REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO.31 OF 2018

(From SPM's Court at Sirisia Cr.No.1174 of 2015 by: Hon. F. Kyambia (PM)

VICTOR NDIWA...APPELLANT

V E R S U S

REPUBLIC...RESPONDENT

JUDGMENT

Victor Ndiwa, the appellant herein, has filed this appeal against the conviction and sentence imposed by Hon. Kyambia Principal Magistrate, Sirisia Court.

The appellant faced the following charges:

1. ***Preparation to commit a felony Contrary to Section 308(10 of the Penal Code:***

The particulars of the charge are that on 25/6/2015 at Tulienge Shopping Centre, Narubila Sub-Location Bungoma County, was found armed with a dangerous weapon, namely AK 47 rifle in circumstances that indicated that he was so armed with intent to commit a felony namely robbery with violence;

2. ***Being in possession of a firearm without a valid firearm certificate contrary to section 4(A) 1(a) (2) (3) of the Firearms Act Cap.114 LoK.***

It was alleged that on 25/6/2015 at Tulenge Shopping Centre, was found in possession of an AK 47 rifle without a valid firearm certificate;

3. ***Being in possession of ammunitions without a valid firearms certificate contrary to section 4(A) (e) (2) 3 of the Firearms Act. It is charged that on 25/6/2015 at Tulienge Shopping Centre, was found in possession of eight rounds of ammunition.***

The appellant was sentenced as follows:

Count i: ***10 years imprisonment***

Count ii: ***7 years imprisonment***

Count iii: ***7 years imprisonment***

The sentences were ordered to run concurrently.

Being aggrieved by both conviction and sentence, the appellant preferred this appeal under the petition of appeal filed in court on 26/6/2018 and the submissions filed by the appellant. The grounds cited by the appellant are as follows:

1. That the complainant did not mention the appellant in the first report to the police;

2. That the identification of the appellant was not full proof;

3. That the charge was defective;

4. That there were contradictions in the prosecution evidence;

5. That the parade was conducted irregularly and contrary to Forces Standing Orders;

6. That the appellant's fundamental rights were breached when he was arraigned in court after 24 hours.

In his submissions, the appellant averred that he was not arrested with the gun in issue and possession was not proved; that the incident occurred at night and the court did not properly direct itself in admitting the evidence on identification; that whereas PW1 said that they had a tin lamp on the table, the husband said that they had a solar lamp and identification was therefore not full proof; that PW1 gave contradictory evidence on whether or not he knew the appellant; that if PW1 knew the appellant then the parade was irregular; that in any event the people on the parade did not meet the requirements of forces standing orders.

The appellant also submitted that the prosecution did not explain the delay in bringing him to court and lastly that despite amendment, the charge was defective. He urged the court to quash the conviction and set aside the sentence.

The appeal was opposed by learned counsel Ms. Njeru who submitted that PW3 reported that he was threatened by the appellant on 6/4/2015, but the possession was on 25/6/2018; that on the issue of identification, the appellant placed himself at the scene; that PW1 was in her house with her children when her door was pushed open; there was a tin lamp on the table; PW1's husband managed to get hold of the appellant from behind but during the ensuing struggle, the appellant aimed the gun at the husband and ordered them to remain still and managed to escape; that the appellant was identified on the parade which he did not challenge; that the appellant disappeared for 5 months till he went back to the scene and was arrested; counsel also submitted that the appellant left the gun at the scene and PW1 & 2 called the police to collect it on the same night.

As respects the first report to police, counsel submitted that it is not mandatory that the first report be produced in court and if it was needed, the applicant should have applied for it and that there was no requirement that the prosecution produce a photograph or identity card. He urged the court to dismiss the appeal.

This is a first appeal and it behoves this court to re-evaluate all the evidence that was tendered in the trial court and make its own determination but bearing in mind that it is the trial court which had the opportunity to see and observe the witnesses' demeanor. See ***Okeno v Republic (1972) EA 32***.

A brief summary of the case before the trial court is that **PW1 Phyllis Nasimuyu Chemonges** was at her home on 25/6/2015 about 9.30 p.m. She was with her husband Wilson Chemonges she was washing clothes when she heard dogs barking, the door was pushed open and a person stood at the door and pointed a gun at her as he ordered her to lie down. PW1 pretended to be lying down but instead got hold of the person by the neck, pulled him inside the house. The husband (PW2) joined her and a struggle ensued whereby the person dropped the gun and ran off and escaped; that the person was tall, slim, black and wore a Marvin, a black jacket and pimples on the sheen; she raised alarm, neighbours came and Administration Police from Tulienge. They called officers from Sirisia Police station who took the gun; that she was called on an identification parade on 10/1/2015 at Malakisi Police Station where she identified the appellant because she had seen him before the incident. PW1 said they had a tin lamp on the table on the night of the attack.

