



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT GARISSA
CRIMINAL APPEAL NO. E009 OF 2020
ABDULLAHI SALAT ADAN.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

(Being an appeal from the Judgement of Wajir Principal Magistrate Hon. Amos Mokeross in Criminal Case No. 51 of 2019 made on 17th November 2020)

JUDGEMENT

1. At his trial in the Wajir Principal Magistrates Court the appellant was faced with II Counts as follows; -

Count I Being in possession of Firearm without a license contrary to Section 4A (1)(a) of the Firearms Act 2012("The Act").

The particulars of the offence are that on the 5th day of February 2019 at around 17.30 hrs at Kanjara Trading Center in Habasweni sub-county, within Wajir County, the Appellant was found in possession of a fire arm make RPD Machine Gun S/NO. PC458, without a license.

Count II Being in possession of Ammunition without a License contrary to Section 4(2) of the Act.

The particulars of the offence are that on the 5th day of February 2019 at around 17.30 hrs at Kanjara Trading Center in Habasweni sub-county, within Wajir County, the Appellant was found in possession of fourteen (14) live rounds of 7.62MM X 39 Ammunition without a license.

2. The Appellant denied both counts, the matter proceeded to trial where he was convicted of both counts and sentenced to 5 years on each count. The sentences were to run concurrently.

3. Being aggrieved by the aforesaid decision the appellant preferred an Appeal to this court raising seven grounds of appeal as follows; -

- i. That the trial court erred in law by convicting the Appellant on contradictory evidence.**
- ii. That the learned magistrate erred in law and facts by convicting the Appellant in the absence of a *prima facie* case.**
- iii. That the trial Magistrate erred in law by convicting the Appellant notwithstanding the burden of proof had not been discharged.**
- iv. That the trial Magistrate misdirected himself on the law by taking into account extraneous factors.**
- v. That the learned trial magistrate erred in law by failing to uphold the Appellant *alibi*.**
- vi. That the learned magistrate failed to take into account the Appellant's mitigation before sentence.**
- vii. That the learned magistrate erred in law by imposing on the appellant a sentence that was unduly harsh and excessive in the circumstances.**

4. The Appeal was canvassed by way of written submissions summarized as follows; -

Appellant's Submissions

The appellant's Counsel submitted that five issues emerge for consideration;

- a. Whether the standard of proof beyond all reasonable doubt was established
- b. Whether the Court properly addressed the alibi defence
- c. Whether the Court misdirected itself by apply extraneous matters
- d. Whether a prima facie case was established
- e. Whether the Court took into account the mitigation before sentencing.

5. Firstly, he submitted that there were material contradictions in the testimonies of PW1 and PW2 as to who of the two recovered the firearm; further that the prosecution based their case on constructive possession but did not prove the same beyond reasonable doubt. That the trial magistrate only considered the fact of arrest but did not consider the substance of the testimonies in support of the allegation that the firearm, ammunition and ammunition belt were recovered from the appellant. In this regard Counsel cited the case of **Peter Kinyua Ireri v Republic [2016] eKLR, Buya Salim Bajila v Republic [2013] eKLR & Salim Chagawa Karisa v Republic [2016] eKLR.**

6. Secondly, the counsel submitted that the trial Magistrate gave undue regard to extraneous matters giving weight to the fact that there was non-existence of a grudge between the police officers and the appellant to allow the framing of the appellant.

7. It was contended further that the trial court erred by holding that the alibi was introduced late in the trial and disregarded the same stating that the same ought to have been raised at the earliest opportunity. Counsel cited **Kiarie v Republic (1984) KLR 739, R V Sukha Singh & Others (1939) 6 EACA, Victor Mwendwa Mulinge v Republic [2014] eKLR, Athuman Salim Athuman v Republic [2016] eKLR & Simon Njoroge Waithira v Republic [2020] eKLR.**

