



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAPENGURIA**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NUMBER 9 OF 2018**

**BETWEEN**

**JOSEPH NALIMA DOMOKWANG.....APPELLANT**

**AND**

**REPUBLIC..... RESPONDENT**

**(Being an appeal from original conviction and sentence in Kapenguria PMCR Case number 75 of 2018 delivered on 15<sup>th</sup> May, 2018 by Hon. V. O. Adet, SRM)**

**CORAM: LADY JUSTICE RUTH N. SITATI**

**JUDGMENT**

**Introduction**

The appellant herein, Joseph Nalima Domokwang was arraigned before the Principal Magistrate's Court at Kapenguria on one count of being in *possession of a firearm contrary to section 4A(1)(a) of the Firearms Act cap 41 Laws of Kenya*. The particulars of the offence are that on the 2<sup>nd</sup> day of October 2017, at Nakor Trading Centre of Pokot Central Sub-County within West Pokot County, was found in possession of an AK 47 rifle serial number 38384 without a licence or permit or other lawful justification from a licencing officer. The appellant pleaded not guilty, but after a full trial during which the prosecution called 4 witnesses to testify against the appellant, the appellant was found to have a case to answer and was accordingly put on his defence. He was the only witness for the defence. He gave sworn evidence. He did not call any witnesses.

**Judgment of the Learned Trial Court**

After carefully considering the entire evidence that was placed before him, the learned trial magistrate was satisfied that the prosecution had proved its case against the appellant beyond any reasonable doubt. The appellant was found guilty as charged, convicted and sentenced to 7 years imprisonment.

**The Appeal**

The appellant was dissatisfied with judgment and brought this appeal which was initially premised on 8 substantive home-made grounds, but at the hearing of the appeal the appellant who was unrepresented both at the trial and on appeal condensed the 8 grounds of appeal to the following:-

- **THAT the learned trial court erred in law and fact in safeguarding (si) a conviction and sentence[and] failing to observe that the appellant was charged and tried on a defective charge sheet.**
- **THAT the pundit learned magistrate erred in both law and fact in failing to note that the prosecution evidence is flawed by contradictions and not corroborating.(sic)**
- **THAT the trial court erred in failing to observe that the evidence tendered is not consistent, not cogent and not steadfast.**
- **THAT the entire evidence of the prosecution was not proved beyond reasonable doubt.**

It is the appellant's prayer that this appeal be allowed, conviction quashed and sentence of seven (7) years imprisonment be set aside so that

he is set free.

This appeal is a first appeal, and this means that this court is under a duty to hear the appellant's case afresh, only that at this stage, this court will neither see nor hear the witnesses who testified during the trial. The significance of this caution about an appellate court not being able to see or hear the witness is that where any finding of the trial court based on the demeanor of a witnesses is challenged on appeal, the appellate court must be slow to alter it or interfere with it unless it is so obvious to the appellate court that the trial court either misapprehended the law or the evidence touching on the specific finding. For this proposition, see *David Njuguna Wairimu versus Republic Criminal Appeal number 28 of 2009*, an authority that was cited with approval by the Court of Appeal at Nyeri in *Criminal Appeal number 63 of 2014 - John Mwangi Kamau versus Republic* in which the learned judges of appeal said, "*In Okeno versus R [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. Its duty is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusion on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself as to the correctness of the decision.*" I now move on to look at the evidence that was placed before the learned trial magistrate.

