



**Kaibiru v Republic (Criminal Appeal E007 of 2020)
[2022] KEHC 11548 (KLR) (27 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 11548 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CRIMINAL APPEAL E007 OF 2020**

LW GITARI, J

JULY 27, 2022

BETWEEN

DAVID MUTHENGI KAIBIRU APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. This is an appeal against the judgment delivered in Marimanti Senior Resident Magistrate’s Court Criminal Case No. 501 of 2019.
2. The appellant was charged in the lower together with two other co-accused persons with two counts namely:
 - a. Being in possession of a firearm contrary to Section 4(1)(2)(a) as read with Section 4(3)(a) of the *Firearms Act* (Cap 114 of the Laws of Kenya).
 - b. Being in possession of ammunitions contrary to Section 4(1)(2)(a) as read with Section 4(3)(a) of the *Firearms Act* (Cap 114 of the Laws of Kenya).
3. The particulars of the offence were that on 22nd April 2019 at Gaceuni village in Kathangachini location within Tharaka North Sub-County in Tharaka Nithi County, the Appellant jointly with his two co-accused were found in possession of firearm make AK 47 serial number not visible without firearm certificate from firearm licensing officer.

As for the particulars on the 2nd count the appellant was alleged to have been unlawfully found in possession of Seven (7) rounds of 7.62 mm ammunition without certificate from firearm licensing officer.

4. The appellant pleaded not guilty, and the matter proceeded to trial. The prosecution called 4 witnesses to testify in support of the case against the Appellant.



5. At the close of the prosecution case the Appellant was found to have a case to answer and was placed on his defence. He gave a sworn defence in which he totally denied having possession of the gun or ammunition as alleged.
6. After full trial, the trial court acquitted the Appellant's co-accused under Section 215 of the Criminal Procedure Code. The Appellant, on the other hand, was found guilty as charged, convicted and sentenced to 10 years' imprisonment for the first count and 5 years' imprisonment for the second count. Being dissatisfied with the said conviction and sentence, the Appellant preferred the instant appeal.

The Appeal

7. The Appellant raised the 5 grounds of appeal which I reproduce verbatim hereunder:
 - a. That the lower trial court magistrate erred in matters of law and fact by convicting the appellant hereby yet there was an issue of grudge between the appellant and pw3 who had a dispute over a woman.
 - b. That the lower court trial magistrate failed to make a specific (sic) in relation to the burden of proof more specifically the trial court failed to address the following:
 - i. The prosecution failed to give an explanation why the investigation officer did not take the photos at the scene of exhibits MFI-1,2, and 3 recoveries.
 - ii. The prosecution failed to have the fingerprints of the accused taken for dusting to verify if the accused had gotten in contact with the said exhibits.
 - c. That the trial magistrate erred in matters of law and fact by failing to find that the evidence adduced by the prosecution was insufficient to justify the conviction of the appellant for the offence of possession of firearms without firearms certificate as charged.
 - d. That the appellant's fundamental right to equal justice guide equal before the law as enshrined under Article 27(1) of *the Constitution* was violated this defying the accused his right of fair trial.
 - e. That the learned trial magistrate erred in matters of law and fact by dismissing the appellant's defence without giving cogent reason.

The brief facts of the case are that the three arresting officers, constable Isaac Kirera Kithio, (PW2) Constable Wycliff Tarus PW3 and Corporal Kabira Rukaria (PW1) who were stationed at Gachueni AP's Camp while acting on a tip off from an informer that the appellant had in his possession a gun, proceeded to Gachueni market to try and arrest him. As fate would have it they bumped on the appellant along a road while he was in company of two other people. The appellant was arrested together with his two accomplices. The appellant was escorted to the police post and while there he agreed to show the officers where he had hidden the gun. The appellant led the police officers to a farm where he had hidden the firearm. The gun was buried in the soil and the officer dug out the soil and recovered the firearm which was concealed in a motor vehicle tyre tube.

The gun was an AK 47 S/No.84MH05141 and seven rounds of ammunition of 7.62 x 3 mm which were produced in court as exhibit 1&2. A piece of motor vehicle tyre tube was also recovered and produced in court as exhibit -3. The appellant was then handed over to the police at Gatunga Police Station together with the exhibits. The firearm and the ammunitions was then forwarded to the Ballistic Examiner at CID headquarters for examination. A report



by the Ballistic Examiner confirmed the recovered gun was a firearm and ammunitions as defined under the *Firearms Act* (Cap 114) Laws of Kenya. The appellant was then charged. The appellant gave his defence on oath that he was arrested with his co-accused and did not see the gun. He saw the gun at OB at Makutano Police Station. He told the court that he was beaten and due to pain he said he is from Isiolo. He alleged that he had a personal difference with PW3 over a woman. The trial magistrate found that the defence of the appellant was not credible and dismissed it then convicted the appellant.