8. Counsel on the said point submitted that the prosecution had the opportunity to cross-examine the four defence witnesses but failed to challenge the appellant's alibi evidence and the trial court's failure to consider the Appellant's defence on grounds that it was not disclosed beforehand vitiates his right to fair trial as the accused person has no obligation to disclose his defence beforehand as opined in Thomas **Patrick Gilbert Cholmondely v Republic [2008] eKLR** and the provisions of **Article 50 (2) k of the Constitution, Section 212, 309 of the Criminal Procedure Code .**

9. Counsel equally submitted that for the conviction under **Section 4 A(1)(a) of the Firearms Act** to be sustained it was necessary to establish that the firearm was a firearm within the meaning of **Section 4A (2)**, however the prosecution failed to lead evidence that the same was a firearm specified in the aforesaid section or provided a gazette notice as contemplated by **Section 4A(2)(d)**. He invoked **Sections 107 of the Evidence Act** and as elaborated in the cases of **Senator Johnstone Muthama v Director of Public Prosecution & 2 Others; Japheth Muriira Muroko (Interested Party) [2020] eKLR, Republic v Rafiki Chibunja Karisa & 2 Others [2020] eKLR**

10. As for sentencing the appellant's counsel urged the court to consider that even if the appellant is found guilty, he was not engaged in a violent enterprise at the time of his arrest nor did he attempt to use the item against law enforcement. Reliance was placed on the case of **Jane Muthoni Thiaka v Republic [2016] eKLR.**

Respondents Submissions

11. The Respondent on its part submitted that there was concurrent evidence by **PW1 & PW2** that on reaching Kanjara where two groups were fighting, they spotted the Appellant carrying a gun amongst the crowd and when the Appellant saw the police he started running, when they shouted at him to stop, they gave chase without losing sight till the Appellant dropped the gun, he continued to ran and they gave chase and managed to arrest him. Further contradiction as to who picked the gun was not material as to discount the fact that the Appellant was in possession of the gun as they both alluded to the fact that the Appellant was in possession of the gun.

12. **PW1 & PW2** recovered the firearm, fourteen rounds of ammunition and a belt. The firearm examiner, **PW5** confirmed that what was recovered was a firearm with 14 rounds of ammunitions after examining and testing the same and therefore the evidence on record is clear that the Appellant was in possession of the gun and ammunitions and was arrested 50 meters away after dropping the gun. Thus, the burden of proof was discharged.

13. As to whether the trial magistrate considered extraneous matters, the respondent submitted that going through the proceedings and most importantly the judgement it is evident that the Trial Magistrate relied on both the prosecution evidence and detailed the defence to make the judgement.

14. Further, on page 4 paragraph 32 through to page 5 paragraph 36 of the judgement the trial magistrate addressed himself on the alibi raised by the Appellant and did not ignore the same.

15. As to the sentence it was submitted that counsel mitigated on behalf of the appellant. The trial court considered the mitigation against the gravity of the offence for which the appellant was charged.

The offence carries a maximum sentence of seven (7) years. The trial magistrate considering all factors, including mitigation exercised

discretion sentencing the appellant to five years imprisonment on each count.

Analysis and Determination

16. As this is a first appeal, the Court is required to examine the evidence afresh, analyze and evaluate the same and come to an independent conclusion bearing in mind that this court neither saw nor heard the witnesses testify [see **Okeno v Republic [1972] EA 32**].

17. PW1 PC Samuel Kingori Mwangi a police officer attached to Habaswein Police Station testified that on 5/2/2019 at around 15:30 hrs he was informed by the Officer Commanding station that there was conflict at Kanjara Location. They were briefed at the station that there was fight over a borehole. Together with other officers they proceeded to the area and found members of people rioting. When they saw the police, they started running in different directions. The officers saw a man holding a gun running towards the bush. The person was 300 meters from where he was. He had a gun in his hand and was running towards the bush. He had a *kikoi* and a striped shirt. The stripes were blackish.

The witness testified that he spotted the person first, alerted his colleagues, The asked him to stop but he continued running. When the person saw that they were almost catching up with him, dropped the gun. After another 50metres he fell and they caught up with him and restrained him. PC Wanjala recovered the gun which was a RDP machine gun and with 14 rounds of ammunition 7.62 mm. The bullets were in a belt. The gun was not loaded. After arresting the person they took him to Habaswein police station. The gun was forwarded to a ballistic expert for examination.

