



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 205 OF 2015

LEWIS MULI WANZA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(An appeal from the original conviction and sentence in the
Chief Magistrate's court at Makadara Cr. Case No. 4559 of 2013
delivered by Hon. V. Wakumile, SPM on 10th July 2015).*

JUDGMENT

Background

Lewis Muli Wanza, herein the Appellant, was charged with the offence of attempted robbery with violence contrary to **Section 297(2) of the Penal Code**. The particulars of the offence were that on 27th September, 2013 at Nyama Villa area in Nairobi East District within Nairobi Area Province, jointly with others not before court, while armed with a toy pistol attempted to rob Margaret Achieng oduor her properties and at the time of such robbery threatened to use personal violence to the said Margaret Achieng Oduor(sic).

The Appellant was acquitted of the offence charged. The trial court however convicted him of the offence of being in possession of an imitation of a firearm contrary to **Section 34(1) of the Firearms Act**. He was sentenced to serve 10 years imprisonment.

Being dissatisfied with the trial court's conviction and sentence, he has preferred the instant appeal. He relied on amended grounds of appeal filed contemporaneously with written submissions on 7th November, 2017. His grounds of appeal are that the cognate offence was not proved beyond a reasonable doubt and that material witnesses were never called.

Submissions

The Appellant took issue with his identification. His view was that since he was acquitted for the offence charged for lack of identification, the same reason ought to have been applied to vindicate him in the offence for which he was convicted. He submitted that a conviction could not lie given the gaping holes in the prosecution's case. He submitted that when the complainant made a report at the police station she did not state that she was asked to identify the toy pistol. Further, that she failed to identify him in the identification parade that was conducted. He submitted that the fact that the Appellant was arrested on 27th September, 2013 and took plea on 30th September of the same year was in stark contrast with the evidence of the complainant that the identification parade took place a week after his arrest which raised questions about the propriety of the charges.

The Appellant poked holes in the evidence of PW2 that he arrested him soon after the attempted robbery after a chase. He pointed that if the chase and arrest occurred soon after the robbery, then the complainant's evidence that she was elsewhere when she received the call informing her that an arrest was effected called into question the evidence surrounding the arrest and his culpability. In this regard, he questioned the failure to call witnesses who witnessed the arrest even though PW2 testified about the presence of members of the public at the time.

With regard to the offence for which he was convicted, he submitted that the learned trial magistrate did not properly invoke the provisions

of **Section 179(2) of the Criminal Procedure Code** in that no evidence established that the object was exclusively found in his possession. Furthermore, no inventory was prepared and adduced as proof that such an object, a toy pistol, was recovered. For this reason, the Appellant submitted that his conviction was erroneous. He urged the court to quash the conviction, set aside the sentence and set him at liberty.

Learned State Counsel, Ms. Sigei for the Respondent in opposing the appeal submitted that **Section 179(2) of the Criminal Procedure Code** that led to the substitution of the offence charged with the one for which the Appellant was convicted for was properly invoked. In addition, she submitted that all the elements of the offence under **Section 34(1) of the Firearms Act** were satisfied. She urged the court to dismiss the appeal.

Evidence

The complainant, Margaret Achieng who testified as PW1 owned and operated a KCB agency and M-Pesa business in Komarock. On the 27th September, 2013, at about 7.30 a.m., she was approached by a male customer who ordered to buy credit worth Kshs. 20/-. He then left but shortly returned with another short man. On his return, he confronted her and started strangling her while demanding for money. The short accomplice then pointed something which looked like a pistol and threaten to shoot her if she raised alarm. She however raised alarm and fellow businessmen responded. That is when the two attackers boarded a motorbike and left. They did not steal anything from the shop but the complainant sustained injuries around the neck. Shortly afterwards, he was called by a fellow business lady informing her that one of the attackers had been arrested near Dadora. A police officer also called her requesting her to go to Soweto police station where the suspect was being held. She also recorded a statement. One week later, she participated in an identification parade but was not able to positively identify her attacker. Instead, she picked out the wrong person from the parade members. She was however informed that the person charged was the gunman who had a toy pistol which she described as metallic in physical appearance.

PW2, PC Vincent Maronga of Soweto Police Station was in a private car on the fateful day at about 7.30 a.m. with PC Ngugi when they heard members of the public shouting at a thief. They were shown some men on a motorbike who were fleeing. They pursued them and PW1 shot in the air as they approached them. The passenger alighted from the motor bike while holding something resembling a pistol. PW2 gave chase to him and the suspect surrendered after which he recovered a toy pistol from him. According to PW2, he escorted the arrested suspect back to the scene of the attempted robbery where the complainants positively identified him. The arrested suspect was thereafter charged.

PW3, Corporal Coleman Kiilo of Soweto Police Station investigated the matter. His evidence was that the Appellant was escorted to the police station on the said date at about 8.00 a.m. after which he recorded his statement. He also recorded the statement of PW1 and preferred the charge against him.

In his sworn defence, the Appellant, he testified that he used to sell fruits at Komarock Kayole junction and that on 27th September, 2013 at about 7.00 a.m. he was walking towards his house when he came across two men who identified themselves as police officers. They asked for his identity card which he failed produce but produced a police abstract instead. The police refused to acknowledge it as a proper identification document and drove him to Soweto Police Station where he was charged after a through beating.

Determination

The Appellant herein was convicted under Section 34 of the Firearms Act which states:

“(1)If any person makes or attempts to make any use of a firearm or an imitation firearm with intent to commit any criminal offence he shall be guilty of an offence and liable to imprisonment of not less than seven, but not exceeding fifteen years, and where any person commits any such offence he shall be liable to the penalty provided by this subsection in addition to any penalty to which he may be sentenced for that other offence.

(2)A firearm or imitation firearm shall, notwithstanding that it is not loaded or is otherwise incapable of discharging any shot, bullet or other missile, be deemed to be a dangerous weapon or instrument for the purposes of the Penal Code (Cap. 63).

(3)In this section, “imitation firearm” means anything which has the appearance of being a firearm, whether it is capable of discharging any shot, bullet or other missile or not.”

The provision sets out the definition of an imitation firearm as *“anything which has the appearance of being a firearm”*. The question arising in this case then is whether what the Appellant was arrested with fits the definition of an imitation of a firearm.

Black’s Law Dictionary, 9th Edition defines a firearm as:

“A weapon that expels a projectile(such as a bullet or pellets) by a combustion of gunpowder or other explosive.”

The Firearms Act, CAP 114, defines a firearm as:

“A lethal barrelled 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.”

The exhibit in question was referred to by all the witnesses before the court as a toy pistol with PW1 giving the most detailed description of the object as a “metallic toy pistol”. The court would be hard pressed to find that the toy pistol fell within the definition of an imitation firearm. This is predicated by the use of the word “toy” throughout the trial to refer to the exhibit in question. A toy is defined in **Chambers Concise Dictionary** as;

“a plaything: a trifle: a thing only for amusement or look”

This definition then properly fits the toy pistol as a jocular object. And therefore, the exhibit that the Appellant was arrested in possession of does not at all fit the definition of an imitation of a firearm. In conclusion, I find that the offence for which the Appellant was convicted was not proved beyond a reasonable doubt. I accordingly quash the conviction, set aside the sentence and order that the Appellant be forthwith set free unless otherwise lawfully held. It is so ordered.

DATED AND DELIVERED THIS 3RD DAY OF JANUARY, 2018.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

- 1. Appellant present in person.*
- 2. Miss Akunja for the Respondent.*