REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 42 OF 2019

IDLE ABDI ADOW.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the judgement, conviction and sentence of the Chief Magistrate Hon. Cosmas Maundu in the Chief Magistrate's Court Criminal Case No. 1800 of 2014 delivered on 6th November 2019)

JUDGEMENT

1. The appellant was charged with:

- **COUNT I**: Being in possession of a firearm without a firearm certificate contrary to section 4(A) (i) (a) of the Firearms Act Cap. 114 Laws of Kenya. Particulars being that, on the 15th day of November 2014 at Madogo barrier in Madogo Trading Centre within Tana River County was found in possession of a specified firearm namely TOKALEV pistol serial number 49000938 without a firearm certificate.

- **COUNT II**: Being in possession of ammunitions without a firearm certificate contrary to section 4(A) (i) (a) of the Firearms Act Cap 114 Laws of Kenya. Particulars being that, on the 15th day of November 2014 at Madogo barrier, in Madogo Trading Centre, within Tana River County, was found in possession of seven (7) rounds of ammunitions of calibre 7.62mm without a firearm certificate.

- **COUNT III**: Being in possession of a firearm accessory contrary to section 26(1) (e) as read with section 26(2) (b) of the Firearms Act Cap 114 Laws of Kenya. Particulars being that, on the 15th day of November 2014 at Madogo barrier, in Madogo Trading Centre, within Tana River County was found in possession of a firearm accessory namely Tokalev pistol magazine without a firearm certificate.

2. He pleaded not guilty and matter went into full trial. The appellant was convicted on all counts and sentenced to serve 10 years imprisonment in each count and to run concurrently.

3. Being aggrieved by the decision above he lodged appeal and set out the following grounds:-

(a) That the trial court erred in facts and law by failing to find that the prosecution failed to call a crucial witness, to wit, the KDF officers who carried out the search and recovered the firearm.

(b) That the trial court misdirected itself in facts by failing to find that by the fact that PW1 and PW2 were not in the bus when the search was carried out, they could not ascertain that the firearm was found in the brown envelope that was purported in possession of the appellant.

(c) That the trial court erred in law and facts by failing to find that the prosecution's case was based on conjecture and suspicion.

(d) That the trial court erred in law and facts by failing to find that circumstantially there could have been another brown envelope in the bus that contained the firearm other than that which was purportedly in possession of the appellant.

(e) That the trial court erred in facts and law by failing to find that PW1 has a biased view of the appellant as he had previously allegedly arrested him and suspected him by merely sweating while in the bus.

(f) That the trial court erred in law by failing to consider the defence of the appellant which was cogent and plausible.

(g) That the trial court erred in law and facts by failing to find that the prosecution's case did not meet the threshold of prove in criminal cases.

4. The parties were directed to canvass appeal via submissions. The appellant lodged same while the prosecution conceded the appeal.

5. After going through the proceedings and submissions, I find the core issues are:

- ***Whether the prosecution proved its case beyond reasonable doubt?***

- ***Whether appellant's defence was considered?***

6. The trial court was convinced that the prosecution had discharged the burden of proof and held that it had proved beyond reasonable doubt that the appellant was in possession of the firearm, ammunition and accessories.

7. The trial court's finding is at page 119 and 120 of the proceedings, where the court held as follows:

"The first issue for the court to determine is whether Accused 1 was found in possession of a Tokalev pistol and seven rounds of ammunition.

It is not in dispute that on the material date KDF officers searched and recovered a pistol which was loaded with seven rounds of ammunition from as bus which was carrying Accused 1 and other passengers. The pistol was in a khaki envelope which was on the rack inside the bus.

PW1 Police Inspector Dancun Murinda told the court that he saw Accused 1 at Dadaab carrying a bag and a khaki envelope. Accused 1 was asking for a lift to Nairobi from the security officer PW4. He said when Accused 1 boarded the bus he placed his bag and the khaki envelope on the luggage rack. It is the same spot where the khaki envelope was later recovered by KDF officers.

PW2 Ahmed Daro corroborated PW1's evidence by saying that the khaki envelope was recovered on the rack above the last left seat where Accused 1 sat when he boarded the bus.

It is clear that Accused 1 was seen holding a khaki envelope before boarding the bus. PW1 saw Accused 1 placing the khaki envelope on the luggage rack where it was later recovered by KDF officers. Accused 1 did not explain what happened to the khaki envelope which he was seen holding by PW1. I am satisfied beyond reasonable doubt that the khaki envelope that PW1 saw Accused 1 holding was the one which was found containing the pistol and ammunition in issue."

8. This finding is faulted on the basis that the trial court should have considered and found that the prosecution's case could not hold for failure to call the KDF officers who searched the bus and recovered the pistol.

9. It is humbly submitted that these were crucial witnesses and the prosecution's case could not be sustained without their testimony. From the record, there is no account of how the search and retrieval of the pistol was conducted and how it was linked to the appellant.

10. PW1 stated that there were police officers from Madogo Police Station who boarded the bus and conducted the search with KDF officers. It was an officer from the said station who conducted a *"safety precaution"*.

11. They were also not called to testify. PW1 alleges to have stood aside after they disembarked from the bus to watch what the appellant would do. He alleges to have watched the officers retrieve the gun from the place where the khaki envelope was placed by the appellant.

