



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 57 OF 2016

AMIRY JEMBE AMIRY.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against the conviction and sentence in Criminal Case No. 409 of 2012,

REPUBLIC VERSUS AMIRY JEMBE AMIRY at Mombasa delivered

by Hon. I RUGURU (SRM) ON 30TH May, 2016)

JUDGMENT

1. The Appellant, AMIRY JEMBE AMIRY, was tried and convicted for two offences by Senior Resident Magistrate at Mombasa law courts. In count 1 , the appellant was tried and convicted for the offence of being in possession of unauthorized explosive contrary to section 6 (1) (a) as read with section 29 of the Explosives Act, Cap 115. Laws of Kenya.

The facts were that;

“ On the 22nd day of February, 2014 at about 3.30 am at Mwaweche – Ujamaa area in Likoni district within Mombasa county in the Republic of Kenya, the appellant was found in possession of an explosive namely one Chinese 82-2 hand grenade with identification numbers 82-2-53-94 650 without authority from an authorized explosive officer”.

2. He was also tried and convicted for the offence of having suspected stolen property contrary to section 323 of the Penal Code.

The particulars were that;

“ On the 22nd day of February, 2014 at about 3.30am at Mwaweche- Ujamaa area in Likoni District within Mombasa County in that Republic of Kenya, the appellant having been detained by No. 71711 PC STEPHEN SACHITA, No. 74013 Pc PETER MWANGI and No. 80936 PC OSURI OTIENO as a result of the exercise of the powers conferred by section 26 of the criminal procedure code had in his possession one motor cycle registration number KMCR 876 M make SANLG reasonably suspected to have been stolen or unlawfully obtained”.

3. After a full trial, the appellant was convicted for both offences and sentenced to serve ten (10) years imprisonment in count 1 and two (2) years imprisonment in count II respectively.

4. Upon being convicted and sentenced, the Appellant, through his advocate, Mr Chacha Mwita, filed an appeal on 6th June, 2016 whereby he cited the following grounds faulting the trial magistrate for the said conviction and sentence; That,

(a) The learned Hon. Magistrate erred in both law and fact by convicting the Appellant on purely circumstantial evidence which did not conclusively point at him.

(b) The learned Hon. Magistrate erred both in law and fact by convicting the Appellant after the prosecution failed to prove their case beyond reasonable doubt, and more so in proving that the appellant was found to be in possession of the exhibits in question and more so the hand grenade and motor cycle.

(c) The learned Hon. Magistrate erred in both law and fact by convicting, the appellant despite the existence of screaming contradictions, inconsistencies in the prosecution's case and lack of corroborative evidence.

(d) The learned Hon Magistrate erred in both law and fact by convicting the appellant without considering the strong and corroborated defence put forth by the appellant and his witness, hence arriving at a wrong conclusion in law.

(e) The learned Hon magistrate erred in both law and fact by convicting the Appellant in to the absence of evidence to link him to any gang affiliations and other criminal activities;

(f) The learned Hon magistrate erred in both law an fact by taking into account irrelevant and extraneous considerations that did not from part of the evidence tendered therefore making a wrong conclusion in law and the entire decision amounting to miscarriage of justice.

(g) The learned Hon magistrate erred in both law and fact by sentencing the Appellant excessively and in violation of the relevant provisions of the law.

5. To determine this appeal, this court will briefly consider the evidence which was tendered by the prosecution and defence before the trial court.

PROSECUTION CASE.

6. The prosecution adduced evidence of a total of four (4) witnesses to support their case.

According to the prosecution's witnesses on 22.2.2014 at 2.00am Pw1, No. 74013 PC PETER MWANGI, PW2, NO 71911 P.C. STEPHEN SACHITA and PW3, NO 80936 P.C OSORI OTIENO and a team of other officers from the flying squad Unit, and special crime prevention unit proceeded to Mwaweche area within Likoni after information had been received that there was a gang which was terrorizing members of public within Likoni. They then proceeded to a house where the gang was said to have been residing. That when they got to the said house, they found the door closed. They knocked the door but no one opened. They then broke the door to gain access and found the house had four rooms. Pw1, PC Mwangi, Pw2, PC Sachita, Pw3, PC Osuri Otieno and Corporal Kibet entered the house while other officers remained outside to give protection.

