



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 42 OF 2016

MUTUA MUSAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Original conviction and sentence in Kyuso Principal Magistrate's Court Criminal Case No. 81 of 2015 of by B. M. Kimtai S R M on 01/07/16)

J U D G M E N T

1. **Mutua Musau**, the Appellant, was charged thus:

Count 1: Being in Possession of any of the Specified Firearms without a Licence or Permit or other Lawful Justification contrary to **Section 4A(1)(a)** of the **Firearms Act Cap 114 Laws of Kenya**. Particulars of the offence were that on the **14th day of April, 2015** at **0100 hours** at **Mbui Village of Ngaie Location in Kyuso Sub-County** within **Kitui County** was found being in possession of a specified firearm namely **AK 47 Rifle** and two rounds of ammunition.

Count 2: Possession of Public Stores contrary to **Section 324(2)** as read with **Section 36** of the **Penal Code**. Particulars of the offence were that on the **29th day of November, 2014** at **Mbui Village, Ngaie Location in Kyuso Sub-County** within **Kitui County** had in his possession public stores namely a pair of boots and socks of the Kenya Police Department such property being reasonably suspected of having been stolen or unlawfully obtained.

Count 3: Having Suspected Stolen Property contrary to **Section 323** of the **Penal Code**. Particulars of the offence were that on the **29th day of November, 2014** at **Mbui Village, Ngaie Location in Kyuso Sub-County** within **Kitui County** having been detained by **C I David Simiyu** as a result of the exercise of the powers conferred by **Section 26** of the **Criminal Procedure Code** had in his possession of one inverter (**DC-AC**) **S/No. HI30105521**, two electric cables, and one solar panel plate serial No. **PV-TP510S** reasonably suspected to have been stolen or unlawfully obtained.

Count 4: Having Suspected Stolen Property contrary to **Section 323** of the **Penal Code**. Particulars of the offence were that on the **29th day of November, 2014** at **Mbui Village, Ngaie Location in Kyuso Sub-County** within **Kitui County** having been detained by **C I Samuel Nguyo** as a result of the exercise of the powers conferred by **Section 26** of the **Criminal Procedure Code** had in his possession of one AC Automatic Voltage Regulator reasonably suspected to have been stolen or unlawfully obtained.

2. He was tried, acquitted of the 2nd, 3rd and 4th Counts but convicted on the 1st Count and sentenced to **Ten (10) years imprisonment**.

3. Aggrieved by the conviction and sentence he appealed on grounds that the case was not proved per the required standard of proof, evidence of possession was not proved as the court did not visit the scene of crime; evidence adduced was hearsay; the ballistic report was a forgery; the informer was not called to testify and the alibi defence given was rejected erroneously.

4. Facts of the case were that on the **14th day of April, 2015**, police officers from Kyuso Police Station acting on information received lay ambush and subsequently arrested the Appellant who was in possession of a firearm. He was charged.

5. When put on his defence the Appellant stated that on the **29th November, 2014**, while away from home he got information that the police searched his house and took away his pair of gumboots, a pair of socks, an inverter, 3 cellphones, spot light, a bicycle and a solar panel. On his return home on the **13th April, 2015** he went to Kyuso Police Station to get his property. He was released on bond of **Kshs. 50,000/=**. Since he did not have money he was placed in cells. A week later he was charged. Arguing that he was framed up he stated that some of the items were released to him.

6. The Appellant canvassed the Appeal by way of written submissions.

7. The State through **Mr. Mamba**, learned State Counsel opposed the Appeal. He submitted orally that the Appellant was seen scooping the soil and removing a yellow polythene bag that contained the firearm. Although he denied having possessed it, the exhibit was taken to the Ballistic Expert who confirmed that it was capable of being fired. He called upon the Court to find that the conviction was proper.

8. This being a first Appellate Court, I am duty bound to re-evaluate and re-consider all evidence adduced at trial afresh bearing in mind that I had no opportunity of seeing or hearing witnesses who testified. I must therefore come to my own conclusion with that in mind. **(See Okeno vs. Republic (1973) EA 32).**

9. **Section 4A(1)(a)** of the **Firearms Act (Act)** provides thus:

“Notwithstanding Section 4 any person who –

(a) is found in possession of any of the specified firearms without a licence or permit or other lawful justification;..... commits an offence under this Act and is liable to imprisonment for life.”

10. The Act defines possession as:

“Includes not only having in one’s own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use of benefit of oneself or of any other person and the expressions “be in possession” shall be construed accordingly.....”

11. The Appellant faults the trial Magistrate for believing police officers who recovered the exhibit without asking for photographs that should have been taken at the scene and not having come up with an inventory of recovery.