8. The appeal was canvassed by way of written submissions.

Appellant's submissions

The above grounds were merged and argued together

9. The Appellant challenged the authenticity of the alleged recovered gun which was produced as P.Exhibit 1. He further questioned the failure of the investigating officer to dust the gun for fingerprints and to take photos at the scene where the gun was recovered. He disputes what he calls the prosecution's theory purporting that the was in possession of the said weapon.
10. The Appellant further alleged that the vital witnesses were not called in the matter. It was his contention that he was framed of the charges because of a vendetta that existed between him and PW3 over a woman.
11. The Appellant thus submitted that the investigation in the matter was not done to the required standard to sustain a conviction. He prayed that the appeal be allowed, conviction quashed, sentences set aside, and he be set at liberty.

Respondent's Submissions

12. On its part, the Respondent maintained that the testimonies of the prosecution's witnesses were consistent and pointed to the fact that the Appellant was found with a firearm without a permit or any other lawful justification from a licensing officer.
13. On the issue of availing vital witnesses, the Respondent submitted that it availed all the necessary witnesses in proof of the charge that the Appellant was facing.
14. It was the Respondent's further submission that the failure to produce photographs of the scene was not fatal so as to quash the Appellant's conviction.
15. On the failure of having the Appellant's fingerprints taken to verify that he had gotten in contact with the subject firearm, the Respondent submitted that the same was not necessary as it was sufficient for the prosecution to establish that the Appellant knowingly had the subject firearm stored in a place for his benefit.
16. The Respondent finally submitted that the trial magistrate was correct in dismissing the Appellant's defence and convicting him on the charges preferred.

Issues for determination

17. The Appellant is only challenging his conviction. It follows that the main issues for determination by this court is whether the prosecution proved its case against the Appellant to the required standard of beyond any reasonable doubt.



Analysis

18. The duty of this court as the first appellate court is to subject the evidence to a fresh and exhaustive examination, draw its own findings and arrive at its own conclusion while bearing in mind the fact that the trial court had the advantage of hearing and seeing the witnesses and leave room for that. [See: *Okeno v Republic* (1972) E A, 32.]
19. Guided by the above authority, I shall now proceed to analyze the issues raised in this appeal under the following heads.

Whether the Prosecution Proved its case to the required Standard

20. Grounds no. 1-3 of the appeal are addressed under this head
21. Section 4(1) of the *Firearms Act*, Cap 114 of the Laws of Kenya (hereinafter the “Act”) provides that:

“(1) Subject to this Act, no person shall purchase, acquire or have in his possession any firearm or ammunition unless he holds a firearm certificate in force at the time.”

22. Further, Section 4(2)(a) of the Act provides that:

“(2) If any person— (a) purchases, acquires or has in his possession any firearm or ammunition without holding a firearm certificate in force at the time, or otherwise than as authorized by a certificate, or, in the case of ammunition, in quantities in excess of those so authorized; or (b) fails to comply with any condition subject to which a firearm certificate is held by him, he shall, subject to this Act, be guilty of an offence.”

The law is settled that the first appellate court is not supposed to confirm the findings of the trial court. It is enjoined to analyse the evidence, evaluate it and come up with its own independent finding. Indeed the appellant has a legitimate expectation that the evidence will be subjected to evaluation by the Judge and an independent decision made. The appellate court is therefore duly bound to do a thorough analysis and evaluation of the evidence that was before the trial court.

23. In this case, PW1 was Corpl Stephen Kabira Ntorukaria. He testified that on 21st April 2019, he received a tip from an informer that the Appellant had a gun with him. The following day, PW1 was informed that the Appellant had been spotted in some places. He formed a squad with P.C. Tarus (PW3) and PC Kireru (PW2) and proceeded to Gaceani market. They caught up with the Appellant on the road in the company of his co-accused. The three were then arrested and taken for interrogations. PW1 stated that he is a corporal and therefore an officer who under the law is not authorized to receive a confession from an arrested person.
24. According to PW1, the Appellant agreed to show the police where he had kept the suspect gun. The police proceeded to the scene where they found the gun hidden under the soil in the Appellant’s homestead. The gun was an AK47 (P.Exhibit 1) with seven ammunition (P.Exhibit 2 (a)-(g)). The gun had been concealed in a motor vehicle tire tube (P.Exhibit 3).
25. The second witness PW2- was a police constable Isaak Kirero who testified that they were told by an informer that the appellant had a gun. The following day they arrested the appellant. He promised to