7. It was their evidence that only one of the rooms was locked from inside while the others were unlocked. That one of the unlocked rooms had a bed. The officers who entered the house knocked on the door to the unlocked room but no one opened. They then decided to break in There, they found a man, a woman and a girl aged about 11 years old. That the man and woman were sleeping on the bed while the girl was sleeping on a mattress on the floor.

8. The prosecution witnesses went on to state that Pw1, PC Mwangi conducted a search of the room and recovered one hand grenade which was wrapped with clothes under the mattress. A further search led to the recovery of an antelope horn wrapped in a white and red ribbon, a white, and black flag, a Motor cycle registration No. KMCR 876 M make Sanlg, ID card for Amiry Jembe Amiry No 27163887 , 4 mobile phones being 1 techno, 1 Samsung , 1 Nokia and 1 bird; 3 Sim cards holders No 0728344277, 0725983199, and 6390028770093599. They investigated the matter and established that two of the mobile phones, being the techno and Nokia belonged to the appellant's wife and they were released to her. They then conducted a search with the Kenya Revenue Authority (KRA) and found that the motor cycle registration No. KMCR 876 M belonged to one Mohamed Asman as per copy of records dated 29.4.2014. A search certificate was prepared and signed by the appellant and his wife, Pw2 and Pw3. Pw3 then forwarded the recovered hand grenade to the forensic laboratory in Nairobi for analysis by a bombs expert.

9. Pw4, No. 23681 SSP ELIUD LANGAT told court that he was bomb technician having graduated with a Bachelors degree in Automotive Engineering at Baraton University. He testified that on 18.3.2014, he was given a hand grenade marked A 1 by PC Osori (Pw3) of CID, Likoni and requested to analyze it. He examined the said grenade and found it to be 82-5 which is an offensive hand grenade. He gave the technical data of 82-5 grenade's length as 85 mm, diameter 45 mm and weight as 250 gms and 62 g of TNT. He also stated that it had a lethal range of 6 M and fragmentation range of 30 m, with a delay time of 2.8 seconds and 3.8 seconds. He further stated that it is manufactured by Chinese North Industries. He then concluded that the hand grenade was an offensive Chinese hand grenade capable of causing death, injury or destruction to property if successfully thrown. He prepared a report to this effect and signed it on 27.3.2014, which he produced as exhibit P12 and the hand grenade as exhibit P1.

10. Pw3 on the other hand produced a red, black and white colored flag, with motorcycle registration No KMCR 870 M make Sanlg, search certificate. ID a card No. 27163867 in the names of Amiry Jembe Amiry (photocopy), Samsung mobile phone, BTN mobile phone, 2 sim card holders for mobile No 0728344277, 0725983199 and 639028770093599, copy of records, exhibit memo form as exhibits P2, 3,4,5 6 (a) 6 (b) 7, 8, 9 (a) ,(b) (c) 10 and 11 after they had been identified by witnesses to court.

11. They arrested the appellant, his wife and a girl who they had found in the house but released the appellant's wife and girl (child) after interrogation. They then charged the appellant with the two offences after interrogations were complete.

12. The appellant, AMIRY JEMBE AMIRY was placed on defence. He opted to give sworn statement in defence and called one witness.

According to the appellant ,he returned home at 6.00pm on 21.2.2014 and went to the mosque. He told court that he was staying with his wife and sister in law in the house. He was woken up by footsteps behind the house and he saw lights from torches since the house had no ceiling. He then heard drawers opening at the neighbor's house and then door to his house was broken. He saw people who were dressed in bullet proof vests with guns enter into his house and they asked for Juma Masoud and interrogated him. They also conducted a search in the house and hand cuffed him. They recovered his travelling bag, ID Card and mobile phone. He then gave them the phone number of the

owner of the house. He, his wife and sister in law were escorted to Likoni police station where they were shown a photograph of which they identified as having the image of their landlord as the suspect they were looking for. He denied that the hand grenade was recovered from his house but only saw it at the police station. Pw2 prepared a search certificate which he, his wife, Pw2 and Pw3 signed against. His wife and sister in law were released. He was arraigned in court having been charged with the offences before court when he failed to disclose his landlord's whereabouts.