PW2 Wilson Chemonges corroborated PW1's evidence that when the armed man entered their house, PW1 grabbed him and he joined her, the assailant dropped the gun and fled and the police were called to take the gun. According to PW2, they had a solar lamp in the house; that he identified the appellant on an identification parade on 10/11/2015 at Malakisi Police Station; that on 6/11/2015 his nephew Bernard Ngeywa had informed him that a person had attacked him while at the river and threatened to come to collect his gun.

PW3 Bernard Ngeywa testified that on 6/11/2015 about 12.00p.m. he was at Cheptebei river where he went to water cows. He met somebody who slapped him and told him that he would come back to their home for his gun and finish them. PW3 reported at a Namibila Administration Police Camp and together with police officers, found the appellant in a changaa drinking den where he was arrested. PW3 denied having known the appellant before.

PW4 Cpl. Alex Chirchir a Ballistic expert received an AK 47 Serial No.16177622 'A' and 6 rounds of live ammunition; that he fired 4 of the rounds during investigations; on examining the firearm, he found it to be functional and capable of firing and formed the opinion that Ex.A is a firearm which was in sound condition while Ex.B rounds of ammunition.

PW5 Cpl. Aden Mohammed received a report of an attempted robbery at Tulienge, proceeded to the scene, found PW1 and 2 and the gun that the attacker abandoned when he was overwhelmed by PW1 & 2. He received the gun and sent it to the Ballistic expert for further investigation.

PW6 Chief Inspector Abdi Noor conducted an identification parade at Malakusi Police Station where PW1 & 2 identified the appellant.

PW7 APC Polycap Lubembe of Tulienge Administration Police Post recalled that on 6/10/2015 at 2.00 p.m., he was at the camp when two children reported that they had been threatened by a person known to them and they took him where the suspect was i.e the appellant and he was arrested.

When called upon to defend himself the appellant told the court that on 6/10/2015, he was at home when PW4 Ben was taking cows to the river, that the cows destroyed his crops and he enquired from PW4 why he was doing that but he forgave Ben. He went for a walk about 3.00 p.m. passed by complainant's home and went to a chang'aa drinking den and while there PW2 went to threaten him alleging he threatened

his children and soon thereafter police arrived and picked him up.

DW2, Petronilla Wachira told the court that she is the appellant's wife and that he left home on 31/3/2015 for Nairobi, returned home on 11/9/2015 and went back to Nairobi after a week; that he returned home while sick on 1/10/2015 and was arrested on 6/10/2015.

Having considered the evidence on record and the submissions, I proceed to consider the grounds raised.

The applicant complained that the charge was defective. However, the applicant did not specify which of the three charges is defective and what the defect was. That ground was unsubstantiated and must fail. I did not note any defect in the charges.

PW1 and 2's evidence on how they were attacked by a gun trotting man was consistent. The gun was left in their house after the scuffle between the intruder, PW1 and 2. PW5 did confirm that indeed PW2 called him on the night of 26/6/2015 and he went to collect the gun on the same night.

The gun was examined by PW4, the Ballistic expert who found that it was a firearm capable of being fired and the ammunition recovered with it was capable of being fired.

The question that the trial court asked itself is who then had the gun. PW1 & 2 told the court that the incident occurred about 9.30 p.m. but there was light in the house. Whereas PW1 said that there was a tin lamp on the table PW2 said it was a solar lamp. Unfortunately, neither the prosecution nor the court enquired into what was meant by tin lamp or the solar lamp. A solar lamp can be made of tin. PW1 said she was washing dishes and clothes at the time of attack and I believe there must have been some light that enabled her see. Further to that, PW1 & 2 told the court that PW1 got hold of the intruder, was joined by PW2 and struggled with him for some time. Both PW1 and 2 came into close contact with the intruder whom they described as being slim, dark, with pimples on the face, not the normal pimples. PW1 and PW2 gave them description of the attacker to the (PW5) police when they handed over the rifle on the same night. Their evidence was further corroborated when they identified the appellant on a parade conducted on 10/11/2015 by PW6. The parade seems to have been conducted in accordance with the Force Standing Orders. The appellant never raised any complaint about the conduct of the parade and the parade was therefore properly conducted and the appellant identified.

