They searched the area and found a gun about 200 meters from where the appellant was. That he led the appellant to where the gun was recovered. He started to tremble and asked for forgiveness. The other 2 witnesses PW1 and 3 said that they were not there when the gun was recovered.
12. The appellant in his defence stated that policemen found him on the road and gave him a lift home. They dropped him at his manyatta. The policemen proceeded ahead. After some time, they went back with a gun and alleged that it was his. He denied it. He was arrested.
13. The trial court in convicting the appellant of the offences remarked that after the arrest he pleaded for forgiveness from the police officers.
14. This being a first appeal, this court is enjoined to analyze and re-evaluate afresh all the evidence adduced before the lower court and draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See *Okeno v Republic* [1972] EA 32 where the Court of Appeal set out the duties of a first appellate court 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 the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. 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's finding and conclusion; 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. "
15. The appellant was charged with being in possession of firearm and ammunition without a licence. Section 4 of the Penal Code defines "possession" in the following terms:

"be in possession of" or "have in possession" includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person."
16. The Black's Law Dictionary defines possession as follows:

"The detention and control, or manual or ideal custody, of anything which may be the subject of property, for ones use and enjoyment, either as owner or as the proprietor of a qualified right in it, and either held personally or by another who exercises it in one's place and name. That condition of facts under which one can exercise his power over a corporeal thing at his pleasure to the exclusion of all other persons. "
17. The police officer PW2 did not explain the distance the person was from them when he saw him heading to the bush with an object. He did not explain how he identified the person as the appellant. He did not explain how he identified him after the arrest.

18. On the other hand, the other police officer PW4 never mentioned that the person they saw under a tree headed towards the bush. He only said that the person threw something away. He said that the gun was recovered 200m away from where the appellant was under a tree. He did not explain how the appellant would have thrown a gun a distance of 200m away from where he was.

19. It is clear that the evidence of the two police officers left a lot to be desired. The appellant was not identified as the person who was seen moving away from where there were people under a tree.

20. It was admitted that the policemen gave the appellant a lift up to his manyatta. If then the appellant knew that the policemen were around, is it possible that he would have remained carrying a gun only for him to throw it away when policemen approached him? I do not believe so.

21. The trial magistrate stated in his judgment that the appellant had admitted to the arresting officers that he was found with the gun. This is evidence that amounted to a confession. Section 25 of the Evidence act defines confession as follows:

"A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.

22. Section 29 of the same Act provides that:

"No confession made to a police officer shall be proved against a person accused of any offence unless such police officer is—

(a) of or above the rank of, or a rank equivalent to, Inspector; or

(b) an administrative officer holding first or second class magisterial powers and acting in the capacity of a police officer.

23. PW2 and PW4 were not police officers of the rank of Inspector. Their evidence that the appellant admitted to the possession of the gun was inadmissible. The confession was not taken in accordance with the law. The trial court cannot have relied on such evidence to convict the appellant.

24. On my own examination of the evidence, there was no evidence to prove that the appellant was found in possession of the gun and ammunition. The gun was found far from where the appellant was. There was no evidence to connect him with the gun or to show that he had the control of the gun. The contradictions in the evidence of the policemen who testified in the case can only lead to the conclusion that the evidence was fabricated against the appellant. The trial magistrate wrongly convicted the appellant of the offence. The prosecution rightly conceded to the appeal.

25. The upshot is that the appeal is merited. I thereby quash the conviction, set aside the sentence imposed by the trial court and set the appellant at liberty forthwith unless lawfully held.

DELIVERED VIRTUALLY, DATED AND SIGNED AT MOMBASA, THIS 7TH DAY OF APRIL, 2022.

J. N. NJAGI

JUDGE IN THE PRESENCE OF:

Mr. Magero for Respondent

N/A for appellant

Appellant: Present at Marsabit Law Courts

Court Assistant: Kashane

14 days R/A.