13. DW1, MWANAHAMISI MOHAMED told court that she was the appellant's wife. She gave evidence similar as that of the appellant of what had transpired on that night. She said that the motorcycle and other items which they were escorted to Likoni police station which were recovered from the landlord's house. She said that the hand grenade was not among the items the police recovered.

14. In her judgment, the trial magistrate stated;

“ From the above foregoing analysis of the evidence, I have no doubt that hand grenade belonged to the accused. It was found under the mattress he was sleeping on and were it not for the vigilance of the police officer, he would have used it to cause both human and property destruction. I also believe that, the subject motor cycle was stolen and all he ingredients thereof have been established”.

15. For the hearing of the appeal, Mr Chacha, counsel for the appellant filed written submissions which he relied on. Basically, a reading through the said submissions, Mr Chacha stated that the prosecution failed to prove their case against the appellant beyond reasonable doubt and that he was convicted purely on circumstantial evidence, despite his strong and corroborated defence.

16. The respondent through Mr Jami A Yamina, Principal Prosecution Counsel, filed written submissions opposing the appeal in its entirety. Mr Jami, counsel for the respondent proposed substitution of the sentence in the first count arguing that the maximum sentence provided for under section 29 of the Explosives Act is 7 years. He submitted that the appellant was not convicted purely on circumstantial evidence as Pw1, Pw2 and Pw3 who were eye witnesses adduced direct evidence since they participated in the search and recovery of the said grenade. He highlighted evidence they had adduced and submitted that in the said trial, the findings and judgment of the trial magistrate is supported by the evidence and law. He urged the court to dismiss the petition and enhance the sentence accordingly.

17. As the first appellate court, I have evaluated the evidence before the trial court in totality so as to arrive at my own conclusion while bearing in mind that unlike the trial magistrate, I did not have the benefit of seeing the witnesses.

18. I have also considered the rival submissions filed by a counsel for the hearing of the appeal vis a vis the grounds of appeal. Having done so, I find that the issues for determination are;

1. whether the prosecution proved the charges against the appellant beyond reasonable doubt.
2. whether the appellant's defence was plausible
3. whether the sentences that were meted against the appellant were plausible.

19. With regard to the first issue, I wish to first deal with whether the evidence adduced by the prosecution's witness supports the charges and particulars thereof in terms of the law.

20. In count I, the appellant was charged with the offence under the Explosives Act, chapter 115 Laws of Kenya.

The facts were that;

“ On the 22nd day of February, 2014 at about 3.230 am at Mwaweche – Ujamaa area in Likoni District within Mombasa County in the Republic of Kenya, the appellant was found in possession of an explosive namely one Chinese 82-2 hand grenade with identification numbers 82-2- 53-94 650 without authority from an authorized explosive officer”.

21. Section 6 (1) of the Explosives Act, chapter 115 of the Laws of Kenya provides as follows;

“ No person shall keep, store or be in possession of any authorized explosives;

(a) unless it has been manufactured as provided by section 4 (1)(a) and does not exceed two kilograms in weight; or

(b) Unless it has been manufactured as proved by section 4 (1) (b) and is kept, stored or possessed in such a manner and in such quantities as have been approved in writing by an inspector”

To a bridge section 6 (1) of the Explosives Act, explosives that meet the criteria set under section 4 (1) (a) and (b) are permitted.

Section 4 (1) (a) provides as follows;

“ No person shall manufacture any unauthorized explosives unless;

(a) it is manufactured for the purpose of chemical experiment and not for sale and in quantities not exceeding five hundred grams in weight at any one time, or two kilograms in all; or

(b) it is manufactured for practical trial as an explosive and not for sale and in such quantities and under such conditions as maybe specified in writing by an inspector ”

22. For an offence to be said to have been committed under section 6 (i) (a) of the Explosives Act, it must show that the conditions imposed by section 4 (1) of the Explosives Act have been breached.

23. It is therefore the prosecution's burden to prove that the appellant was in possession of the explosive (one Chinese 82-2-hand grenade) and that it met the criteria under section 6 and its sub-section and section 4 and its sub-sections.

24. To discharge this burden of proof placed upon the prosecution so that it shifts to the appellant, the prosecution was required to have adduced evidence confirming the grenade was an explosive manufactured for purposes other than what is specified in the Act.