### **The Prosecution Case**

Number 2511998 PC Peter Karori of Wakor Police Post and who testified as PW2, stated that on 2<sup>nd</sup> October, 2017 at about 2.45am, he was on night duty when he received information from an informer that someone (who was later identified as the appellant) who was travelling from Marich to Ortum was suspected to be carrying a gun which he (appellant) was partially concealing in his clothes. After booking the report, PW2 contacted his in charge, number 217873 SGT Samwel Weiwei, PW3. PW3 instructed PW2 to lay an ambush for the suspect next to the stage. PW3 was accompanied by APC Thuma Ota, and PW2. The three officers proceeded to the stage where they found a motorbike that was stuck in the road. PW1, Benson Limo testified that as he stood at the stage waiting for customers for his motorbike, he saw 4 police officers who were armed and in full combat gear. According to PW1, he was able to see the officers well with the help of bright moonlight from the full moon on the material night. PW1 stated that he not only clearly identified the officers, but he spoke to them. Shortly thereafter, a person emerged into the road. The person was covered in a Maasai shuka just as the informer had told PW2. The officers let the appellant board the motorbike but just before the motorbike could drive off, the police ordered the motorbike rider to stop. The appellant tried to flee but he was held by APC Karori who also handcuffed him. The AK 47 rifle, Pexhibit 2 was retrieved from the appellant. There was an empty magazine which was produced as Pexhibit 5. PW1, PW2 and PW3 all stated that the moonlight from the full moon was so bright that they were able to see everyone clearly.

After arresting the appellant a report was made to Marich Police Station. PW5 Inspector Abdishkui proceeded to Wakor Police Post to attend to the issue. He was accompanied by PC (Driver) Peter Njoroge, PC Musidi and PC Koros. PW4 carried out investigations into the matter after which he charged the appellant. PW4 also drew a sketch plan of the area.

PW4 also produced the ballistic report – Pexhibit 7. The report was to the effect that the firearm recovered from the appellant was a firearm together with magazines Pexhibits 2 and 5. The expert report also confirmed that Pexhibit 2 was a firearm make AK 47 type 56/1 chamber caliber 7.62x39mm. Further that the firearm appeared rusty, though in good mechanical condition and capable of firing and when put to the test, the firearm did fire. That marked the close of the prosecution case.

### **Defence Case**

As stated elsewhere in this judgment, the appellant gave unsworn evidence and denied committing the offence. His side of the story is that he is a dealer in livestock and donkeys. On the day in question, he says, he was coming from far and was heading to his second wife's home. He got to Ortum Centre at about 7.00pm and boarded a motor bike. At Chepkaon, the motorbike rider informed him that he had run out of fuel. He boarded another motorbike but before they could move, they were stopped by police officers. The police officers seemed they knew the motorbike rider. He was then arrested and placed in cells. On 3<sup>rd</sup> October, 2017 he was taken to court at Sigor and charged with an offence he knew nothing about.

### **Issues for Determination**

According to *section 4A(1)(a) of the Firearms Act, Cap 114 Laws of Kenya* under which the appellant was charged, the prosecution was under a duty to prove that:-

- **the appellant was found in possession of the firearm;**
- **the appellant had no licence/permit to possess the firearm or**
- **the appellant had no lawful justification from a licencing officer.**

**Section 2 of the Firearms Act** defines possession in the following terms:-

**“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 or benefit of oneself or of any other person and the expressions “be in possession” or “have, in possession “shall be construed accordingly; and**

**if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them.”**

Under **section 4A(1)(a) of the Act**, if any person is found in possession of any of the specified firearms (as it is alleged the appellant in this case had) without a licence or a permit or other lawful justification, then he commits an offence under the Act and is liable to imprisonment for life.

### **Submissions**

During the hearing of this appeal, the appellant wholly relied on his written submissions, filed in court on 31<sup>st</sup> July, 2018. The appellant submitted that he should have been charged with illegal possession of a firearm and not the offence as it stands. In essence, the appellant submitted that the charge against him was defective, and that the said defect was incurable under the law. The appellant also submitted that the errors in the charge sheet made the same fatally defective. He placed reliance on two authorities: *Njuguna versus Republic (2003) EA206* and *Yosefu and another versus Uganda (1969) EA 236*.

Secondly, the appellant submitted that the evidence adduced by the prosecution was so contradictory and so scarce that the trial court ought not to have used it as a basis for convicting him.

Thirdly, the appellant submitted that because of the defects in the charge, the contradictions insufficiency and inconclusiveness of the evidence, the prosecution failed to prove the charge against him beyond any reasonable doubt.