Further to the above, the evidence of PW3 goes to corroborate PW1 & 2's evidence on identification of the appellant. PW3 led to the arrest of the appellant after the appellant harassed him threatening that he was coming back for his gun. PW3 informed PW1 & 2 about it and was encouraged to report to the police who acted on the same day and arrested the appellant. The appellant did admit that he had never had any dispute with PW1, 2 or 3 and hence no reason for them to frame him.

PW3's evidence was never challenged.

The appellant raised an alibi in his defence. It is trite law that the accused person who raises an alibi defence has no burden placed on him to prove the truth of the said alibi. The onus always remains with the prosecution to prove its case beyond reasonable doubt. It is sufficient if the alibi raises a doubt in the prosecution case.

In the Uganda case of ***Ssentale v Uganda 1968 EA 365***, the court said that the burden of disproving an alibi is always on the shoulders of the prosecution. In ***Victor Mwendwa Mulinge v Republic (2014) eKLR***, the Court of Appeal stated:

> ***"it is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see Karanja v Republic (1983) KLR 501 – this court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought."***

I have considered the alibi raised by the appellant. The alibi was raised for the first time in the defence. The appellant told the court that he left for Nairobi on 30/4/2015 till September, 2015. However, DW2 told the court that the appellant went to Nairobi on 31/3/2015 till 11/9/2015 meaning that he was away at the time the offence was committed.

I find there to be inconsistencies in the alibi raised as to when the appellant left for Nairobi and whether he ever went back to Nairobi. The evidence of PW1 & 2 placed the appellant at the scene of crime the same has not been dislodged. As earlier found, PW1 & 2's evidence also corroborated PW3's evidence.

{The appellant burst into PW1 & 2's house while armed with a firearm. The firearm had live ammunition. He ordered PW1 to lie down but instead PW1, the appellant could only be there for one reason, that is to rob PW1 and 2.}

Whether the offence of preparation to commit a felony was proved. In CRA.120/2011 **Bernard Chege v Republic** the court considered what constitutes an attempt to commit an offence. The person must:

> ***"(a) Intend to commit the offence;***
>
> ***(b) Begin to put his intention to commit the offence into execution by means which are adopted to its fulfillment. This means that the accused begins to carry out his intention to commit the offence in a way suitable to bring about what he intends to achieve;***
>
> ***(c) Do some overt act which manifests his intention; that is the accused performs an act which is capable of being observed by***

another (although it may not have been) and which in itself makes clear his intention to commit the offence. (quoted Barbeler (1977) QD 80."

In this case, the appellant went to PW1 & 2's house, armed with a gun which was loaded with live ammunition and ordered them to lie down.

I am satisfied that the appellant went to that house with the intention to rob or injure the complainants.

The appellant did not possess a valid firearm certificate and a valid certificate for the 5 rounds of ammunition.

Lastly, the appellant complained that the police violated his rights under the constitution by holding him for over 24 hours. The appellant never raised that issue with the police who arrested him to explain why the delay in bringing him to court, if at all. That issue cannot be raised on appeal.

I am satisfied that prosecution proved its case beyond all reasonable doubt and the trial court made the correct findings which this court will not disturb. The conviction will stand.

The appellant complained that the sentence is harsh and his mitigation was not considered. Before sentence, the appellant stated that he is the sole bread winner and asked for leniency which the court considered. On Count I, the appellant was handed 10 years imprisonment. Under Section 308(1) of the Penal Code, upon conviction one is liable to imprisonment for a term of not less than 10 years and not more than 14 years.

The appellant was handed the minimum sentence.

Under Section 4A(1) of the Firearms Act, upon conviction, one is liable to life imprisonment. The appellant was only sentenced to 7 years on each count. (Counts II and III) The sentences were very lenient.

The sentences were ordered to run concurrently and are in my view lawful and lenient. There is no reason to disturb the sentence.

In the end, I find no merit in the appeal and it is hereby dismissed.

Signed and Dated at Bungoma this 23rd day of *November*, 2018.

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R.P.V. Wendoh

JUDGE

Coram:

Court Assistant: Gladys

Court Prosecutor: Mr. Akello

Appellant: Present