25. According to the particulars of the charge in the instant case, the appellant is said to have been “found in possession of an explosive namely one Chinese 82-2 hand grenade with identification numbers 82-2 53-94 650 without authority from an authorized explosive officer.

26. Pw1, PC Peter Mwangi testified that while searching the house where he had found the appellant, he checked under the mattress and recovered something wrapped with clothes. He unwrapped it and found it was a hand grenade S/N 82-25394650(Exhibit P1).

Pw2, PC Stephen Sachita said that Pw1 recovered a hand grenade he identified as S/N 82-23—394650 (Exhibit P1).

Pw3, No 809336 PC Osori Otieno testified that pw1 conducted the search and recovered one hand grenade make Chinese 88-25 under the mattress. When identifying it to court, he said it was SN 53-94- 650.

Pw4, No 230681, SSP Eliud Langat, a bomb technician told court that a hand grenade was handed to him for analysis and he examined it. He said he found it was 82-5 which is an offensive hand grenade, oval in shape, its explosive charge is TNT with a close fitting protecting cap with safety pin which was intact. He gave its technical data as 825 grenade, its length as 85 mm, diameter as 45 mm and weight as 250 gm and 62 grams of TNT. He also said that it was manufactured by China North Industries and concluded that it is an offensive Chinese hand grenade capable of causing death, injury or destruction of property if successfully thrown.

27. The standard of proof set by the provisions of sections 4 and 6, both of the Explosives Act is so high. And this is so, so as to distinguish the toys from war machines and distinguish the purpose for which they were manufactured

What I make of Pw4's evidence with regard to his examination and analysis of the hand grenade, is that it was based on his observation and academic knowledge of a hand grenade which I find speculative. He ought to have made effort to get a certificate from the China North Industry – Beijing specifying the purpose for which it was manufactured.

Pw4 also testified that the hand grenade which was allegedly found in the possession of the appellant was 250 gm and 62 gm of TNT. This is definitely below the weight prescribed by sections 4 (1) (c) and 6 (1) (a) of the Explosives Act as offensive. It was less than 500 grams or two kilograms in all.

28. So, clearly, from the evidence adduced by the prosecution's witnesses, and more so, Pw4, the bomb technician, even though Pw1 was said to have searched and recovered the hand grenade (Exhibit P1) under the mattress that was on the bed where the appellant was found sleeping, it failed to disclose that its weight exceeded the authorized weight and the purposes for which it was manufactured as provided for by the law.

29. Having failed to prove this, the burden remained upon the prosecution, hence the provisions of section 4 (4) of the Explosives Act could not have been included in this case. This section provides that;

“ The burden of proof that any manufacture of any unauthorized explosive is solely for the purpose of chemical experiment or practical trial and not for sale, shall, in any prosecution under this section, be upon the accused .”

30. Another aspect in the charge against the appellant is that for it to have disclosed an offence, section 6 (1) of the Explosives Act ought to have been read with section 4 (1) of the same Act and then Section 29 which provides for the penalty, as required under section 137 (f) of the Criminal procedure Code, that;

“ subject to any other provisions of this section, it shall be sufficient to describe a place, time, thing, maker, act or omission to what it is necessary to refer in a charge or information in ordinary language as to indicate with reasonable clearness the place, time, thing matter , act or omission referred to”

Section 6 (1) provides for the thing, matter and act while section 4 (1) provides for the act or omission, and so they have to be read together for an offence to be disclosed. The charge against the appellant in count 1 did not include section 4 (1), hence incomplete.

31. Apart from the evidence falling short of the statutory provisions, there were glaring inconsistencies in the evidence that was adduced by prosecution's witnesses, who were all police officers and were involved in the same transaction at the same time.

The particulars of the charge described the hand grenade's serial No. as 82-52. Pw1 and Pw2 gave it as S. N 82-25 39465. Pw3 said it was 88-25, Pw4, the bomb technician described it as 82-5 offensive hand grenade and his report (Exhibit P 1) described it as 82-25. From these different serial numbers given by these witnesses, the question becomes, what was the serial number of the hand grenade that the appellant was found in possession of.

32. Another issue that was found wanting in the prosecution's evidence was the description of the house where they found the appellant, and how and where they found him and the other people he was with.