show where he had hidden the gun. PW1 & PC Tarus left with the appellant. He was left with the other two suspects. PW1 returned with the exhibits in this case. PW3 was P.C. this I believe stands for police constable Wycliffe Tarus. He testified that the informer went to the camp and reported that the appellant was having a gun. The appellant was arrested and upon interrogation he admitted the offence. He directed them to the scene where they recovered the gun and the ammunitions. The witness denied that he had a grudge with the appellant over a woman.

26. The material evidence in support of the charge was adduced by PW1, 2 & 3. From this testimony, the issue which arises is whether the testimony of PW1, 2 and 3 is admissible. As can be discerned from the evidence, PW1, 2 and 3 they relied on confessions by the appellant. The *Evidence Act* defines a confession. Section 25 A of the *Evidence Act* provides:

- “ 1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Inspector of Police, and a third party of the person’s choice.
- (2) The Attorney General shall in consultation with the Law Society of Kenya, Kenya National Commission on Human Rights and other suitable bodies make rules governing the making of a confession in all instances where the confession is not made in court.”

The provision states that confessions are generally inadmissible unless they are made strictly under the law. *The Constitution* on the other hand guarantees the rights of an arrested person. I need to look at some of the rights as they touch on the issue at hand. Article 49 of *the Constitution* provides for the rights of an arrested person. The rights are as follows:

“ An arrested person has the right— (a) to be informed promptly, in language that the person understands, of— (i) the reason for the arrest; (ii) the right to remain silent; and (iii) the consequences of not remaining silent.

- b) to remain silent;
- (c) to communicate with an advocate, and other persons whose assistance is necessary;
- (d) not to be compelled to make any confession or admission that could be used in evidence against the person;
- (e) to be held separately from persons who are serving a sentence;
- (f) to be brought before a court as soon as reasonably possible, but not later than —
 - (i) twenty-four hours after being arrested; or
 - (ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;
- (g) at the first court appearance, to be charged or informed of the reason for the detention continuing, or to be released; and



(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”

27. The arrested person as can be seen from the provisions of Article 49 enjoys the right to be informed promptly in the language that the person understands, the reason for his arrest, the right to remain silent and the consequences of not remaining silent, to communicate with an advocate and other persons whose assistance is necessary and not to be compelled to make any confession or admission that could be used against him in evidence. These rights afforded to an accused person under *the constitution* are absolute and cannot be violated. Under Article 49 of *the Constitution* it is clear that evidence obtained in a manner that violates any right or fundamental freedom in the bill of rights shall be excluded if the admission of that evidence would render the trial unfair or would otherwise prejudice the accused. A violation of the right of an arrested person is a denial of the right which is detrimental to the accused person. Article 49 (1) of *the Constitution* guarantees an accused the right not to make a confession or an admission that could be used in evidence against him. The law as stipulated above gives the rights of an arrested person. The provision must be given the seriousness that it deserves which again guarantees the right of an arrested person the right to be presumed innocent until proved guilty. See Article 50(2) (a). The arrested person further has the right to refuse to give self –incriminatory evidence. See Article 50(2) (L).
28. In view of these provisions, where the state wishes to rely on admissions and confession, it must prove that they were made strictly as provided under the Law.
29. Under Section 25 A of the *Evidence Act* (supra) Rules were envisaged under Sub-section two (2). The Rules were formulated in 2009 as “*Evidence (out of Court) confession. Rule,2009.*” Rules 4 of these Rules has elaborately listed the rights of an accused person. It is important to list these rights here. The Rule provides :

“1Citation

These Rules may be cited as the Evidence (Out of Court Confessions) Rules,2009.2.InterpretationIn these Rules, except where the context otherwise requires– “Act” means the *Evidence Act* (Cap. 80); “electronic recording media” includes any removable or physical audio recording medium; and “recording officer” means a police officer (other than the investigating officer) who is not below the rank of Chief Inspector of Police. 3. Availability of Rules.These Rules shall be readily availed by the Attorney-General for reference by police officers, accused persons and members of the public and in particular, shall–