18. PW2 PC Paul Wanjala Muicha attached to Habaswein Police Station restated the testimony of PW1. He told the court that the appellant dropped the gun when he was 10 meters away from him. He testified that he was faster than PW1 and he asked **PW1** to pick the gun. The gun recovered was a RPD machine gun with a belt containing 14 bullets. He confirmed that the appellant was bleeding at the time of his arrest.

19. PW3 CPC Johnstone Momanyi also attached to Habaswein Police Station corroborated the testimonies of PW1 and PW2. He testified that PW1 and PW2 followed the man with the gun. That he was about 250 meters away and he only saw the gun when the same was brought to him. The gun was a R.D.P machine gun with 14 rounds of ammunition. The rounds of ammunition were in a belt. He identified the rifle in court. He further testified that he is the one who took the appellant to the police station and booked him. He identified the person in court and further confirmed that at the time of his arrest he was hurt and would later on be taken to hospital.

20. PW4 Chief Inspector James Onyango a firearms examiner with seven years' experience trained in Moscow Russia in forensic technology, in South Africa and Madison Police Academy, USA on firearm examination, testified that he is familiar to the handwriting of Rueben Bett who conducted the examination and filed a report having worked with him for seven years. It was his testimony that on 11/2/2019 the following exhibits were received from Sergeant Moses Mwangi. Machine gun SNO. 0 0HB and P458 marked exhibit A. one ammunition belt marked exhibit B, 14 ROUNDS OF ammunition marked B1-14 and one belt marked as Exhibit C.

Further, on examination it was found that the RDP machine is designed to chamber rounds of ammunition in caliber 7.62 x 39 mm, the gun is made in Russia and is complete in all its component parts and serviceable. It was test fired using 3 rounds of ammunition picked randomly from B1-B14. The test cartridge cases were recovered and marked TC1-TC3 and preserved for comparison purposes. That from this examination they formed the opinion that Exhibit A B1-B14 are firearm and ammunition respectively as defined under the Firearms Act, Chapter 411 Laws of Kenya.

21. PW5 PC Henry Gicheru attached to DCIO Habaswein, the investigating officer informed the court that he took over the file from Mr. Mwangi. He testified that at the time he took over the matter witness statements had already been recorded and the firearm taken for ballistic examination. He confirmed receiving exhibits and presented the same as follows; **Rapid Machine Gun Pexh. 1 ammunitions Pexh 2, an ammunition belt Pexh 3 tested cartridges Pexh 4 a.b.c.**

22. At the close of the prosecution case the court found the Appellant had a case to answer and the appellant was placed on his Defence.

23. DW1, the appellant herein testified that on the material day there was a fight over water in the locality. Initially the fight was between two people and the police tried to arrest one of them, but women present resisted. The police then called for reinforcement and at which point they started beating people. At the time he was building his house and was outside the said house when the police came there and arrested him, though he was not part of the crowd. He testified that at the point he was in with Omar Abikar, who ran to the house but the said Omar was not arrested. He denied being chased by the police or having a gun. After the arrest he was bungled into the police vehicle together with 13 women were also arrested. The police did not arrest any other man.

24. DW2 Nuria Omari Abdi testified that she was at home on the material day and had seen the appellant building his house. She also saw the appellant being arrested; the Appellant had no gun while being arrested. She was also arrested and taken to Habaswein Police station together with the other women. She did not witness any fight.

25. DW3 Omar Abikar Ali confirmed being with the appellant on the material day as they were building the appellants house when the Appellant was arrested outside the same. He had been informed by a small child of the presence of the police as a result he locked himself in the house. At the time of his arrest the Appellant did not have a gun.

In cross he stated that they did not participate in the riot. He did not see the appellant running from the police.

26. DW4 Adan Mohammed Mohamud testified that the police came to the scene at between 1:00 & 1:30 p.m. The police arrested one person who was injured when women and children started to protested and they police called for reinforcement that came at around 4:00 p.m. when the Appellant was arrested the appellant at around 5:00 p.m. He did not see the police chasing the Appellant neither was the appellant

armed at the time. The appellant's house is in between his and that of DW2.