In response, M/S Kiptoo for the respondent submitted that the prosecution case against the appellant was beyond reproach; that there is no defect in the charge sheet as the appellant was correctly charged with possession of a firearm without licence or permit. M/S Kiptoo urged the court to uphold the judgment of the learned trial court and to dismiss the appeal in its entirety.

### **Analysis and Determination**

I have now intently and with the greatest care reconsidered and evaluated the evidence afresh. I have also carefully considered the judgment of the learned trial court as well as the grounds in the petition of appeal. I have considered the rival submissions and the authorities cited by the appellant in his written submissions. The conclusion I have reached after considering all the above is that the prosecution proved its case against the appellant beyond any reasonable doubt. Regarding the appellant's complaint that the charge sheet is defective, I do agree with respondent's submissions that the charge sheet is correctly framed and in accordance with **section 4A (1)(a) of the Firearms Act**. Even if there were any defects, the same could be cured under **section 382 of the Criminal Procedure Code**. In fact for the record, when the appellant appeared for plea and the charge was read to him in Kiswahili, a language he confirmed he understood there is no doubt that he understood the charge against him. At some point during the proceedings the appellant even indicated he was ready to enter into a plea bargain, and this was further confirmation that the appellant was under no illusion as to what he had pleaded to and was prepared to plead to.

In grounds 2,3 and 4 of the amended grounds of appeal the appellants complaint is that the evidence was contradictor and not corroborated, that it was inconsistent, not cogent and steadfast thereby leading to the only logical conclusion that the said evidence did not meet the threshold of proof beyond reasonable doubt. A close look at the evidence on record shows where this whole -case started until the appellant was arrested while in possession of an AK47 rifle S/N number 38384. Upon arrest, the appellant had no document to show why he was in possession of the firearm. PW2, PC Karori testified that he was the one who received a tip off that the appellant who was travelling to Ortum had a gun which he had concealed in his clothes. He booked the report in the OB and immediately mobilized other officers to lay an ambush which they did. Sure enough the appellant got to the stage and as he boarded a motorbike, the officers ordered the motor bike rider to stop and go no further. The appellant was apprehended as he made an attempt to escape. PW3, Sgt Weiwei testified that APC Karuri is the one who got hold of the appellant, as he tried to escape, and APC Karori confirmed that piece of evidence by Sgt Weiwei. The AK 47 rifle was recovered from the appellant who had hidden the same under a Maasai shuka.

PW1, Benson Limo the motorbike rider testified that indeed the appellant asked him to carry him and that at that time PW2 and PW3 were around the bus stage. That after going for only a short distance, the police stopped them and fired shots in the air. The appellant tried to jump but the police got hold of him and recovered a gun from him which was concealed in the clothing. The clothing included a Maasai shuka which the appellant had wrapped around himself for purposes of concealing the gun.

I have also given very careful consideration to the appellant's defence. What I can say about the said defence is that it is a corruption of the events of the material day, only that the same has been so corrupted to suit the appellant's denial that he committed the offence. I therefore reject the said defence as being a lie manufactured by the appellant in a desperate bid to free himself from the crime and to deceive the court. There is no doubt that the appellant was at the scene of crime and he was arrested in the circumstances described by the prosecution witnesses.

There is also clear documentary evidence from PW4, the investigating officer that the rifle found in the possession of the appellant was a firearm within the meaning of **section 2 of the Firearms Act**, because when it was tested, it was confirmed it could fire and in fact it did fire.

### **Conclusion**

From the above analysis I am satisfied that the prosecution case against the appellant was watertight and that the defence offered by the appellant did not shake the case in at all. That being the case, I find and hold that the appellant's appeal has no merit and is accordingly dismissed in its entirety. The appellant has his right of appeal to the Court of Appeal, which he must exercise within 14 days from the date of this judgment as provided under **section 361(1) of the Criminal Procedure Code**.

It is so ordered.

**Judgment delivered, dated and signed in open court at Kapenguria on this 23<sup>rd</sup> day of October,2018.**

**RUTH N. SITATI**

**JUDGE**

**In the Presence of:**

Present in person for Appellant

Miss Kiptoo for Respondent

Mr. Juma Court Assistant