



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CRIMINAL APPEAL NOS. 102 AND 102A OF 2017

JOHN MBUGUA.....1ST APPELLANT

JOHN MWANGI WAWERU.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgement, conviction and sentence dated 16th August 2016 in the

Chief Magistrate's court in Criminal Case No. 322 of 2016,

Republic v John Mbugua and John Mwangi waweru)

JUDGEMENT

1. The appellants have appealed against their conviction and a concurrent sentence of seven years imprisonment in respect of the offences of preparations to commit a felony, contrary to section 308 (1) of the Penal Code, being count 1, possession of a firearm contrary to section 4 (1) as read with section 4 (3) (b) of the Firearms Act, being count 2, possession of an imitation of a firearm contrary to section 34 (1) of the Firearms Act, being count 3.

2. Mr. Omwega conceded the conviction and sentence in count 1. However, he supported the convictions and sentence in counts 2 and 3.

3. The law requires the appeal of each appellant has to be considered separately.

1st appellant's appeal – John Mbugua

4. This appellant has raised three grounds in his amended petition of appeal to this court.

5. In ground 1 the appellant has faulted the trial court for convicting him for preparations to commit a felony, in the absence of evidence that he was in possession of dangerous weapons. The evidence of the prosecution through No 77958 Cpl Joseph Kabete (Pw 3), was that he received information from an informer. As a result, he and other officers proceeded to the dump site at Olpopong area. In one house there they saw two people, who were sleeping. He told them to get up and raise their hands and get out of the house. He recognized the 2nd appellant as someone he knew. The second appellant had a homemade gun, which he dropped. The 1st appellant had a plastic gun, exhibit 2.

6. The evidence of Pw 3 is supported by the other police officers namely No. 236886 APC Bonface Warima (Pw 1) and No. 232383 APC Peter Ruto (Pw 2).

7. In the light of the evidence of Pw 1, Pw 2 and Pw 3, there is no evidence that the appellants were arrested in the act of preparation to commit a felony. I therefore find that the offences of preparations to commit a felony was not proved. I therefore acquit both appellants of this offence, that is charged against them in count 1.

8. In ground 2 the appellant has faulted the trial court for convicting him for being in possession of an imitation of a firearm on contradictory and uncorroborated evidence. According to Pw 3, it is the second appellant who had the homemade gun. According to Pw 1 it was the first appellant who had the homemade gun. This is not a material contradiction, as both appellants were jointly in possession of both the homemade gun and grey coloured genuine one in terms of section 21 of the Penal Code (Cap. 63) Laws of Kenya. I therefore find no merit in this ground which I hereby dismiss for lacking in merit.

9. In ground 3 the appellant has faulted the trial court for rejecting the defence evidence, without giving cogent reasons. The trial court did not believe the appellant's sworn evidence. That court found contradictions in the appellant's evidence surrounding his arrest in town. I have also re-assessed this appellants evidence and I find it to be incredible. This ground lacks merit and is hereby dismissed.

10. The appellant's appeal against conviction is hereby dismissed.

11. As regards, the trial court sentenced this appellant to seven years imprisonment in counts 2 and 3, which was ordered to run concurrently. The trial court failed to take into account that the appellant had been in custody for over one year in terms of section 333(2) of the Criminal Procedure Code (Cap. 75) Laws of Kenya. The court was bound to take into account the custody period in sentencing the appellant. I therefore reduce the sentence to three concurrent years imprisonment in respect of both counts 2 and 3, which now the appellant has to serve.

2nd appellant's appeal – John Mwangi Waweru

12. This appellant has raised three grounds of appeal in his amended petition of appeal in this court.

13. This appellant has raised the same grounds as the 1st appellant. The reasons advanced in dismissing the 1st appellant's appeal apply to this appellant as well. His appeal in count 1 succeeds. The conviction and sentence recorded therein are hereby quashed. His appeal against conviction in counts 2 and 3 fails and is hereby dismissed. His appeal against sentence succeeds. He is therefore now to serve three concurrent years of imprisonment in respect of counts 2 and 3.

Judgement signed, dated and delivered in open court at Narok this 24th day of September, 2019.

in the presence of both appellants and Mr. Mwangi for the respondent.

J. M. Bwonwong'a

Judge

24/9/2019