27. The onus of proving a criminal case squarely and always rests on the prosecution so much so that in the instant case the prosecution had the onus of bringing forth evidence that the Appellant was in possession of the gun and ammunition and that indeed the items allegedly found on him do meet the definition of the said items in the Act.

The well-established doctrine of proving criminal cases **beyond all reasonable doubt** which forms part of the our Criminal Justice system can be traced back to the case of **Woolmington vs D.P.P (1935) UKHL** where Lord Denning stated

“It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadows of doubt. The law would fail to protect the community if it admitted forceful possibilities to deflect the course of justice. If the evidence is so forceful against a man to leave only a remote possibility in his favour which can be dismissed with the sentence, of course it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice.”

28. Similarly, it was held in **Stephen Nguli Mulili v Republic** [2014] eKLR:

“[I]t is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of DPP V WOOLMINGTON, (1935) UKHL 1 where the court eloquently stated that the “golden thread” in the “web of English common law” is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See FESTUS MUKATI MURWA V R, [2013] eKLR.”

29. In arriving at its decision, the court has also considered crucial sections of the Act; -

Section 4(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”. (Emphasis added).

Section 2 states “Possession” to mean;

“(a) 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 of benefit of oneself or of any other person and the expressions “be in possession” or “have in possession” shall be construed accordingly; and

“ammunition” to mean

“means any cartridge, whether a blank, tracer, explosive, incendiary, gas-diffusing, signalling or any other cartridge of any other kind capable of being discharged from or used with a firearm and includes—

(a) any grenade, bomb or other missile whether explosive or not and whether or not capable of or intended for use with a firearm;

(b) any mine whether for use on land or at sea, depth-charge or other explosive charge;

(c) any other container or thing designed or adapted for use in or as weapon for the discharge of any noxious liquid, gas or other substance;

(d) any projectile, powder or other charge, primer, fuse or bursting charge forming part of any cartridge or any component part thereof; and

(e) any ammunition or pellets for use in an airgun, air rifle or air pistol;

“firearm” means

“a lethal barreled weapon of any description from which any shot, bullet or other missile can be discharged or which can be adapted for the discharge of any shot, bullet or other missile and includes—

(a) a weapon of any description designed or intended to discharge—

(i) any noxious liquid, noxious gas or other noxious substance; or

(ii) an electrical charge which when it strikes any person or animal is of sufficient strength to stun and temporarily disable the person or animal struck (such weapon being commonly known as a “stun gun” or “electronic paralysar”);

30. The Appellant and his witnesses all denied that the Appellant had a gun & ammunitions at the point of his arrest. The evidence of **PW1** and **PW2** was that they spotted the Appellant among the crowd and he was holding a gun. They chased the appellant who was running towards a bush and when the appellant saw that they were not far from catching up with him he dropped the gun and continued running, he fell and they caught up with him and arrested him and took him to the police station. It was also their testimony that they never lost sight of the Appellant as they saw and chased him. Both were able to identify that at the time he wore a stripped black shirt and a Kikoi. The Appellant raised an Alibi, that he was at his house building, was never part of the crowd, was not chased as alleged by **PW1** & **PW2** as they arrested him right outside his house. Though the Alibi was raised at the defence level the court has to weigh the prosecution's witness testimonies as against the evidence of the appellant & his witnesses in other words did the evidence of alibi by the defence dislodge that of the prosecution case? The alibi cannot be ignored.

31. In **Athuman Salim Athuman v Republic [2016] eKLR** the Court of appeal held as follows;

“Although the appellant in this case put forth his alibi defence rather late in the trial, we cannot agree with counsel for the respondent that the alibi defence must be ignored. That defence must still be considered against the evidence adduced by the prosecution. Indeed, in *GANZI & 2 OTHERS V. REPUBLIC [2005] 1 KLR 52*, this Court stated that where the defence of alibi is raised for the first time in the appellant's defence and not when he pleaded to the charge, the correct approach is for the trial court to weigh the defence of alibi against the prosecution evidence....”

