



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 20 OF 2007

(An Appeal arising out of the conviction and sentence of Hon. M.W. Muigai (Mrs.)- SPM delivered on 12th January 2007 in Nairobi CMC. CR. Case No.432 of 2005)

REUBEN SHANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Reuben Changi was charged with the offence of **preparation to commit a felony** contrary to **Section 308(1)** of the **Penal Code**. The particulars of the offence were that on 24th January 2005 at Monte Carlo Night Club along Accra Road in Nairobi, the Appellant jointly with others not before court, was found armed with a dangerous weapon namely a Tokalev Pistol S/No.XX05733 loaded with three rounds of ammunition in circumstance that indicated that they were armed with the intent to commit a felony namely robbery. He was further charged with being in possession of a firearm and ammunition contrary to **Section 4(1)** and **Section 4(2)(a)** of the **Firearm Act**. The particulars of the offence were that on the same day and in the same place, the Appellant was found in possession of a Tokalev Pistol S/No.XX05733 firearm and three rounds of ammunition without a firearm certificate. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged on the three counts. In respect of the first count, he was sentenced to serve twelve (12) months imprisonment. In respect of the charges of being found in possession of a firearm and ammunition without a firearm certificate, he was sentenced to serve seven (7) years imprisonment on each count. The sentences were ordered to run concurrently. The Appellant was aggrieved by his conviction and sentence. He filed an appeal challenging the same before this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted against the weight of evidence. He was aggrieved that he was convicted of being found in possession of a firearm yet no evidence was adduced to connect him with the offence. He faulted the trial magistrate for relying on tampered evidence to convict him. He was of the view that the evidence produced by the prosecution witnesses was unreliable and full of contradictions. He took issue with the fact that his defence was disregarded by the trial magistrate before reaching the impugned decision. It was on that basis that the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. He urged the court to allow the appeal. He told the court that although he had served his sentence, he wished to appeal against the conviction. Ms. Akunja for the State opposed the appeal. She submitted that the prosecution had adduced sufficient culpatory evidence which connected the Appellant to the offences that he was convicted. In the premises therefore, she urged the court not to disturb the finding reached by the trial magistrate. She urged the court to dismiss the appeal.

The prosecution's case, according to the witnesses who testified before the trial magistrate's court was as follows: On the night of 23rd January 2005, PW1 Patrick Lumumba, PW2 Josephat Saidi Mulumba and PW3 Eric Arnold Opiyo were on guard duty at Monte Carlo Night Club along Accra Road in Nairobi. The three witnesses were employed as security guards at the said club. They testified that their duties included charging those who wanted to enter the club and checking those entering the club so as to ensure they did not have any weapons that could endanger other patrons in the club. PW1 testified that while on duty, a customer came and sought to enter the club. The customer expressed his reluctance to be searched. PW1 assisted by PW2 and PW3 insisted that they would search the customer. They searched him. They discovered that he had a pistol on his waist. They removed the pistol and detained the customer. The customer is the Appellant in this case. They then detained him in a security room.

PW1 called the police. PW4 Sgt Francis Wachira was on patrol on the material night when he was instructed to go to Monte Carlo Club. He found the Appellant had been apprehended. He took his custody and took him to Central Police Station where he was detained. He also took custody of the Tokalev Pistol and the three rounds of ammunition. The pistol was taken for ballistic examination by PW7 Lawrence Nthiwa, a ballistic officer based at the CID Headquarters. After examining the pistol, he formed the view that the same was a firearm within the meaning ascribed to the term under the **Firearm Act**. He also examined the ammunition and reached the same conclusion that it was

ammunition within the meaning ascribed to the term under the **Firearm Act**. The pistol, ammunition and the ballistics reports were produced in court as exhibits by the prosecution.

When the Appellant was placed on his defence, he denied that he was found in possession of the firearm. He narrated how on the particular night he had gone to the club to enjoy himself with his girlfriend by the name Elizabeth. At the club, he realized that his girlfriend was double dealing him with another man. A fight ensued between him and the man. The security guards at the club intervened. They took them to a certain office and told them to pay for the items that they had broken before they could be released. He was shocked when three police officers came to the club and arrested him. They took him to Central Police Station where they charged him with the offences that he was convicted. He denied being in possession of the pistol or the ammunition. He denied preparing to commit a felony. He pleaded his innocence of the charges.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge –Vs- Republic [1987] KLR 19 at P.22:**

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570)”.

The issue for determination by this court is whether the prosecution adduced sufficient evidence to establish the charges that were brought against the Appellant to the required standard of proof beyond any reasonable doubt.

The Appellant contends that the evidence adduced against him by the prosecution witnesses was essentially fabricated against him. It was his defence that he was an innocent citizen who was connected with a crime that he was not aware of. On re-evaluation of the evidence and the submission made by the parties to this appeal, it was clear to this court that indeed the prosecution established the charges brought against the Appellant to the required standard of proof. The three witnesses who were security guards at Monte Carlo Night Club gave consistent, cogent and corroborative evidence which gave a true account of the events as they occurred on the material night. They told the court that while on security guard duties at the entrance of Monte Carlo Club, the Appellant sought to gain entrance into the club without being searched.

When the three security guards insisted on searching him, he balked. He was searched and a pistol was recovered from his waist. He was apprehended and taken to a guard room. The police were called. They arrested the Appellant and took him to Central Police Station where he was later charged. The pistol with the three rounds of ammunition was produced into evidence. The ballistic examination of the pistol revealed that it was a firearm. Similarly too, the ammunition recovered from the Appellant were found to be ammunition within the meaning ascribed to the term under the **Firearm Act**. The Appellant did not produce a certificate to confirm that he was authorized to have the pistol and the ammunition.

In the premises therefore, this court agrees with the holding by the trial court that the prosecution established to the required standard of proof that the Appellant was illegally found in possession of the firearm and ammunition. The conclusion reached by the trial court that the Appellant was found in possession of the said firearm in such circumstances that suggested that he was preparing to commit a felony cannot be faulted. The defence offered by the Appellant was evasive and did not displace the strong culpatory evidence adduced against him by the prosecution witnesses.

The upshot of the above reasons is that this court finds no merit with the appeal lodged by the Appellant. The prosecution established the charges brought against the Appellant to the required standard of proof beyond any reasonable doubt. The appeal against conviction is dismissed. The appeal against sentence is similarly dismissed. The sentence that the Appellant served was legal. The Appellant informed the court that he is serving another sentence. This court therefore deems the Appellant’s sentence in this appeal to have been served. It is so ordered.

DATED AT NAIROBI THIS 27TH DAY OF MARCH 2019

L. KIMARU

JUDGE