Pw1 said;

“ We broke the door to gain access. The house had 4 rooms. One of the rooms was locked from inside. The other rooms were unlocked. Only one of the unlocked rooms had a bed and the others were empty. (I.P Gitare, PC Osuri , PC Sachita, PC Bushin and myself entered the house. The other officers remained outside. We also knocked at the locked inside room but on opened. We decided to break the door as well as well to access the room. When we broke, we entered and found one man, one woman and a girl aged about eleven years sleeping. He eleven ear was asleep on the mattress which was placed on the floor. The mam was sleeping on the bed and the woman was under the bed.....”

Pw2 said.....

“after breaking and giving access we found Amiry Jembe his wife Mwanahamisi Mohamed and a girl named Mariam Mohamed. The house had four rooms. Two of the rooms were bed rooms. We found Amiry Jembe, his wife and girl sleeping in one room. It wsa not locked”.

From this evidence, while Pw1 first indicated the house had four rooms whereby three of them were unlocked while another was locked from inside, and this is where they found the appellant, his wife and girl, Pw2 said that this house had four rooms whereby two were bedrooms with the appellant and his wife occupying one bedroom while the young girl was found sleeping in the other.

33. Also, according to Pw1, they found the room where the appellant, his wife and young girl sleeping locked that they had to break the door to gain entry. Pw2 said that they found the room unlocked.

Clearly, there is noted contradiction in the evidence of Pw 1 and Pw2, who were at the same scene at the same time with regard to the number of rooms and which room they found the appellant, his wife and girl occupying in the house. There is also a contradiction in their evidence as to whether or not the room where they found them were closed or not.

34. As for count II, where the appellant was charged with the offence of handling stolen property, being a motorcycle registration No. KMCR 876 m KME Sanlg, it was the evidence of Pw1, that they recovered the said motor cycle in the sitting room of the house where they found the appellant, his wife and girl sleeping in one room. He then requested for registration documents from the appellant but he did not have any. When cross examined, Pw1 said that he did not know whether the appellant had rented the house or not .

Pw2 on the other hand said that they conducted a search at the KRA offices and established that the motorcycle belonged to Mohamed Asman as per the copy of records dated 29.4.2014(Exhibit P10). It is worth noting that in his evidence, he never made a mention of how and where they removed the motor cycle.

Pw3 testified that they had received information that the house belonged to one Juma Mohamed Mswafara Alias Boda Boda who was said to be harboring thugs who were harassing people in Likoni, Kwale and Ukunda. He said that they recovered a motor cycle registration No KMCR 876 M Sanlg but on interrogation, the appellant did not give a satisfactory account and hence he wrote to the Registrar of motor vehicles and was given a copy of records showing the owner of the motor cycle as Mohamed Asman. They were not able to trace the said Mohamed Asman because his details were minimal. And when cross examined Pw3 said that the investigations revealed the house belong to Juma Mohamed.

35. I find that with evidence which does not clearly confirm who the entire house belonged to, its difficult to tell whether or not the said motor cycle was in the possession of the appellant. Furthermore, failure to conduct investigations to confirm whether the Mohamed Asman indicated in the copy of records (Exhibit P10) existed or not and where he lived, fell short of nailing the appellant.

As I analyzed the evidence on record, it was not clear to tell who prepared or drew the search certificate. According to Pw1, they all drew it but he did to sign on it. Pw2 and Pw3, each claimed they drew it. And worse of all, the said document was not authenticated by an official stamp or letter head, meandering its credibility questionable.

36. In my own analysis of the evidence on record, I find the investigations that were conducted by the investigating officer were wanting to the extent that a lot of gaps were left rendering the allegations against the appellant doubtful . The benefit of these gaps goes to the appellant.

37. I therefore find the appellant's appeal meritable and proceed to quash the conviction and set aside the (10) years imprisonment in count I and two years imprisonment in count II respectively. The appellant is hereby set at liberty unless unlawfully held.

It is so ordered.

Judgment delivered, signed and dated this 17th day of May, 2018.

HON LADY JUSTICE D. O. CHEPKWONY

In the presence of:

M/s Ngina , counsel for the state

Mr Egunza, counsel holding brief for Mr Chacha for the Appellant

Appellant –Present

C/clerk- Beja