32. PW1 stated; -

“...I proceeded to Kanjara location and we found members of the public rioting. When they saw us they started dispersing we saw one person carrying a gun running into the bush and we followed him. He fell severally. When he saw us he dropped the gun and about 50 meters from where he dropped the gun we managed to arrest him.

in cross- examination stated as follows;

“The accused came out from a house near the road. He was beside a house and I am sure he came out of the house. The door of the house faced the road. The incident occurred between 4:00 p.m. to 5 p.m. hence the same was visible.”

PW2 on his part stated

“..... we found members of public rioting. The Officers with me were OCS David Tanui, Sgt Mwangi, CPL Baraza, PC Domic, and PC Kingori. When they saw us they started running in different directions. We saw one man carrying a gun and he ran towards the bush. We decided to follow him. We continued to follow him and he fell down and got injured we arrested him; we recovered the gun a RPD machine gun with 14 rounds of 7.62 special.”

33. In the alibi evidence the defence witnesses all allege they were not at the scene of the riot, did not witness the Appellant running towards the bush and were inside their houses. Was it possible for them to have concretely testified as to how the Appellant was arrested and the circumstances surrounding the arrest? Could the Appellant have been building when there was chaos near his house oblivious of the situation?

DW2 stated in evidence

“... I was at home. I came out of the house and I saw the accused building his house. I saw the police arrest him. He did not have anything when he was arrested. The police saw me then came and arrested me.....The police only arrested one man”

In cross examination she said

“... I was arrested at my home.....”

We were not arrested together.....”

DW3 on his part stated; -

“... At the time I was building the house with the accused. I was inside the house. A small child came and told me the police were coming and I locked myself in the house....”

34. The trial Magistrate in paragraph 28 of his judgement indicated that he was impressed by the evidence of **PW1** & **PW2**, further he found them to be straight forward and objective witnesses. He equally found their evidence to be collaborative and consistent.

35. This court agrees with the findings of the trial court to the extent that the evidence of **PW1** & **PW2** in as far as seeing, chasing, and arresting the Appellant is cogent and consistent and from the record the witnesses appear to be truthful.

36. However, as was submitted on behalf of the Appellant, there was inconsistency in the testimonies of **PW1** & **PW2** as to who of the two

picked the gun that was dropped by the Appellant. The question to ask is if the same are so grave as to affect the substance of the prosecution evidence. The Court of Appeal in **Erick Onyango Odeng' v. Republic [2014]eKLR** cited with approval the Uganda Court of Appeal case of **Twehangane Alfred v. Uganda Criminal Appeal No. 139 of 2001, [2003] UGCA, 6** wherein it was held; -

“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case.”

37. This court finds that the contradiction as to who of the two between **PW1 & PW2** picked the gun is not so material as to go to the root of the prosecution case. The officers worked together in the mission. The end result is that they arrested the Appellant and recovered the gun & ammunitions.

38. Coupled with the above the court like the trial court sees no reason why the police out of a big crowd would pick on this one person; the Appellant who they had no issue with and charge him with such a serious offence.

39. The court believes the prosecution evidence that Appellant was found to be carrying the gun and only dropped the same when chased, he was therefore in actual possession of the gun and the ammunitions. The Items recovered from the Appellant were tested by a firearm expert and proved to fit the definition within the Act, and this court therefore is in agreement with the trial magistrate that the alibi failed to dislodge the prosecution case that was proved beyond all reasonable doubt.

40. Further this court does not find any fault with the charge as crafted or the conviction thereof by the trial court under Section 4 A (1) (a) & 4(2) of the Act. The court has also considered the sentence imposed by the trial court, notes that the trial court indicated that it considered mitigation and while aware that sentencing is a discretion of the trial court and this court can only interfere in exceptional circumstances. This Court finds that the sentences meted out were justifiable in the circumstances of the case.

41. Having taken all factors into consideration, this court affirms the conviction & sentence. The Appeal lacks merit and is dismissed.

DATED SIGNED AND DELIVERED IN GARISSA THIS 17TH DAY OF DECEMBER, 2021

ALI-ARONI

JUDGE