12. He does not inform us what distance he was from the bus when the search was being conducted, what obstructions existed between him and the searching officers that hay have obscured his view of the search, his testimony therefore not negate the need to call the KDF and police officers who conducted the search.

13. Further failure to call these officers cannot be cured by the statement of PW1 who as it will be demonstrated was biased against the appellant. In the premises and as was held in the locus classicus case of ***Bukenya vs Uganda [1972] EA 549*** and as cited by **Dulu J** and **Chitembwe J** in ***Said Awadhi Mubarak vs Republic Criminal Appeal No. 212 of 2012***. The court held as follows:

"Secondly, very crucial witnesses were not called by the prosecution to testify in this case. These were the people who arrested the appellant. These crucial witnesses would have explained the circumstances and reasons for the arrest of the appellant. Since they were not called to testify, we do not know the circumstances and reasons for the arrest of the appellant. In the case of Bukenya vs Uganda [1972] EA 549, the Court of Appeal held that a failure to call crucial witnesses by the prosecution entitles the court to make an adverse conclusion against the prosecution case, and acquit the accused person. In our view, the failure by the prosecution to call crucial witnesses herein weakened their case to an extent that they failed to prove the case against the appellant beyond reasonable doubt as required in criminal cases. The gap created by the failure of the prosecution to call important witnesses is a doubt whose benefit we must give to the appellant, which we hereby do."

14. In summarizing this proposition, since PW1 and PW2 were not in the bus when the search and recovery of the weapon was carried out, there is doubt as to which precise envelope contained the gun. The trial court should have faulted the prosecution for not calling crucial witnesses and made an adverse inference for this material flaw in the prosecution's case.

15. The trial court finding is also impugned on the basis that there could have been another brown envelope in the bus that contained the firearm other than that which was allegedly in possession of the appellant.

16. It cannot be disputed that the only witness who alleges to have seen the appellant enter the bus with a khaki envelope was PW1. Not even PW4, the safety and security officer who interacted with the appellant as he tried to request for a lift to Nairobi.

17. In his evidence, PW1 stated that he could not confirm that the khaki envelope in court was the one that had the gun. He further stated that khaki envelope he saw at Dadaab did not have special marks.

18. It is submitted that there were several instances in which any other person could have placed a gun in another brown envelope or in the same envelope in luggage rack above the rear second left sit where the appellant was initially sited. This was Nomad Hotel where the bus stopped and passengers alighted for a health break and during the search at Madogo.

19. The prosecution seemed to circumstantially connote that the envelope the appellant entered the bus with was the only envelope in that bus and that it could have only been the envelope with the gun.

20. This is so because after PW1 allegedly saw the appellant enter with the envelope, there was no one else who kept his eye on the bag throughout the journey. There is an assumption from the prosecution that there could not have been any other envelope with a gun.

21. In ***Sawe vs Republic [2003] KLR 364*** the Court of Appeal made the following finding with regard to the test of acceptable circumstantial evidence:

> **"In order to justify on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt."**

22. Granted the many opportunities that existed to have another envelope introduced in the bus, or a gun place in the envelope, then there is sufficient doubt to conclude that it was not safe to convict on the basis of the evidence on record.

23. The trial court's finding is impugned on the basis that the prosecution's case was based on conjecture and suspicion. It is also submitted that PW1 was biased and as such he is not a reliable witness on whose testimony a safe conviction could be based.

24. PW1's evidence consisted of obvious exaggerations, attention seeking antics, biases and outright unreasonableness.

25. To that extent, the trial court ought to have cautioned itself before relying on his evidence which was not the case. The exaggerations are notably where he alleges that when he saw the appellant in Dadaab, he knew he was carrying a pistol.

26. He then scales down in cross examination and denies he said the appellant had a pistol and claimed it to have been a mistake. He also alleges to have studied psychology in the year 2000 at CID Training School and as a result of that, he is very observant and detects suspects and their funny behavior.

27. He alleges that he suspected the accused because he was sweating, despite Garissa being a generally hot environment. However, he never asked any of the officers at the Dadaab, Alango, Modica and Tana Bridge to search him. This is despite the fact that he looked suspicious to him.

28. His unreasonableness is demonstrated by his allegations that he was able to follow the appellant when he boarded the bus at a distance of 12 metres, this is virtually impossible for anyone to see.

29. He also states that he suspected him because there was a security meeting that had discussed him, this may have biased his appreciation of the facts at hand and he may have overlooked the possibility that the appellant was indeed innocent.

30. Finally the trial court erred in failing to consider the defence of the appellant which was plausible and cogent. The appellant gave sown testimony, he denied owning a gun, he even reminded the court that he had sworn and could not tell lies.

31. The trial court misled itself by finding that the appellant did not explain what happened to the envelope. He addressed the envelope by stating he had nothing to do with the weapon that was found in the carrier of the bus and that the bus was carrying more than 40 passengers.

32. That sufficiently explained the facts as he perceived them. There was no special reason for the trial court to believe PW1 over the appellant.

33. Therefore the court finds merit in the appeal and makes the following orders ;

i) Appeal is allowed, conviction is quashed and sentence is set aside.

ii) Appellant is released forthwith unless otherwise lawfully held.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 20TH DAY OF FEBRUARY, 2020.

……

C. KARIUKI

JUDGE