- (a) be displayed prominently at every police station and police unit;
- (b) upon request, be made available by a police officer, in a form of a copy,to an accused person .
- 4.Rights of accused person (1) Where an accused person intimates to the police tha the wishes to make a confession, the recording officer shall take charge of the accused person and shall ensure that the accused person–
- (a) has stated his preferred language of communication;
- (b) is provided with an interpreter free of charge where he does not speak either Kiswahili or English;



- (c) is not subjected to any form of coercion, duress, threat, torture or any other form of cruel, inhuman or degrading treatment or punishment;
 - (d) is informed of his right to have legal representation of his own choice;
 - (e) is not deprived of food, water or sleep;
 - (f) has his duration, including date and time of arrest and detention in police custody, established and recorded;
 - (g) has his medical complaint, if any, adequately addressed;
 - (h) is availed appropriate communication facilities; and
 - (i) communicates with the third party nominated by him under paragraph (3) prior to the caution to be recorded under rule 5. (2) The recording officer shall not record a confession from any accused person who complains to him of being a victim of torture or whose physical appearance shows signs of physical injuries including open wounds, body swelling, or shows extraordinary fatigue or any other indicators that would suggest that the accused person has been tortured. (3) The recording officer shall ask the accused person to nominate a third party who shall be present during the duration of the confession session, and upon the appearance of the third party, the recording officer shall record the third party's particulars and relationship to the accused person."
30. In addition under Rule – 5, the Rules provides for the caution to be administered on accused person. It provides:
- (1) The recording officer shall caution the accused person in the following terms and shall record his response: "Do you wish to say anything? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence." (2) While recording the confession, the recording officer shall ensure, and record compliance, that where the confession session is prolonged, the session included rest and relaxation periods. (3) The recording officer shall ensure that the confession is recorded at the same time it is made and shall record the date and time of commencement of the confession session and the place where the confession is recorded."
31. The rules emphasis that the confession or admission must be reduced in writing or be recorded in electronic recording media.
32. The rules constitute the law which must be strictly followed before an admission or a confession can be used against an accused person short of compliance with these rules any purported admission or confession amount to extra judicial confessions.

The Constitution guarantees the right of an accused person to fair trial. These rights are under Article 50 of *the Constitution*. Article 50(2) (a) states-

“Every accused person has the right –

- (a) To be presumed innocent until the contrary is proved.
- (b) The rights of an accused person to fair trial is one of the rights under *the Constitution* which cannot be limited. Article 25(c) provides:



Despite any other provision under this Constitution the following rights and fundamental freedoms shall not be limited-

(c) The right to a fair trial. “

33. I will now proceed to consider whether the rights of the accused to a fair trial were violated and therefore denied.

PW1, 2 and 3 in their testimony told the learned trial magistrate that the appellant confessed and led them to recover the firearm. The appellant in his defence told the trial magistrate that he was tortured by the police. The trial magistrate gave a deaf ear to this defence and yet even the co-accused testified that they were tortured by the policemen at the Police camp. All the three who were charged informed the court that they first saw the gun at Makutano Police Station. The trial magistrate acquitted the co-accused which is an indication that he believed them. It was clear before the trial magistrate that the appellant was tortured. The three key witnesses who were a corporal and two constables affirmed that the accused confessed. They had no capacity to receive the confession. The appellant was not charged and cautioned. I find that the rights of the accused to a fair trial were violated as he was forced to confess through torture. I find that the evidence adduced by PW1, 2 and 3 was extra judicial and could not be relied on in the absence of corroboration with material evidence. The admission was not reduced in writing nor was it electronically recorded as required under the law. The evidence of PW1, 2 and 3 shows that material corroboration would have been readily available as they alleged that the appellant had threatened to shoot somebody. The person was not called. Secondly as submitted by the appellant the police could have taken photographs at the scene or call independent witnesses. This was not done. The police should be wary of violating the rights of an accused person. The new Constitutional dispensation gives arrested person inalienable rights as well as the rights to fair trial. The *Evidence Act* also elaborately makes provision on how a confession is to be recorded and has provided Rules to guide the police. These laws are not made in vain and have to be followed to the letter to ensure that the arrested person's rights are enjoyed, not violated.

34. The Supreme Court while considering similar circumstances to the present case in *Republic v Ahamed A Muhammed & another* (2019) eKLR in a majority decision stated:

Confession:

“It can be surmised therefore, that a confession is a direct acknowledgment of guilt on the part of the accused while an admission is a statement by the accused, direct or implied of facts pertinent to the issue which in connection with other facts tends to prove his guilt but which of itself is insufficient to found a conviction.”

