



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 27 OF 2018

LAWRENCE KIRUI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. R. Odenyo, Senior Principal Magistrate in Migori Chief Magistrate's Criminal Case No. 867 of 2015 delivered on 26/06/2018)

JUDGMENT

1. **Lawrence Kirui**, the Appellant herein, was charged with negligently losing a firearm make G3 S/No. F95266 on the 20th day of November 2012 at Kehancha Police Station in Kuria West Sub-County of Migori County.

2. The Appellant denied the charge and a trial was held. Two witnesses testified in support of the charge. **PW1** was **No. 70861 Corp. Mike Kiptum** who was the In-Charge of Armory at the Kehancha Police Station. **No. 231199 C. I. Evans K. Sang** who was the investigating officer testified as **PW2**. He was the Deputy DCIO Migori.

3. At the close of the prosecution's case the Appellant was placed on his defense and opted to give a sworn statement. The Appellant was then found guilty as charged and was convicted. He was sentenced to a fine of Kshs. 10,000/= and in default to serve one year in jail. The Appellant paid the fine.

4. Being aggrieved by the conviction and sentence, the Appellant preferred an appeal through **Messrs. Edward Kisia & Associates Advocates** where he raised the following five grounds: -

1. The learned trial magistrate erred in law by handling over a verdict of guilt when the evidence on record was insufficient to so warrant the decision.

2. The learned trial magistrate erred in law and in fact by failing to take into consideration the defence that was advanced by the appellant.

3. The learned trial magistrate erred in law and in fact in failing to make a finding that the charge as drawn was defective.

4. The learned trial magistrate erred in law by committing the appellant to a fine of Kenya Shillings Ten Thousand.

5. The learned trial magistrate erred in law by not taking into consideration, the mitigation advanced by the appellant while handing down the sentence.

5. Directions were given and the appeal was disposed of by way of oral submissions. The Appellant submitted that the firearm in issue had been recovered well before the Appellant was charged and as such the guilty verdict was contrary to the evidence. He pleaded that the appeal be allowed and the conviction quashed, sentence set-aside. The Learned Senior Principal Prosecution State Counsel **Mr. Kimanthi** opposed the appeal and submitted that the alleged recovery was in itself an admission of the loss of the firearm. He prayed that the appeal be dismissed.

6. This being the Appellants' first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

7. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the charge were proved and as so required in law; beyond any reasonable doubt. Needless to say, I have carefully read and understood the proceedings and the judgment of the trial court as well as the record before this Court and the submissions and I must say that both the prosecution and defence evidence was well captured in the judgment under appeal and I hereby incorporate that part herein by reference.

8. The Appellant maintained from the defence to his submissions in this appeal that the gun was truly lost, but recovered and was held at the Kehancha Police Station courtesy of a communication he produced as D. Exhibit 1. I hence agree with **Mr. Kimanthi** that the alleged recovery was in itself an admission that the firearm was in the first instance lost. The recovery, if at all true, would then be a mitigating factor in sentencing.

9. But, was the firearm truly recovered by dint of the D. Exhibit 1? I have carefully perused the said exhibit. It is a Signal communication from the Police Headquarters to the Kuria West Divisional Police Headquarters enquiring on the firearm. Police signal communication is a technical way of communication and one needs to have a clear understanding of how it operates before interrogating a signal. PW1 and PW2 testified that the firearm was lost and all efforts to recover the same were in vain. The Appellant did not cross-examine any of the witnesses on the alleged recovery or the exhibit. I cannot therefore say with certainty that the signal was confirming the recovery or was enquiring about the recovery. However, as said, the recovery could only be a mitigating factor.

10. The upshot is therefore that the Appellant was properly convicted and sentenced. The appeal is disallowed. I hereby affirm the decision of the Learned Trial Magistrate.

DATED, SIGNED and DELIVERED at MIGORI this 28th day of March 2019

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. Kisia, Counsel for the Appellant.

Mr. Kimanthi Learned Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Evelyne Nyauke – Court Assistant