12. PW1 **No. 233625 Chief Inspector Samuel Guyo** stated that as they waited in ambush at **1.00 a.m.** they saw a person scoop the soil and remove what had been hidden. They ordered him to stop but he ran away. They pursued him and caught him. He carried a polythene bag, yellow in colour that contained a rifle. His evidence was corroborated by that of PW2 **No. 217872 Inspector Fredrick Kurugat** and PW3 **No. 64375 Sergeant Moses Lelekong** in material particulars. The fact that no photographs were taken at that particular time in the night does not disapprove the fact of recovery. Taking of photographs by police officers in the course of investigations is not mandatory but discretionary **(See Section 21 of the Police Act).**

13. Secondly, the learned trial Magistrate is faulted for relying on hearsay evidence. PW5 **No. 933383 P C Simon Yego** acted on information received prior to the arrest of the Appellant. He moved to his house and recovered items suspected to have been stolen. An inventory of recovery was prepared of recovered items that was duly signed by the Appellant’s daughter, neighbours amongst other people. The charges could not stand as the Appellant who was alleged to have escaped was not at home during the recovery.

14. What led the police to the recovery of the rifle was information given by an informer. It is the argument of the Appellant that the informer should have been availed to testify. In the case of **Kigecha Njuga vs. Republic (1965) EA 773 Sir John Ainley CJ and Madan J.** Stated that:

“Informers play a useful part no doubt in the detention and prevention of crime, and if they become known as informers to that class of society among whom they work, their usefulness will diminish and their very lives may be in danger. But if the prosecution desire courts to hear the details of the information an informer has given to the police clearly the informer must be called as a witness.”

15. The information given by the informers simply caused the police to lay ambush. It was not necessary for the informer to be called as a witness for purposes of concealing his identity.

16. The exhibits that were recovered were submitted to the Ballistic Expert for examination. They comprised of one **AK 47** assault rifle, a rifle magazine and two (2) rounds of ammunition. The firearms examiner found the **AK 47** assault rifle capable of being fired hence a firearm as per the **Firearms Act Chapter 114 Laws of Kenya**. The Ballistic Report that is dismissed by the Appellant as a forgery is signed by **Charles Koilege** a Firearms Examiner. The allegation of the Appellant is that the document was made by officers at the D.C.I.O’s office, Mwingi.

17. At the hearing the document was not produced in evidence by the maker. The report was adduced in evidence by PW4 **No. 230245 Superintendent Laurence Nthiora** a Firearms Examiner based at Nairobi. Prior to the witness taking the witness stand an application was made by the State Counsel to have the report adduced in evidence pursuant to the provisions of **Section 77** of the **Evidence Act**. An explanation was given by the State Counsel as to why the Firearms Examiner was not available. The Appellant had no objection to the report being adduced in evidence by that particular witness. Therefore the trial Court presumed that the signature on the document was the known signature of the author as stated by his colleague and admitted it as the Ballistic Examiner’s report. Without prove to the contrary it cannot be alleged to be a forgery.

18. Further, the Appellant faults the trial Magistrate for disregarding his alibi defence. An alibi defence is a defence where the Accused raises an argument that he was not at the scene of crime when the crime was committed having been elsewhere. Ordinarily the Accused may have witnesses to testify and adduce evidence to support the alibi defence raised.

19. In the instant case the Appellant had no witnesses. There was undisputed evidence that the police moved to his house on the **29th day of November, 2014** and recovered military boots amongst other items. Although the Prosecution stated that he was at home but managed to escape, the Appellant stated that he was away in Garissa and got to know of the search from his daughter. He explained that he travelled to Mwingi and subsequently Kyuso on the date he was arrested. The OCS allegedly released him on bail that he could not raise therefore remained in custody. Police officers who testified were from Kyuso Police Station. When the Appellant was cross examining them at the outset, he did not raise such an allegation. In the case of **Karanja vs. Republic (1983) KLR 501**, the Court of Appeal held that:

“The word ‘alibi’ is a latin verb meaning “elsewhere” or at another place. Therefore where an accused person alleged that he was at a place other than where the offence was committed at the time when the offence was committed and hence cannot be guilty, then it can be said the accused has set up an alibi. The appellants story in this case did not amount to an alibi as it was mentioned in the passing when giving evidence and furthermore, it was not raised at the earliest convenience i.e. when he was initially charged.”

20. The Appellant was arrested on the **14th April, 2015** at **1.00 a.m.** when he alleges that he was in police custody having been locked up on the **13th April, 2014**. Nothing would have been easier than to ask for the occurrence book to be availed to prove that fact. The learned Magistrate was justified in disregarding the defence put up.

21. The Appellant was found in personal possession of a rifle that was examined and found to be a serviceable **AK 47 rifle** which is a specified firearm that was a firearm under the **Firearms Act (See Section 4A(2) of the Act)** without any certificate.

22. In the premises, the Appellant has failed to prove the grounds raised in the Appeal. In the result, the Appeal lacks merit. Accordingly it is dismissed.

23. It is so ordered.

Dated, Signed and Delivered at Kitui this 12th day of April, 2018.

L. N. MUTENDE

JUDGE