Paragraph 46 the Supreme Court of Kenya while considering a case where the prosecution claimed that upon being confronted with intelligence reports that the respondent had explosives which they had hidden somewhere and led the police to recover them and that the said act of leading police to recovery is testimony of the respondent's personal knowledge of the presence of explosive at the spot which is admissible under section 111(1) of the *Evidence Act*. The Supreme Court held:-

”In the above context it is our view that while confessions under section 25 A of the *Evidence Act* are often made to the police during investigations, as counsel for the respondents argued. Section 111(1) deals with the burden of proof and only comes into play in the trial when the prosecution has proved to the required standard of beyond reasonable doubt, that the accused person committed an offence and part of the prosecution case comprises of a situation only “within the knowledge of the accused person so that if he does not offer an explanation, he risks conviction.....”



Section 111(1) of the *Evidence Act* cannot be invoked at investigations stage but in the hearing of the defence case in the course of the trial when necessary.

The court stated that the evidence leading to recovery is admissible and stated as follows:-

“ We also agree that interviewing suspects is a standard operating procedure in criminal investigation. In such interviews, police are entitled to confront suspects with any report they may have received about the suspects commission or involvement in the commission of a crime and demand an explanation. In response a suspect may offer an explanation. If it happens the explanation the suspect gives is an admission of a material ideally the police are required to invoke the provisions of Section 25 A of the *Evidence Act*. If they do not, bearing in mind the distinction between an admission and a confession as stated above. Such admission is in admissible in evidence but unlike a confession it cannot on its own found a conviction. It will require corroboration to found a conviction. It would be absurd if admissions made in such circumstances were to be held admissible in evidence. It follows therefore that admissions though not meeting the outeria set under section 25 A (1) of the *Evidence Act* are admissible..... while as stated, a confession can of itself found a conviction when a court is confronted with an admission which does not amount to a confession under Section 25 A of the *Evidence Act*, it should not base a conviction solely on such admission instead it should look for clear and credible corroboration of such an admission.”

35. It follows that the evidence which the prosecution relied on though admissible was not sufficient to base a conviction. The prosecution did not adduce proof as to where the said firearm and ammunition were recovered. The law is trite that the burden is on the prosecution to prove the charge against an accused person beyond any reasonable doubts. This burden in criminal case never shifts. It rests in the prosecutions backyard. In *Halisbury Law of England 4 Edition Vol.17* it is stated, “the legal burden of proof is the burden of establishing the fact which will support a party’s case.”
36. This burden in my view is not discharged by the number of witnesses called to repeat one thing over and over again, it is the quality of that evidence and its ability to support party, to achieve the goal which goal in a prosecution case is to prove the charge beyond any reasonable doubt. The burden remains constant throughout the case. The evidence by the prosecution fell short of achieving this threshold. In this case where the prosecution solely relied on the information which they claim was volunteered by the appellant and led to recovery the information should not be expected to form a basis for finding a conviction. Instead the court should look for evidence to corroborate and which tends to demonstrate the truthfulness of such information and discovered evidence.
37. On the evidence presented there was material contradictions by the witnesses which raised doubts in their testimony. It is also clear that the defence of the appellant was not considered. The contradictions and the casual manner in which the witness stated that they recovered the exhibits and the confirmation by the two other co-accused that they only saw the gun at the police station OB Counter clearly shows that the defence was not far fetched and there was a possibility of settling some scores.

27. Article 50 (2) (g) (h) provides as follows:-

- (2) Every accused person has the right to a fair trial, which includes the right—
 - (g) to choose, and be represented by, an advocate, and to be informed of this right promptly;
 - (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.”
38. There is no doubt that the charges facing the appellant were serious. There is no evidence on record to show that the trial magistrate informed the appellant of his rights to legal representation. This again



falls back on Article 25 of *the Constitution*. The right of the appellant to fair trial was violated and therefore denied. Though a violation may not necessarily lead to an acquittal as the court may order a retrial, or compensation, the facts do not warrant a retrial in view of what I have stated above. Suffice to say that the right to fair trial was violated.

39. In view of what I have stated above, I need not consider other grounds pleaded by the appellant. I come to the conclusion that the evidence adduced by the prosecution was insufficient for the trial court to base a conviction. I therefore find that the appellant is +entitled to an acquittal.

39. I therefore allow the appeal, quash the conviction and set aside the sentence. The appellant be set at liberty unless he is otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 27TH DAY OF JULY 2022.

L.W. GITARI

JUDGE

27/7/2022

The judgment has ben read out in open court

L.W. GITARI

JUDGE

27/7/2022

